

**United States Department of Labor
Employees' Compensation Appeals Board**

I.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington, DC, Employer**

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**Docket No. 18-0145
Issued: June 1, 2018**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 26, 2017 appellant, through counsel, filed a timely appeal from a May 31, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision dated March 18, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 20, 2014 appellant, then a 53-year-old general clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 20, 2014 she injured her back when she slipped and fell on the wet concrete floor in the employing establishment's employee entrance lobby. On the claim form a witness reported that he saw appellant fall. The employing establishment controverted the claim.³ There is no indication that appellant stopped work.

A May 29, 2014 letter of controversion from the employing establishment was received. Also received were: appellant's May 29, 2014 statement; a May 31, 2014 report, May 31 and June 6, 2014 notes, and a June 20, 2014 request for authorization from Dr. Michael K. Liebling, a chiropractor; appellant's June 9, 2014 letter to her union; copies of an article regarding the 'No Fear Act'; copies of the employing establishment's policy and instructions for filing an accident report; and appellant's June 20, 2014 letter to Dr. Liebling.

A June 3, 2014 lumbosacral x-ray indicated that there was no acute traumatic abnormality, but there was multilevel degenerative changes with degenerative disc disease at L2-L3 and L3-L4 and mild degenerative joint disease in hip joints. A June 3, 2014 x-ray of the cervical spine noted no acute traumatic osseous abnormality, but revealed mild reversal of normal cervical lordosis, mild retrolisthesis of C4-C5, probably degenerative, and multilevel degenerative joint disease and degenerative disc disease with neural foraminal encroachment.

In a July 11, 2014 development letter, OWCP requested that appellant submit additional evidence in support of her claim, including a physician's opinion supported by a medical explanation as to how the reported employment incident caused or aggravated a medical condition. It also requested that she complete and return an attached questionnaire which posed various questions regarding the employment incident that she believed caused or aggravated her claimed condition. Appellant was afforded 30 days to submit the necessary evidence.

OWCP received an August 9, 2014 letter from appellant requesting additional time to answer questions. Several statements from various individuals about the work-related fall on March 20, 2014 and an alleged incident at a church in April 2014 were also received along with a June 11, 2014 letter of warning for failure to follow instructions -- failure to report an accident and evidence from Dr. Liebling, which included a June 6, 2014 disability certificate and duty status reports (Form CA-17) dated May 31 and July 15, 2014.

In a July 23, 2014 report, Dr. Rida N. Azer, a Board-certified orthopedic surgeon, reported that appellant had complaints of neck and lower back pain since March 20, 2014 when she slipped and fell on wet concrete at work. He provided diagnoses of cervical disc syndrome with radiculopathy versus double crush injury with traumatic bilateral carpal tunnel syndrome and lumbar disc syndrome with probable herniated L5-S1 disc and L5-S1 radiculopathy on the right. In an August 8, 2014 report, Dr. Azer provided limitations for appellant's work duties.

By decision dated August 25, 2014, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish the factual component of fact of injury. It also

³ The employing establishment advised that it was not aware of the incident. It also noted that appellant started using a cane in April 2014 after a fall at church.

noted that the medical evidence of record failed to contain a medical diagnosis in connection with the alleged employment incident.

Following the decision, OWCP received July 23 and August 8, 2014 duty status reports (Form CA-17) from Dr. Azer, which noted that appellant could work full time with restrictions. However, no diagnosis was provided.

On September 24, 2014 OWCP received appellant's September 20, 2014 request for a review of the written record by an OWCP hearing representative. New evidence included appellant's May 29, 2014 statement regarding the March 20, 2014 employment incident and her September 14, 2014 response to OWCP's questionnaire. Other statements by appellant, including her notarized statement of September 7, 2014 regarding an incident at church, were also received.

In a September 17, 2014 report, Dr. Azer indicated that appellant had a slip and fall on March 20, 2014, which she reported to the safety manager at work. He noted that, after the March 20, 2014 fall, she experienced neck pain, headaches and severe back pain, which did not resolve on their own. Dr. Azer noted examination findings and discussed the July 23, 2014 x-rays of the lumbar spine and pelvis and cervical spine. He provided diagnoses of cervical disc syndrome with radiculopathy versus double crush injury with traumatic bilateral carpal tunnel syndrome and lumbar disc syndrome with probable herniated L5-S1 disc and L5-S1 radiculopathy on the right. Dr. Azer opined that appellant's symptoms, which included headache, neck pain, back pain and leg pain, and her limitations were all "caused by the work injury of March 20, 2014."⁴

In an October 27, 2014 report, Dr. Vagmin P. Vora, an orthopedic surgeon, noted examination findings and provided an impression of cervical strain, lumbar strain, and possible disc herniation in the lower lumbar spine. He recommended physical therapy for her neck and back.

By decision dated March 18, 2015, an OWCP hearing representative affirmed OWCP's August 25, 2014 decision as modified. Although the hearing representative found that the March 20, 2014 incident occurred as alleged, he denied the claim on the basis that the medical evidence of record failed to support that appellant sustained an injury causally related to the accepted March 20, 2014 employment incident.

On March 18, 2016 OWCP received additional evidence. In a May 14, 2015 report, Dr. Sankara R. Kothakota, a Board-certified orthopedic surgeon, noted that appellant fell at work on March 28, 2014. He diagnosed lumbago and lumbar disc displacement.

In a March 18, 2016 letter, the office manager from the office of Dr. Ricardo Pyfrom, a Board-certified orthopedic surgeon, noted that appellant was seen in the office on March 15, 2016. The office manager requested reconsideration of appellant's workers' compensation claim. March 15, 2016 progress notes from Dr. Pyfrom were attached. Dr. Pyfrom noted that appellant

⁴ Attached to the September 17, 2014 report was a sheet which noted appellant as the patient, March 20, 2014 as the date of accident, and appellant's OWCP claim number. It indicated: "For: Reconsideration. Review of written record. Questionnaire sent under separate letter/cover."

slipped and fell on the wet floor on March 20, 2014, provided examination findings, and recommended additional diagnostic testing.

In an August 5, 2016 report, Dr. Pyfrom noted the history of injury and that appellant was working regular duty. He indicated that her June 6, 2016 magnetic resonance imaging scan showed broad-based disc protrusions at L3-L4 and at L4-L5 with nerve root impingement at the right more than left neural foramina and that the L4-L5 was worse than the L3-L4. Dr. Pyfrom provided an assessment of lumbar spine sprain of ligaments, lumbosacral region intervertebral disc disorders with radiculopathy, and cervical disc disorder with radiculopathy, mid-cervical region.

On March 2, 2017 OWCP received appellant's December 20, 2016 and February 27, 2017 statements, wherein she asserted in pertinent part that she had responded to the reconsideration letter and submitted additional medical documentation from Dr. Pyfrom's office. She indicated that she had been waiting for a response for the medical reconsideration that was submitted to OWCP.

By decision dated May 31, 2017, OWCP denied appellant's request for reconsideration. It found that her request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ OWCP will consider an untimely request for reconsideration only if the request demonstrates "clear evidence of error" on the part of OWCP in its "most recent merit decision."⁸ The request must demonstrate on its face that such decision was erroneous.⁹ Where a request is untimely and

⁵ This section provides in pertinent part: the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.607(b).

⁹ *Id.* To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant filed an untimely application for review.

OWCP's regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision. The last merit decision in this case was on March 18, 2015. Appellant's request for reconsideration was received on March 2, 2017. The Board notes that the record contains a March 18, 2016 letter from the office manager of Dr. Pyfrom's office requesting reconsideration of appellant's claim. However, this statement is not a request for reconsideration of OWCP's March 18, 2015 decision on behalf of appellant as it was not signed by appellant or an authorized representative of appellant.¹¹ It is appellant's responsibility to submit the proper documents and request for reconsideration to OWCP.¹² As appellant's request for reconsideration was received on March 2, 2017, more than one year after the March 18, 2015 merit decision, the Board finds that the request was untimely filed. Appellant must, therefore, demonstrate clear evidence of error on the part of OWCP.

The Board has reviewed the record and finds that appellant has not demonstrated clear evidence of error.

The underlying issue in appellant's claim was medical in nature with respect to causal relationship. Appellant submitted a May 14, 2015 report from Dr. Kothakota, which noted the history of injury and diagnosed lumbago and lumbar disc displacement. Dr. Kothakota, however, did not provide an opinion on causal relationship. Appellant also submitted March 15, 2016 progress notes and an August 5, 2016 report from Dr. Pyfrom. While Dr. Pyfrom noted the history of injury and, in his August 5, 2016 report, provided an assessment of lumbar spine sprain of ligaments, lumbosacral region intervertebral disc disorders with radiculopathy, and cervical disc disorder with radiculopathy, mid-cervical region, he also failed to provide an opinion on causal relationship. As these reports are irrelevant to the issue for which OWCP denied appellant's claim,¹³ they are insufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP's decision.

As noted, clear evidence of error is intended to represent a difficult standard and evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was

¹⁰ 20 C.F.R. § 10.608(b).

¹¹ While no special form is required to request reconsideration, and the word reconsideration need not be used, the request must be in writing, be signed and dated by the claimant or the authorized representative, and be accompanied by relevant new evidence or argument not considered previously. The request should also identify the decision and the specific issue(s) for which reconsideration is being requested. See *M.D.*, Docket No. 15-0811 (issued August 20, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (February 2016).

¹² See *A.S.*, Docket No. 16-0902 (issued September 28, 2016); *S.W.*, Docket No. 13-1618 (issued December 12, 2013).

¹³ *F.R.*, Docket No. 09-0575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁴ Consequently, OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On appeal counsel argues the merits of appellant's claim. As previously noted, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).