

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

P.L., Appellant)	
)	
and)	Docket No. 18-0813
)	Issued: November 20, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Chicago, IL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 7, 2018 appellant, through counsel, filed a timely appeal from a February 15, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision, dated May 30, 2013, 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 to review the merits of this case.³

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.*

³ 20 C.F.R. § 501.3(e).

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are set forth below.

On December 2, 2006 appellant, then a 37-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained multiple injuries on December 1, 2006 when she fell down a staircase. On June 11, 2007 OWCP accepted the claim for displacement of lumbar intervertebral disc without myelopathy. Appellant returned to full-time work without restrictions on January 2, 2007.

On April 30, 2009 appellant filed Form CA-7 claims for compensation for leave without pay for the periods August 13 to November 18, 2007 and July 30, 2008 to May 15, 2009.

By decision dated August 3, 2011, OWCP denied appellant's claims for disability compensation.

By decision dated September 28, 2011, OWCP expanded the acceptance of the claim to include cervical radiculopathy, cervicgia, and temporary aggravation of cervical degenerative disc disease.

By decision dated November 5, 2012, OWCP denied modification of its August 3, 2011 denial of appellant's disability compensation for the period August 13 to November 18, 2007 and July 30, 2008 to May 15, 2009. It found that she had failed to submit medical evidence to establish disability during the claimed periods.

On November 19, 2012 appellant, through counsel, appealed the November 5, 2012 OWCP decision and requested a telephone hearing before an OWCP hearing representative.

By decision dated May 30, 2013, an OWCP hearing representative reversed the November 5, 2012 decision in part, finding that appellant was entitled to wage-loss compensation for the period August 13 to November 18, 2007. He affirmed the decision in part, finding that she had not submitted sufficient medical evidence to establish disability for the period July 30, 2008 to May 15, 2009. The hearing representative determined that appellant had not established that her work stoppage after returning to work in November 2007 was due to a recurrence of her work-related conditions. He further determined that she had not established a change in her modified-duty position which prevented her from returning to work during this period, noting that she was provided with multiple, suitable, modified-duty positions after she stopped work.

⁴ Docket No. 14-1875 (issued March 20, 2015); Docket No. 17-0146 (issued October 24, 2017).

On May 5, 2014 appellant, through counsel, requested reconsideration of the May 30, 2013 hearing representative's decision. Counsel submitted a March 24, 2014 medical report not previously considered from Dr. Michael Haak, a Board-certified orthopedic surgeon.

By decision dated July 30, 2014, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review.

On August 26, 2014 appellant, through counsel, appealed to the Board.

By decision dated March 20, 2015, the Board affirmed the July 30, 2014 OWCP decision denying appellant's request for reconsideration.⁵

On October 12, 2015 appellant, through counsel, requested reconsideration of the March 20, 2015 decision. In support of the reconsideration request, counsel submitted the deposition transcript from U.S. District Court of Dr. Charles W. Mercier, a Board-certified orthopedic surgeon. Dr. Mercier discussed appellant's treatment for her injuries stemming back to the December 1, 2006 employment incident and her release to full-duty work after he last evaluated her on November 26, 2007, noting that her cervical conditions had resolved. He explained that appellant presented for evaluation on April 1, 2008 with new complaints relating to the lumbar spine. A magnetic resonance imaging scan revealed L4-5 disc herniation which was not present on prior examinations. Dr. Mercier noted that it did not appear that the disc herniation was caused by the December 1, 2006 injury and was likely due to another injury. Due to her disc herniation, he provided appellant her previous limited-duty work restrictions for the period October 2008 to April 2009.

By decision dated September 27, 2016, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant further merit review.

On October 28, 2016 appellant, through counsel, appealed to the Board.

By decision dated October 24, 2017, the Board set aside the September 27, 2017 decision, finding that OWCP erroneously applied the standard of review for a timely request for reconsideration pursuant to section 8128(a) of FECA.⁶ The Board remanded the case for application of the clear evidence of error legal standard for cases in which a reconsideration request is untimely filed.

By decision dated February 15, 2018, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

⁵ Docket No. 14-1875 (issued March 20, 2015).

⁶ Docket No. 17-0146 (issued October 24, 2017).

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁷ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁸ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁹

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit and it must manifest on its face that OWCP committed an error.¹⁰

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁴ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁵

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

⁹ *See M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Thankamma Mathews*, 44 ECAB 765 (1993).

¹⁰ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, *supra* note 9.

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.¹⁶

The last merit decision of record was OWCP's May 30, 2013 decision denying disability compensation for the period July 30, 2008 to May 15, 2009. Appellant's last request for reconsideration was dated October 12, 2015. Since the reconsideration request was received more than one year after the last May 30, 2013 merit decision, it was untimely filed. As appellant's request for reconsideration was untimely, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁷

With the October 12, 2015 reconsideration request, counsel provided Dr. Mercier's deposition transcript. Dr. Mercier discussed appellant's treatment pertaining to the December 1, 2006 work-related injury, noting that she was released to full-duty work in November 2007. He reported that appellant returned for evaluation in April 2008 due to a new injury for an L4-5 herniated disc which he considered a new injury unrelated to the December 1, 2006 employment incident. Dr. Mercier discussed appellant's disability, noting that he provided her work restrictions from October 2008 to April 2009 due to her L4-5 disc herniation. Dr. Mercier's testimony fails to provide support for total disability from July 30, 2008 to May 15, 2009 as appellant was released to work with restrictions. Moreover, the restrictions provided related to appellant's L4-5 disc herniation, a condition not accepted by OWCP as work related, which the physician opined was caused by a new injury. Appellant did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying her claim for disability compensation.¹⁸

The Board has held that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to demonstrate clear evidence of error.¹⁹ The Board finds that the evidence submitted with appellant's untimely request for reconsideration is insufficient to establish that OWCP erred in its denial of appellant's claim.²⁰ As the underlying issue is medical in nature, the medical evidence submitted was insufficient to shift the weight in appellant's favor to establish that OWCP erred in denying her claim for disability compensation for the period July 30, 2008 to May 15, 2009.²¹

¹⁶ *S.E.*, Docket No. 14-1223 (issued November 7, 2014).

¹⁷ *See Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ *G.B.*, Docket No. 13-1557 (issued October 29, 2013).

¹⁹ *Supra* note 8 at Chapter 2.1602.5 (February 2016).

²⁰ *See W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²¹ *H.T.*, Docket No. 14-964 (issued December 17, 2014).

Appellant did not submit the type of positive, precise, and explicit evidence that manifests on its face that OWCP committed an error.²² Thus, she did not demonstrate clear evidence of error in the denial of her compensation claim.²³

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.²⁴

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

²² *J.T.*, Docket No. 10-313 (issued February 24, 2010).

²³ *B.B.*, Docket No. 08-232 (issued August 7, 2008).

²⁴ *J.V.*, Docket No. 14-0788 (issued October 19, 2015).