

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

V.L., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Brooklyn, NY, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 17-1493
Issued: September 12, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 26, 2017 appellant filed a timely appeal from a June 9, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated May 27, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated November 2, 2017, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-1493 (issued November 2, 2017).

FACTUAL HISTORY

On April 25, 2014 appellant, then a 45-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her back, shoulder, and side on April 16, 2014 as a result of slipping on ice at 6:15 a.m. while stepping up onto the sidewalk in front of a staircase while in the performance of duty. She stated that she tried to catch herself from falling and twisted her upper torso (back) at which time she hurt her back, shoulder, and side. Appellant stopped work beginning April 17, 2014. She received continuation of pay through May 31, 2014, and returned to work on June 16, 2014. On a Form CA-1 the employing establishment represented that her regular tour of duty was 8:00 a.m. to 4:00 p.m., Monday through Friday.

An, authorization for examination and/or treatment (Form CA-16), was issued by the employing establishment on April 16, 2014. It authorized appellant to visit Lutheran Medical Center in Brooklyn, New York. Appellant submitted reports dated April 16, 2014 from Julie John, a physician assistant at Lutheran Medical Center, who diagnosed back strain, spasms, and shoulder pain as a result of slipping on a curb and twisting her back that morning. She reported that her right leg slipped on ice at 6:30 a.m. (April 16, 2014) while working and walking to the curb of the sidewalk.

On June 24, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for the period June 2 to 13, 2014.

In a July 2, 2014 development letter, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It stated that it had reopened the claim for consideration because appellant had filed a claim for wage-loss compensation. OWCP requested additional evidence and afforded appellant 30 days to respond to its inquiries.

In a July 11, 2014 statement, the employing establishment confirmed that appellant was on its premises at the time of injury: "on the staircase of the institution." It stated that appellant's schedule on the date of injury was 6:00 a.m. to 2:00 p.m. and the injury occurred at 6:15 a.m. OWCP did not receive any additional evidence.

By decision dated August 6, 2014, OWCP denied the claim because the evidence of record failed to establish that the injury and/or events occurred on April 16, 2014, as alleged.

In an appeal request form postmarked September 6, 2014 and received by OWCP on September 8, 2014, appellant requested an oral hearing before a representative of its Branch of Hearings and Review.

In a narrative statement received by OWCP on September 9, 2014, appellant reiterated that on April 16, 2014 at approximately 6:15 a.m. she got out of her car as she reported to work for duty and proceeded to step up onto the sidewalk in front of her building. As she attempted to walk toward the staircase, she felt herself falling. Appellant looked down and realized that she was slipping on a sheet of ice and tried to catch her balance. She stated that she continued to slip and

did not fall, but twisted her body in such a violent manner that she felt a terrible strain in her back, shoulder, and side. Appellant reported the injury to her supervisor and had to be escorted to the local hospital for treatment. She noted that at the time of her injury there were no witnesses present.

By decision dated September 22, 2014, OWCP denied appellant's request for an oral hearing finding that her request was untimely filed because it was not made within 30 days of its August 6, 2014 decision. It further indicated that it had exercised its discretion and further denied the request as the relevant issue of the case could equally be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

On October 17, 2014 appellant requested reconsideration and resubmitted her narrative statement reiterating the factual history of her claim.

In a July 18, 2014 report, Dr. David H. Helman, a Board-certified internist and emergency medicine specialist, noted that on April 16, 2014 appellant suffered multiple injuries in a work-related slip and fall incident. He indicated that appellant did not actually hit the ground, but twisted her body violently because of this slip and fall. Dr. Helman reported that appellant sustained another injury at work on July 17, 2014 when someone dropped a drill on her hand and it injured her right thumb. Appellant denied any exacerbation in pain in her neck, back, or left shoulder. Dr. Helman diagnosed status post work-related slip and fall accident on April 16, 2014 with multiple injuries, cervical and lumbar spine myofascial derangement with multiple cervical and lumbar spine disc bulges and herniations, as well as electromyography (EMG) evidence of left-sided C6 and bilateral L5 radiculopathy, and left shoulder derangement with tenderness and tendinopathy.

In reports dated August 25 and September 29, 2014, Dr. Alfredo Davila, a Board-certified physiatrist, noted that appellant sustained an injury at work on July 17, 2014 when someone dropped a drill on her hand and it injured her right thumb. He diagnosed status post work-related slip and fall accident on April 16, 2014 with multiple injuries, cervical and lumbar spine myofascial derangement with multiple cervical and lumbar spine disc bulges and herniations, as well as electromyography (EMG) evidence of left-sided C6 and bilateral L5 radiculopathy, and left shoulder derangement with tenderness and tendinopathy.

By decision dated December 4, 2014, OWCP modified its prior decision finding that the factual evidence was sufficient to establish that the April 16, 2014 incident occurred as alleged, but the medical evidence was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted April 16, 2014 employment incident.

On March 16, 2015 appellant requested reconsideration for a second time and submitted a January 12, 2015 report from Dr. Helman, who noted that on April 16, 2014 appellant slipped while on the sidewalk in front of the stairs going to her work building. Dr. Helman indicated that the slip was such that appellant tried to grab onto the railing of the stairs which caused her to violently twist her neck, back, and left shoulder. He opined that appellant's work-related slip and fall caused the muscle, fibrous, and connective tissues in her neck, back, and left shoulder to stretch beyond their normal limits, which created the permanent injuries to her cervical spine, lumbar spine, and left shoulder.

By decision dated May 27, 2015, OWCP modified its prior decision and found that the factual evidence of record was insufficient to establish that the April 16, 2014 incident occurred at the time, place, and in the manner alleged or that appellant was in the performance of duty at the time of injury. It found that appellant's CA-1 claim form was "generated on [April 25, 2014], considerably after the [April 16, 2014] incident." OWCP further found that contemporaneous with the injury on April 16, 2014 appellant provided another history of the incident, stating to personnel at Lutheran Medical Center, that she slipped on ice at 6:30 a.m. while walking to the curb of the sidewalk. Based on these differing histories of injury and the considerable delay in filing the claim, OWCP found that the most reliable history of the incident was provided by appellant on April 16, 2014 at the Lutheran Medical Center, which supported that she had not reached the curb and was not on the sidewalk at the time of the incident, but in the street. It therefore found that appellant had not provided sufficient evidence to establish that she experienced an employment incident at the time, place, and in the manner alleged, or that she was injured on the property owned, controlled, or maintained by the employing establishment. OWCP also noted that on the claim form the employing establishment indicated that appellant's regular work hours were from 8:00 a.m. to 4:00 p.m. It found that coming into work 1.5 hours prior to the start of her tour of duty, without explanation, could not be considered a reasonable interval for her to be considered to have been engaged in preparatory or incidental acts related to her assigned duties. OWCP therefore found that appellant was merely traveling to and from work and was not engaged in any activity incidental to work. It additionally found that since appellant had "not established any compensable employment factors," it was unnecessary to review the medical evidence.

On May 5, 2017 appellant again requested reconsideration. In support of her reconsideration request, she submitted a narrative statement addressing the May 27, 2015 OWCP decision and its findings regarding her delay in filing the claim, differing history of injury, and her work hours. Appellant explained that she initially filed a Form CA-16 on April 16, 2014 which she thought was the process for filing a claim, as she was unfamiliar with the process, and then filed her claim as soon as she was informed of how to do so online. Regarding OWCP's finding that there were differing histories of the injury, she stated that the statement written by the medical staff when she visited the hospital on April 16, 2014 was inaccurate and her own narrative statements, including the CA-1 form she completed, should be deemed accurate for the purposes of adjudicating her claim. Finally, appellant explained that the employing establishment had flexible work schedules and her work schedule was from 6:00 a.m. to 2:00 p.m. on April 16, 2014. She reiterated that her injury occurred at 6:15 a.m. on the employing establishment's premises.

Appellant further submitted a copy of her work schedule which indicated that she was scheduled to work from 6:00 a.m. to 2:00 p.m. on April 16, 2014.

In a July 21, 2014 report, Dr. Leon Reyfman, a Board-certified anesthesiologist and pain medicine specialist, noted that appellant was injured on April 16, 2014 as a result of slipping on ice in front of her job building. He diagnosed cervical disc displacement, cervical radiculopathy, lumbar disc displacement, and lumbosacral neuritis radiculopathy and opined that there was a direct causal relationship between appellant's work incident and her conditions.

A magnetic resonance imaging (MRI) scan of the cervical spine demonstrated C2-6 disc herniation, C6-T2 disc bulge, T2-3 disc extension, and right maxillary sinusitic change *versus* possible cyst or polyp noted.

By decision dated June 9, 2017, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error. It found that appellant had submitted additional factual and medical evidence, but failed to provide an explanation as to why OWCP's prior decision was improperly decided.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵ 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."⁶ The request must establish on its face that such decision was erroneous.⁷ Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁹ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁰

³ This section provides in pertinent part: "[t]he 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).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. 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.

⁶ 20 C.F.R. § 10.607(b).

⁷ *Id.* To establish 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).

⁸ 20 C.F.R. § 10.608(b).

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP,¹¹ is positive, precise, and explicit and manifests on its face that OWCP committed an error.¹² The evidence must not only be of sufficient probative value to create a conflict in the medical opinion or demonstrate a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought.¹³

Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP regulations¹⁵ and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The Board has held that for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in iFECS.¹⁶ The most recent merit decision was OWCP's May 27, 2015 decision. Appellant had one year from the date of that decision to make a timely request for reconsideration. Since her request was not received by OWCP until May 5, 2017, it was filed outside the one-year time period. As appellant's May 5, 2017 request for reconsideration was received more than one year after the May 27, 2015 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁷

In its June 9, 2017 decision, OWCP further found that appellant's reconsideration request failed to demonstrate clear evidence of error. The Board finds, however, that the evidence appellant submitted in support of her untimely request for reconsideration raises a substantial

¹¹ See *A.M.*, Docket No. 17-1434 (issued January 2, 2018); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *D.D.*, Docket No. 17-1750 (issued March 8, 2018); *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ See *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

¹⁵ *Id.* at § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); see *C.B.*, Docket No. 13-1732 (issued January 28, 2014).

¹⁷ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

question as to the correctness of OWCP's May 27, 2015 merit decision and is sufficient to demonstrate clear evidence of error.

To determine whether appellant has demonstrated clear evidence of error, OWCP will review the evidence submitted and arguments raised in support of the request and determine whether such evidence or argument is sufficient to show error in its prior decision.¹⁸ In its May 27, 2015 merit decision, OWCP found that the factual evidence was insufficient to establish that the April 16, 2014 incident occurred as alleged. In particular, OWCP found that appellant arrived at work 1.5 hours prior to the start of her tour of duty and, therefore, she was merely traveling to and from work and was not engaged in any activity incidental to work at the time of injury. In support of her May 5, 2017 reconsideration request, appellant submitted a narrative statement explaining that the employing establishment had flexible work schedules and her work schedule on April 16, 2014, the date of the alleged employment injury, was from 6:00 a.m. to 2:00 p.m. and her injury occurred at approximately 6:15 a.m. on that day. Appellant further submitted a copy of her work schedule which indicated that she was scheduled to work from 6:00 a.m. to 2:00 p.m. on April 16, 2014. In addressing the delay in filing her claim, which OWCP found in its May 27, 2015 merit decision, appellant explained that she initially filed a Form CA-16 on April 16, 2014, which she thought was the process for filing a claim as she was unfamiliar with the process, and then filed her claim as soon as she was informed of how to do so online. Regarding OWCP's finding that she had offered differing histories of the alleged employment injury, appellant explained that the statement written by the medical staff when she visited Lutheran Medical Center on April 16, 2014 was inaccurate and that her own narrative statements should be deemed accurate for the purposes of adjudicating her claim.

The Board has held that the evidence submitted with an untimely reconsideration request must relate to the issue presented and the evidence that was before OWCP at the time of the prior decision.¹⁹ As discussed above, OWCP denied appellant's claim based on the factual component of fact of injury. With her untimely request for reconsideration, appellant explained the factual inconsistencies relative to the occurrence of the alleged April 16, 2014 employment injury, submitted evidence confirming that she had an earlier reporting time on that date which coincided with the date and time of the alleged employment injury, as well as explained why she delayed in filing the traumatic injury claim form.²⁰ The Board finds, therefore, that appellant has raised a substantial question as to the correctness of the May 27, 2015 merit decision. Thus, OWCP abused its discretion in failing to reopen her claim for further merit review.²¹ The Board will reverse

¹⁸ See *George C. Vernon*, 54 ECAB 313 (2003).

¹⁹ See *K.N.*, Docket No. 13-0911 (issued August 21, 2013); *J.S.*, Docket No. 10-0385 (issued September 15, 2010).

²⁰ The Board notes that prior to the issuance of its May 27, 2015 merit decision, the employing establishment had apprised OWCP that appellant was on its premises at the time of the injury, *i.e.*, "on the staircase of the institution," that her tour of duty on April 16, 2014 was from 6:00 a.m. to 2:00 p.m., and that the injury occurred at 6:15 a.m.

²¹ See *e.g.*, *A.B.*, Docket No. 10-1070 (issued March 8, 2011), wherein claimant submitted new evidence with an untimely reconsideration request, including an Equal Employment Opportunity decision relating to her allegations of error by the employing establishment. The Board found that the claimant had established clear evidence of error.

OWCP's June 9, 2017 decision and remand the case for an appropriate decision on the merits of appellant's claim.

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error in its May 27, 2015 merit decision and, thus, OWCP improperly denied her request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 12, 2018
Washington, DC

Christopher J. Godfrey, 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