

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

L.S., Appellant)	
)	
and)	Docket No. 18-0534
)	Issued: September 13, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
CENTRAL ALABAMA HEALTHCARE)	
SYSTEM, Montgomery, AL, Employer)	
)	

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 January 18, 2018 appellant filed a timely appeal from an August 22, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated April 30, 2014, 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 to review the merits of the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² Following the issuance of OWCP's August 22, 2017 decision and on appeal, appellant submitted new evidence. The Board's jurisdiction is limited to the evidence which was before OWCP at the time it issued its final decision. Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *see Steven S. Saleh*, 55 ECAB 169 (2003).

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.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On March 19, 2013 appellant, then a 39-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that on that day she developed neck, back, shoulder, and arm pain when a veteran lost his balance and pulled her arm while at work. She did not stop work on the date of injury.

Appellant submitted several medical reports dated beginning March 26, 2013, including an April 10 and a June 10, 2013 report from Dr. Jeffry Pirofsky, an attending Board-certified physiatrist. Dr. Pirofsky noted appellant's complaints of neck and mid and low back pain with numbness and weakness of the bilateral arms. Appellant also complained of bilateral hip pain. Dr. Pirofsky discussed examination findings and assessed cervical radiculopathy; cervical, lumbar, and thoracic sprains; and cervical, lumbar, hip, and thoracic pain. He advised that he was unable to explain all of her complaints based on the description of the March 19, 2013 event. Dr. Pirofsky indicated that he was going to attempt to obtain records from Dr. William P. Ware, III, a Board-certified anesthesiologist, and Dr. Patrick G. Ryan, an attending Board-certified neurosurgeon and anesthesiologist. He suggested that appellant may need to return to Dr. Ryan as he saw her preinjury and postinjury and would be in a better position to comment on causation. Dr. Pirofsky recommended that she perform modified-duty work.

By development letter dated July 2, 2013, OWCP noted that appellant's claim initially appeared to be a minor injury that resulted in minimal or no lost time from work. It further noted that, because the employing establishment did not controvert continuation of pay or challenge the merits of the case, payment of a limited amount of medical expenses was administratively approved. However, appellant's claim was now being reopened because her medical bills had exceeded \$1,500.00. OWCP informed her of the type of evidence needed to support her claim and afforded her 30 days to submit the necessary evidence.

In a July 8, 2013 report, Dr. Pirofsky indicated that appellant was evaluated for follow-up evaluation of neck, mid back, and bilateral hip pain. He restated his prior assessments of cervical radiculopathy; cervical, lumbar, and thoracic sprains; and cervical, lumbar, hip, and thoracic pain.

By decision dated August 8, 2013, OWCP denied appellant's traumatic injury claim finding that the medical evidence of record was insufficient to establish causal relationship between a medical condition and the accepted March 19, 2013 employment incident.

³ Docket No. 17-0809 (issued July 21, 2017).

In procedure notes dated February 21 and March 13, 2013, Dr. Ware diagnosed cervical disc disease of the cervical spine at multiple levels based on a magnetic resonance imaging (MRI) scan. He noted that appellant received cervical epidural steroid injections. In a consultation note dated February 20, 2013 and office notes dated April 15 and June 10, 2013, Dr. Ware indicated that she had received several epidural steroid injections which provided significant relief, but that her pain was reactivated as a result of being grabbed and pulled down by someone at work. He noted a history of her medical treatment and provided an impression of multiple level cervical disc disease causing a significant amount of symptomatology.

On September 4, 2013 appellant requested a telephone hearing before an OWCP hearing representative regarding OWCP's August 8, 2013 decision.

Appellant submitted an additional report dated February 11, 2013 from Dr. Ryan who discussed examination findings and provided an impression of cervical radiculitis with spondylitis change and a moderate bulging disc at C5-6 and to a slightly lesser degree at C4-5 and C6-7. Dr. Ryan also provided an impression of lumbar radiculitis. In a February 11, 2013 return to work note, he found that appellant could work with restrictions. In a March 26, 2013 letter, Dr. Ryan set forth her physical restrictions and maintained that lifting or working directly with patients had been detrimental to her recovery. He recommended that her job duties be changed.

In a report dated March 15, 2013, Dr. Ware indicated that appellant had received another cervical epidural steroid injection.

On July 8, 2013 Dr. Pirofsky examined appellant again and reiterated his prior assessments of lumbar, thoracic, and cervical sprains, lumbar, thoracic, cervical, and hip pain, and cervical radiculopathy.

By decision dated April 30, 2014, an OWCP hearing representative affirmed the August 8, 2013 decision. She found that the medical evidence submitted by appellant failed to provide a rationalized medical opinion causally relating appellant's diagnosed conditions to her accepted March 19, 2013 employment incident.

In an undated letter, appellant reiterated her contention that she sustained injuries due to the work related March 19, 2013 incident. She noted the treatment she received from an employing establishment occupational health nurse and several other physicians, which included cervical surgery, her work restrictions, and resultant disability.

Appellant submitted handwritten employee health records dated April 30, 2008 to October 27, 2014 and a February 5, 2015 employing establishment report of an employee's emergency treatment signed by employing establishment certified nurse practitioners who addressed appellant's various conditions, including the claimed cervical condition sustained on March 19, 2013, medical treatment, and physical restrictions.

Appellant also submitted additional reports from Dr. Ware and Dr. Ryan. In reports dated November 4, 2013 to November 10, 2014, Dr. Ware again noted that he had examined her and restated his prior impression of multiple level disc disease of the cervical spine causing a significant amount of symptomatology. He also provided an impression of cervicalgia, cervical facet disease, cervical radiculopathy, headache, myalgia or myositis, thoracic spine pain, and long-

term use of other medications. Dr. Ware indicated that appellant was scheduled to undergo an anterior cervical discectomy and fusion on December 4, 2014.

In reports dated October 20 and December 4, 2014, Dr. Ryan reiterated his prior diagnosis of cervical radiculopathy. He indicated appellant's desire to proceed with the anterior cervical discectomy and fusion. In an October 27, 2014 letter, Dr. Ryan noted her diagnosis of cervical disc herniation and that she was scheduled to undergo surgery on December 4, 2014. He advised that appellant would be out of work for eight weeks. In an operative report dated December 4, 2014, Dr. Ryan performed an anterior cervical discectomy and fusion at C5-6. He noted a prediagnosis and postsurgical diagnosis of herniated cervical disc at C5-6. In a follow-up report dated January 19, 2015, Dr. Ryan indicated that appellant was six weeks status post operative the December 4, 2014 surgery. He reviewed cervical spine x-ray test results and noted her cervical symptoms. Dr. Ryan restated his prior diagnosis of cervical radiculopathy.

Appellant submitted an office note dated August 6, 2013 from Dr. Trey Ware, an anesthesiologist. Dr. Ware noted that she had been seen in his office since February 2013 for the evaluation of her cervical spine. He reported examination findings and assessed cervicgia, cervical disc disease, and cervical facet disease.

In a cervical spine MRI scan report dated July 7, 2014, Dr. Terry D. Williams, a Board-certified radiologist, found a disc bulge/protrusion at C4-5 down through C6-7 with some varying degrees of cord flattening which was degenerative, some foraminal stenosis, and a lesion within the cord substance at disc space level C3-4 of unknown significance. No similar lesions were found in the cervical spine. Dr. Williams suggested imaging of the brain precontrast and postcontrast and of the cervical and thoracic spine looking for other similar lesions if that was new information. He noted that demyelination of unknown etiology was the most likely etiology.

Also, on July 7, 2014 Dr. Justin W. Phillipott, a Board-certified radiologist, performed a thoracic spine MRI scan. He provided an impression of mild degenerative changes throughout the thoracic spine without significant degree to the spinal neural foraminal stenosis. Dr. Phillipott provided an impression of multiple areas of abnormal increased T2 signal in the upper and mid thoracic spine as described. He advised that this could be plaques related to multiple sclerosis. However, Dr. Phillipott related that they were fairly central which could be a syrinx with varying sizes throughout the thoracic cord. He maintained that a postcontrast MRI scan of the thoracic spine would certainly be helpful for further evaluation.

On July 18, 2014 Dr. Ronald A. Stanton, Jr., a Board-certified radiologist, reported that a cervical spine MRI scan was negative for abnormal enhancement in the cervical cord, visualized upper thoracic cord, and visualized skull base structures.

Dr. Jason H. Dorey, a Board-certified radiologist, performed a brain MRI scan on July 18, 2014, which was normal with and without contrast. He also performed a thoracic spine MRI scan on the same day which demonstrated no abnormal enhancement throughout the thoracic cord.

In a letter submitted through her congressional representative and received on August 15, 2016, appellant requested reconsideration of OWCP's hearing representative's April 30, 2014 decision.

By decision dated August 25, 2016, OWCP denied reconsideration of the merits of appellant's claim pursuant to section 8128(a) of FECA, finding that it neither raised substantive legal questions, nor included new and relevant evidence.

Appellant appealed to the Board on February 21, 2017. In an order dated July 21, 2017, the Board set aside the August 25, 2016 decision and remanded the case to OWCP for further review under the clear evidence of error standard.⁴ The Board found that OWCP received appellant's latest request for reconsideration on August 10, 2016, which was more than one year after the latest merit decision dated April 30, 2014. Thus, the Board found that OWCP applied the wrong standard of review to the untimely request for reconsideration.

On remand, by decision dated August 22, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System.⁶ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁸ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁹ is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.¹⁰ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish 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. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the

⁴ *Id.*

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

⁷ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

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.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration.

OWCP's regulations¹² and procedures¹³ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was an OWCP hearing representative's April 30, 2014 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since OWCP did not receive her request until August 15, 2016, it was filed outside the one-year time period. As appellant's August 15, 2016 request for reconsideration was submitted more than one year after the April 30, 2014 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her March 19, 2013 traumatic injury claim.¹⁴

The Board has reviewed the record and finds that the evidence submitted in the untimely request for reconsideration does not raise a substantial question as to the correctness of OWCP's last merit decision and is therefore insufficient to demonstrate clear evidence of error. The underlying issue in appellant's claim was medical in nature with respect to causal relationship. The Board notes that the term clear evidence of error is intended to represent a difficult standard.¹⁵ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.¹⁶ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁷

Appellant submitted reports from Dr. William Ware, Dr. Ryan, and Dr. Trey Ware, addressing various conditions, including her cervical, lumbar, and thoracic spine conditions. In consultation and office notes and reports dated November 4, 2013 to November 10, 2014, Dr. William Ware examined her and diagnosed cervical disc disease at multiple levels of the cervical spine, cervicalgia, cervical facet disease, cervical radiculopathy, myalgia or myositis, and thoracic spine pain. In reports dated October 20 and 27 and December 4, 2014, and January 19,

¹¹ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

¹² 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

¹³ *Supra* note 6 at Chapter 2.1602.4 (February 2016); see *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

¹⁵ *Supra* note 8 at Chapter 2.1602.5 (February 2016); see *Dean D. Beets*, *supra* note 9.

¹⁶ See *L.L.*, Docket No. 13-1624 (issued December 5, 2013); *D.G.*, 59 ECAB 455 (2008).

¹⁷ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

2015, Dr. Ryan examined appellant, reviewed cervical diagnostic test results, and diagnosed cervical radiculopathy and cervical disc herniation at C5-6. He performed an ACDF on December 4, 2014. Dr. Trey Ware described the examination he performed on August 6, 2013. He assessed cervicalgia, cervical disc disease, and cervical facet disease. The July 7, 2014 diagnostic test reports of Dr. Williams and Dr. Phillipott and July 18, 2014 diagnostic reports of Dr. Stanton and Dr. Dorey addressed appellant's cervical, thoracic, and brain conditions. She did not explain how the resubmission of these reports would show that OWCP's hearing representative erred in issuing her April 30, 2014 decision

Appellant resubmitted Dr. Pirofsky's April 10 and June 10, 2013 reports which had previously been considered by OWCP and deemed insufficient to establish causal relationship. She did not explain how the resubmission of these reports would show that OWCP's hearing representative erred in issuing her April 30, 2014 decision. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review.¹⁸

Appellant also submitted medical records and a report dated April 30, 2008 to February 5, 2015 from employing establishment certified nurse practitioners. Nurse practitioners are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.¹⁹ Consequently, these medical records and report are insufficient to demonstrate clear error by OWCP with respect to the underlying medical issue.

Appellant did not submit medical evidence sufficient 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. Consequently, the Board finds that she has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

CONCLUSION

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

¹⁸ See *A.F.*, Docket No. 13-0007 (issued February 8, 2013).

¹⁹ See *E.P.*, Docket No. 17-1086 (issued October 13, 2017); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law).

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 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