

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

_____)	
D.M., Appellant)	
)	
and)	Docket No. 18-1689
)	Issued: April 4, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Columbia Falls, MT, 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 September 6, 2018 appellant filed a timely appeal from a March 19, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision, dated December 8, 2016, 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 this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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

On November 4, 2014 appellant, then a 56-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a herniated disc in her neck and disc bulges in her neck and back as a result of her repetitive employment duties. She noted that she first became aware of the claimed condition and its relationship to factors of her federal employment on December 28, 2013. On the reverse side of the claim form the employing establishment indicated that appellant had stopped work on January 2, 2014, first reported her condition to her supervisor on November 4, 2014, and had not returned to work.

In a letter dated November 7, 2014, the employing establishment challenged appellant's occupational disease claim. It contended that she had failed to provide the evidence required to support her claim, including a detailed description of the factors of employment believed to be responsible for her condition, a history of her condition, and a comprehensive medical report from her physician.

By development letter dated November 10, 2014, OWCP acknowledged receipt of appellant's claim and informed her that the evidence submitted was insufficient to establish her claim. It provided a factual questionnaire for her completion and requested medical evidence in support of her claim. OWCP afforded appellant 30 days to submit the necessary evidence.

In a work capacity evaluation form (OWCP-5c) dated July 22, 2014, Dr. Allen M. Weinert, Board-certified in physical medicine and rehabilitation, noted appellant's restrictions, which he reported were permanent. He concluded that appellant would not be able to perform her usual work duties.

In response to the November 10, 2014 development letter, appellant indicated that, while working on December 28, 2013, she had just finished casing her mail when her back froze and she could not turn to the right. She noted that she was unable to see her doctor until January 2, 2014. In her completed questionnaire, appellant indicated that casing mail, pulling packages out of a tub, and bending to lift heavy packages all contributed to her condition.

By decision dated December 30, 2014, OWCP denied appellant's claim. It noted that she had established that the employment factors occurred as described. However, OWCP found that appellant had not submitted medical evidence containing a diagnosis in connection with her alleged condition.

In a report dated January 15, 2015, Dr. Camden Kneeland, Board-certified in anesthesiology and pain medicine, diagnosed chronic pain syndrome, myofascial pain, and cervicogenic migraine.

In a report dated March 17, 2015, Dr. Kneeland examined appellant and diagnosed thoracic myofascial strain (chronic), a strain of her neck, and chronic pain syndrome.

In a report dated February 20, 2014, received by OWCP on June 2, 2015, Dr. Patrick McDonnell, a diagnostic radiology specialist, related that a magnetic resonance imaging (MRI) scan revealed degenerative changes of appellant's cervical spine along with the presence of vertebral and facet joint arthrosis and a small right posterolateral disc protrusion at the T9-10 level without significant neural impingement.

OWCP also received a report dated March 12, 2014, wherein Dr. William Benedetto, Board-certified in diagnostic radiology, reviewed a cervical spine MRI scan and indicated that appellant had multilevel spondylosis with disc space narrowing, anterior and posterior osteophytes and posterior disc protrusions, a faint elevated T2 signal at the C5-6 level within the cord itself, broad-based disc/osteophyte at C4-5 with moderate central canal narrowing, moderate left and mild-moderate right foraminal narrowing, moderate broad-based C5-6 disc/osteophyte complex with moderate central canal stenosis with moderate right and moderate-severe left foraminal narrowing, mild C6-7 central canal narrowing with mild left foraminal narrowing, and a small far lateral/foraminal C7-T1 disc extrusion.

On June 2, 2015 appellant requested reconsideration of OWCP's December 30, 2014 decision.

In a report dated June 23, 2015, Dr. Kneeland examined appellant and again diagnosed chronic pain syndrome.

By decision dated September 9, 2015, OWCP modified its December 30, 2014 decision to find that appellant had established a medical diagnosis, but denied her claim because the medical evidence of record did not relate her diagnosed conditions to any specific duties of her employment. It noted that appellant had neither provided medical documentation that contained specific employment duties/activities nor a physician's opinion supported by medical explanation as to how those duties in federal employment caused, contributed to, or aggravated her medical conditions.

In a letter dated September 8, 2016, Dr. Kneeland opined that appellant's chronic myofascial pain syndrome was the result of a combination of her December 28, 2013 injury and repetitive upper extremity, neck, and upper back use during her years in federal employment. He noted that her chronic condition was exacerbated by the December 28, 2013 injury. Dr. Kneeland opined that her chronic pain syndrome and her cervicogenic headaches were primarily the result of chronic myofascial neck and upper back pain. He related that appellant's duties were restricted so not to include repetitive upper extremity, upper back, and neck movements.

On September 13, 2016 appellant requested reconsideration of OWCP's September 9, 2015 decision.

By decision dated December 8, 2016, OWCP denied modification of the September 9, 2015 decision. It found that the evidence provided did not establish a correlation between the diagnosed conditions of strain of neck and thoracic myofascial strain and specific employment factors. OWCP noted that appellant had not provided a rationalized medical opinion establishing causal relationship.

In a report dated June 26, 2017, Dr. Dustin Carpenter, a family medicine specialist, examined appellant and diagnosed myofascial pain dysfunction syndrome. He noted that appellant had fallen recently and injured her ribs.

In a letter dated December 7, 2017, Dr. Kneeland indicated that appellant's chronic pain was due to her repetitive work duties. He noted that her federal employment activities resulted in a chronic myofascial pain syndrome. Dr. Kneeland related that appellant's duties as a mail carrier directly resulted in her chronic myofascial pain, and that the pain had not resolved.

On December 19, 2017 OWCP received appellant's reconsideration request of its December 8, 2016 decision.

By decision dated March 19, 2018, OWCP denied appellant's request for reconsideration, finding that it 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.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that for merit decisions issued on or after August 29, 2011, the request for reconsideration must be "received" by OWCP within one year of the date of the decision for which review is sought.⁵ 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).⁶ 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.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 To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error.¹⁰ Evidence that does not raise a substantial

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). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁶ *Id.* at Chapter 2.1602.4b.

⁷ *See M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Thankamma Mathews*, 44 ECAB 765 (1993).

⁸ 20 C.F.R. § 10.607(b).

⁹ *Id.*

¹⁰ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

The Board notes that clear evidence of error is intended to represent a difficult standard.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷ Where a request is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁸

ANALYSIS

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. Appellant had one year from the date of OWCP's December 8, 2016 decision to timely request reconsideration. One year from December 8, 2016 fell on Friday, December 8, 2017. OWCP received appellant's reconsideration request on Tuesday, December 19, 2017. As OWCP did not receive appellant's reconsideration request until December 19, 2017, 11 days past the one-year deadline from the December 8, 2016 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁹

The Board finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in issuing its prior merit decision dated December 8, 2016. In support of her request, appellant submitted a report dated June 26, 2017 from Dr. Carpenter, who diagnosed myofascial pain dysfunction syndrome after appellant sought treatment for a fall and injury to her ribs. This report refers to an incident unrelated to the occupational disease claim at issue in this case.

¹¹ *R.C.*, Docket No. 17-0198 (issued January 28, 2019); *see Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *R.C.*, *id.*; *Thankamma Mathews*, *supra* note 7.

¹³ *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹⁴ *R.L.*, Docket No. 18-0496 (issued January 9, 2019); *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *R.L.*, *supra* note 14; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, *supra* note 7.

¹⁸ 20 C.F.R. § 10.608(b).

¹⁹ *Id.* at § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

Appellant also submitted a letter from Dr. Kneeland dated December 7, 2017, which indicated that appellant's chronic pain was "likely related" to her repetitive work duties. Dr. Kneeland noted that her federal employment activities resulted in a chronic myofascial pain syndrome. However, his opinions were largely repetitive from a letter dated September 8, 2016, which was submitted prior to the December 8, 2016 decision. Repetitive or cumulative evidence is insufficient to *prima facie* shift the weight of the evidence in favor of the claimant.²⁰

The term clear evidence of error is intended to represent a difficult standard.²¹ 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, does not constitute clear evidence of error. 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.²²

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its December 8, 2016 decision denying her claim for an employment-related back and neck condition.²³ The evidence and argument submitted in connection with her untimely reconsideration request did not raise a substantial question concerning the correctness of OWCP's prior decision.

As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of OWCP's last merit decision, appellant has failed to demonstrate clear evidence of error.²⁴

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.

²⁰ See *M.P.*, Docket No. 17-0367 (issued March 12, 2018).

²¹ See *L.C.*, Docket No. 18-1407 (issued February 14, 2019).

²² *Id.*

²³ See *supra* note 10.

²⁴ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); see *W.A.*, Docket No. 18-0297 (issued July 18, 2018).

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2019
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