

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

E.I., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Oakland Park, IL, Employer**

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**Docket No. 18-0634
Issued: January 23, 2019**

Appearances:
Appellant, pro se
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 February 1, 2018 appellant filed a timely appeal from a January 12, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated February 9, 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 over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 18, 2015 appellant, then a 53-year-old revenue officer, filed an occupational disease claim (Form CA-2) alleging that on April 27, 2015 she first became aware that her right hand arthritis was caused by her repetitive federal employment duties which include walking, bending, twisting, writing, typing documents, lifting bags with files, and sitting due to prolonged driving. She also noted that she was at work when she had “the accident” and the issues did not arrive until after the accident.²

By development letter dated June 16, 2015, OWCP advised appellant that additional factual and medical evidence was necessary to establish her claim. It afforded her 30 days to submit the necessary evidence.

OWCP received x-ray interpretations of appellant’s right arm, shoulder, and thumb dated April 24 and July 8, 2015.

In June 1, 2015 report, Dr. Estella Hernandez, a Board-certified family practitioner, diagnosed employment-related right carpal tunnel syndrome and osteoarthritis, based upon physical examination findings.

A July 6, 2015 electromyography (EMG) study, signed by Dr. Engin Yilmaz, Board-certified in neurophysiology, reported evidence of lower extremity sensory motor axonal, mild left S1 and mild-to-moderate right L4-5 and (S1) chronic radiculopathy.

In a statement dated July 15, 2015, appellant reported that she was injured in a July 29, 2002 employment-related automobile accident. As a result of this event she alleged that she sustained a brain injury as well as arthritis in her shoulders, back, hips, knees, legs, feet, and hands.

In a July 13, 2015 narrative report, Dr. Hernandez provided examination findings and treatment. She related appellant’s account that she sustained a brain injury as the result of a work-related automobile accident on July 9, 2015.³ Work-related diagnoses included right shoulder pain and osteoarthritis, shoulder tendinitis, right knee pain and osteoarthritis, right hip pain and osteoarthritis, lumbar pain and radiculopathy, lower back osteoarthritis, right wrist carpal tunnel syndrome, right wrist osteoarthritis, right lower extremity injury, right lower extremity peroneal tendinitis, lower extremity varicose veins, right knee osteoarthritis, right plantar fasciitis, and right foot pain and osteoarthritis.

By decision dated September 2, 2015, OWCP denied appellant’s claim, finding that she had not established that her diagnosed medical conditions were causally related to her accepted work event(s).

In a report dated September 24, 2015, Dr. Hernandez reiterated his opinion that appellant’s diagnosed conditions of right carpal tunnel syndrome and osteoarthritis were caused by her past

² Under OWCP File No. xxxxxx466 OWCP accepted that appellant sustained a concussion due to a July 29, 2002 employment-related motor vehicle accident.

³ This appears to be a typographical error as the date of the accident is subsequent to the report date.

car accident while at work. She cited to the second edition of the American Medical Association, *Guides for Evaluation of Disease and Injury Causation* in support of his causation opinion.⁴

On October 1, 2015 OWCP received appellant's request for a review of the written record by an OWCP hearing representative. Appellant also submitted a September 16, 2015 letter describing her work duties and describing her July 29, 2002 employment-related automobile accident. She contended that the July 29, 2002 accident caused permanent changes to her behavior and thinking and impacted her ability to drive.

By decision dated February 9, 2016, an OWCP hearing representative affirmed the denial of appellant's occupational disease claim. She found that the evidence submitted did not establish causal relationship between a diagnosed medical condition and a specific factor of appellant's employment. Despite the affirmance, on remand OWCP was instructed to combine OWCP File No. xxxxxx702 with OWCP File No. xxxxxx466 as appellant appeared to be claiming a recurrence of disability under OWCP File No. xxxxxx466.⁵

In a letter dated June 15, 2016 and received on June 21, 2016, appellant detailed the duties of her position and her medical conditions. She asserted that as a result of working 14 years as a revenue officer she developed pain in her right knee, lower extremity, hip, shoulder, wrist, foot, and right lower back.

On June 21, 2016 OWCP received physical therapy notes dated August 5 and September 21, 2015 and an April 4, 2013 order for physical therapy.⁶

The record contains progress notes covering the period March 31, 2004 to February 12, 2016, which detailed appellant's physical examination findings. OWCP also received a magnetic resonance imaging scan dated August 19, 2015 and a January 23, 2016 computerized tomography scan.

In a September 18, 21, 2015 report, Dr. Young-II Ro, a Board-certified neurologist, diagnosed abnormal brainstem auditory and left optic neuropathy. On September 21, 2015 he diagnosed normal upper extremity somatosensory and abnormal lower extremity somatosensory, which might indicated myelopathy. A December 11, 2015 letter from Dr. Ro, related that appellant had been under his care since August 2015 for chronic headaches since a July 29, 2002 automobile accident.

In a narrative letter dated January 24, 2016, Dr. J. Michael Morgenstern, an orthopedic surgeon, diagnosed unspecified leg peroneal tendinitis, plantar fasciitis disorder, peroneal tendinitis disorder, right pes plantus, knee osteoarthritis, carpal tunnel syndrome, right hip joint pain, lumbar radiculopathy, shoulder secondary osteoarthritis, shoulder tendinitis, right shoulder

⁴ A.M.A., *Guides* (2nd ed. 2014).

⁵ *Supra* note 2.

⁶ In a letter dated August 2, 2016, OWCP informed appellant that OWCP File No. xxxxxx702 and OWCP File No. xxxxxx466 had been combined for administrative case management as instructed by OWCP's hearing representative. It advised that OWCP File No. xxxxxx466 was the master file number.

lesion, concussion with loss of consciousness, and traumatic brain injury, right shoulder pain and osteoarthritis, shoulder tendinitis, right knee pain and osteoarthritis, right hip pain and osteoarthritis, lumbar pain and radiculopathy, lower back osteoarthritis, right wrist carpal tunnel syndrome, right wrist osteoarthritis, right lower extremity injury, right lower extremity peroneal tendinitis, lower extremity varicose veins, right knee osteoarthritis, right plantar fasciitis, and right foot pain and osteoarthritis. He provided examination findings and attributed the diagnosed conditions to the 2002 motor vehicle accident.

In a March 8, 2016 report, Dr. Roumen D. Blabanov, a treating Board-certified neurologist, diagnosed multiple sclerosis.

Dr. Hernandez, in a letter dated June 13, 2015, noted that appellant had been under her care since March 31, 2004 for head trauma sustained in a 2002 automobile accident. She observed that since the accident appellant had experienced headaches and pain in her neck, back, right hip, knee, hand, and first digit.

In June 27, 2016 progress notes, Dr. Michael Y. Ko, a Board-certified neurologist, diagnosed multiple sclerosis and noted that appellant presented with cognitive issues.

On August 12, 2016 appellant requested reconsideration.

By decision dated January 12, 2018, OWCP found that the evidence of record was insufficient to warrant merit review of the decision dated February 9, 2016 as the evidence submitted with the request for reconsideration was irrelevant or immaterial and had no bearing on the issue of causal relationship.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If OWCP chooses to grant reconsideration, it

⁷ 5 U.S.C. § 8128(a); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁸ 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ *Id.* at § 10.607(a).

reopens and reviews the case on its merits.¹⁰ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision.

The last merit decision in this case was OWCP's hearing representative's decision dated February 9, 2016. In that decision the hearing representative affirmed the denial of appellant's occupational disease claim as the evidence of record did not establish causal relationship between a diagnosed medical condition and a specific factor of her federal employment.

Following the February 9, 2016 decision appellant submitted additional evidence and argument. In a letter dated June 15, 2016, she detailed the duties of her position and her medical conditions and argued that as a result of working 14 years as a revenue officer she developed pain in her right knee, lower extremity, hip, shoulder, wrist, foot, and right lower back. Appellant also submitted physical therapy notes, progress notes covering the period March 31, 2004 to February 12, 2016, diagnostic studies, and reports from several attending physicians including Drs. Ro, Morgenstern, Blabanov, Hernandez, and Ko.

On August 12, 2016 appellant requested reconsideration.

By decision dated January 12, 2018, OWCP found that the evidence of record was insufficient to warrant merit review of the decision dated February 9, 2016 as the evidence submitted with the request for reconsideration was irrelevant or immaterial and had no bearing on the issue of causal relationship. This decision was issued 518 days after appellant's request for reconsideration. In order to preserve her right to timely request reconsideration, OWCP has a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.¹² Its procedures provide that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review.¹³ As OWCP's January 12, 2018 decision was issued more than 90 days after it received appellant's request for reconsideration, the question becomes whether the delay has jeopardized her right to a review of the merits of the case by the Board. OWCP has determined that there is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following its receipt of the claimant's reconsideration request.¹⁴ The Board has considered whether the 180-day time limit for requesting review by the Board expired within the

¹⁰ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (October 2011).

¹³ *Id.* at Chapter 2.1602.7

¹⁴ *Id.*; *see also C.L.*, Docket No. 10-1483 (issued May 12, 2011).

90-day period following OWCP's receipt of appellant's reconsideration request.¹⁵ The Board finds that because appellant filed her request for reconsideration on August 12, 2016, 185 days had passed from the last merit decision and therefore an appeal to the Board would have been untimely filed.

Under the facts of the present case, the Board finds that OWCP's delay of 518 days in issuing the January 12, 2018 nonmerit decision has impacted appellant's ability to file a timely request for reconsideration of the merits of her case under 5 U.S.C. § 8128(a). Had it issued the decision within its 90-day timeliness goal, she would have had an additional 90 days to seek review under the criteria set forth for a timely request for reconsideration with OWCP. Here, the delay has precluded such further review and any further request for reconsideration would *per se* be untimely as it would be filed more than one year following the February 9, 2016 merit decision. The standard of review for an untimely request for reconsideration requires appellant to demonstrate clear evidence of error. To demonstrate clear evidence of error she must submit evidence relevant to the issue decided by OWCP which is positive, precise, and explicit and it must manifest on its face that OWCP committed an error.¹⁶ 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.¹⁷ The Board has repeatedly held that clear evidence of error is intended to represent a difficult standard.¹⁸

The Board therefore finds that, under the facts of this case, the 518-day delay in issuance of a reconsideration decision by OWCP has impacted appellant's ability to submit additional evidence or argument and bring a timely request for reconsideration before OWCP. This, correspondingly impacts the review permissible by the Board. OWCP's delay in issuing its denial of reconsideration resulted in appellant being limited to filing an untimely reconsideration request which, as explained above, is a much higher burden of proof. Therefore, the Board finds that this case is not in posture for a decision. To preserve appellant's right to file a timely request for reconsideration, and to afford her the ability to present further evidence or argument to establish her claim, this case will be remanded to OWCP for a merit review of the evidence of record followed by an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁵ See *G.B.*, Docket No. 16-1485 (issued January 6, 2017).

¹⁶ 20 C.F.R. § 10.607(b); *P.L.*, Docket No. 18-0813 (issued November 20, 2018); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁷ *V.L.*, Docket No. 17-1493 (issued September 12, 2018); *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁸ *P.L.*, *supra* note 16; *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: January 23, 2019
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