

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

V.M., Appellant

and

**U.S. HOUSE OF REPRESENTATIVES, CHIEF
ADMINISTRATIVE OFFICE, Washington, DC,
Employer**

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Docket No. 18-1184
Issued: July 10, 2019

Appearances:

Stephanie N. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 23, 2018 appellant, through counsel, filed a timely appeal from a February 22, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from the last relevant merit decision, dated November 21, 2014, to the

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 The application for review (Form AB-1) specifically identified OWCP's February 22, 2018 nonmerit decision as the subject of the current appeal. On May 22, 2018 OWCP's Branch of Hearings and Review issued a final overpayment decision. As neither appellant nor counsel has specifically requested review of the May 22, 2018 overpayment decision, the Board will only exercise jurisdiction over the February 22, 2018 nonmerit decision. See 20 C.F.R. § 501.3.

filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's November 30, 2017 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 24, 2013 appellant, then a 64-year-old special assistant, filed a traumatic injury claim (Form CA-1) alleging that on April 10, 2013 she sustained a broken wrist and torn shoulder muscles as a result of tripping and falling down onto a marble floor after leaving a meeting at work. She stopped work on April 11, 2013.

OWCP accepted appellant's claim for closed fracture of the lower end of the right radius, right shoulder rotator cuff sprain, and right medial meniscus tear. It later expanded the acceptance of her claim to include right pulmonary contusion, right pleural effusion, right pneumonia, and atrial fibrillation. On August 16, 2013 appellant underwent authorized cardio ablation for atrial fibrillation and flutter.

OWCP paid wage-loss compensation and medical benefits and placed appellant on the periodic rolls, effective April 30, 2014.

On June 9, 2014 OWCP referred appellant, along with a statement of accepted facts and the medical record, to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a June 25, 2014 report, Dr. Smith discussed her history of injury and provided examination findings. He opined that the presumed fracture of the right distal radius had never existed based on careful review of appellant's x-ray examination. Dr. Smith also concluded that her right shoulder rotator cuff sprain had resolved according to diagnostic studies from April 2013 and February 2014. He also determined that appellant's right knee medial meniscus tear had resolved because there was no evidence of a complaint of right knee pain initially in the emergency room. Dr. Smith explained that her symptoms with respect to her right shoulder and knee were consistent with degenerative disease and unlikely related to the accepted April 10, 2013 employment injury. He also found that appellant was no longer totally disabled from work and could return to regular duty. Dr. Smith further reported that, with respect to her accepted lung and heart problems, these conditions were outside the realm of orthopedics and recommended that she be evaluated by a cardiologist/internist.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the February 22, 2018 decision, OWCP received additional evidence. 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.*

OWCP subsequently referred appellant to Dr. Richard A. Schwartz, a cardiologist, for a second-opinion evaluation regarding her accepted heart and lung conditions. In a July 8, 2014 report, Dr. Schwartz reviewed her history and indicated that his review was confined to the issue of her atrial fibrillation condition. Upon examination, he reported that appellant's cardiovascular examination was unremarkable and that auscultation of her heart was within normal limits. Dr. Schwartz explained that her accepted atrial fibrillation persisted until August 2013 when she underwent cardio ablation and she was returned to normal sinus rhythm. He also reported that appellant would have been disabled from her atrial fibrillation until her ablation in August 2013, and could now be gainfully employed from the standpoint of her atrial fibrillation.

In a July 15, 2014 report, Dr. Cary Schwartzbach, a Board-certified orthopedic surgeon, indicated that he treated appellant for follow-up of her right knee and shoulder. Upon physical examination of her right shoulder, he observed pain-induced weakness in abduction and external rotation. Impingement sign was positive. Dr. Schwartzbach reported that examination of appellant's right knee showed some tenderness in the anteromedial joint line. He related that it was apparent that her condition was not improving and that they had discussed surgical options.

On October 2, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that Dr. Smith's and Dr. Schwartz' opinions that she no longer had disability or residuals due to her accepted April 10, 2013 employment injury constituted the weight of the medical evidence.

On November 21, 2014 OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective November 20, 2014. It found that the weight of the medical evidence rested with the June 25, 2014 report of Dr. Smith and the July 8, 2014 report of Dr. Schwartz who determined that she no longer had residuals or disability causally related to her accepted April 10, 2013 employment injury.

On November 30, 2017 appellant, through counsel, requested reconsideration. In a November 13, 2017 brief, counsel asserted that OWCP did not meet its burden of proof to establish that appellant's residuals and disability had ceased or that they were no longer related to her employment. She alleged that Dr. Smith's June 25, 2014 report exhibited personal bias against appellant and contained improper legal analysis by a second-opinion examiner. Counsel also asserted that he did not provide sufficient medical rationale to support his conclusion that appellant's orthopedic conditions had resolved. She also contended that reports submitted after Dr. Smith's June 25, 2014 report clearly conflicted with his opinion that appellant's injuries had resolved and, accordingly, OWCP should have sought an impartial medical opinion in order to resolve the conflict. Counsel further alleged that neither Dr. Smith nor Dr. Schwartz opined on whether appellant's accepted conditions of right pleural effusion or right pneumonia had resolved. She requested that OWCP review appellant's case and reverse the termination decision as her arguments had shown clear evidence of error on the part of OWCP.

OWCP also received progress reports by Dr. Schwartzbach dated June 28 and July 7, 2016, which noted diagnoses of right rotator cuff sprain and right knee meniscus tear. Dr. Schwartzbach described appellant's April 10, 2013 work injury and reviewed her history. Upon physical examination of her right shoulder, he observed limited range of motion with pain and weakness and positive impingement sign. Examination of appellant's right knee showed mild thickening

with no obvious effusion and notable tenderness medially with pain on flexion and patellofemoral compression. Dr. Schwartzbach opined that she continued to have persistent symptoms of her right shoulder and knee related to her April 10, 2013 employment injury. He reported that, although appellant's orthopedic profile could be degenerative in nature, there was no reason to conclude that they were not traumatic in nature, particularly because she denied any symptoms with her knee or shoulder prior to the April 10, 2013 employment injury.

Appellant also submitted reports by Dr. Richard L. Gaertner dated July 1 and 5, 2016. Upon examination of her right forearm and wrist, Dr. Gaertner observed moderate pain and swelling, but full range of motion. Neurovascular examination of the upper extremities was intact. Upon examination of appellant's right knee, Dr. Gaertner reported moderate diffusion and medial joint-line tenderness with some decrease of extension and full flexion. He related that x-rays showed cystic changes which are compatible with old trauma. Dr. Gaertner also noted that a right shoulder x-ray showed that appellant's partial tear from three years ago had progressed to a tear of all four rotator cuffs and some mild-to-moderate osteoarthritis of the glenohumeral joint.

In a November 20, 2016 report, Dr. William A. Wilson, an internist, addressed appellant's history of right foot drop. He reviewed her history and indicated that a January 24, 2014 electromyography and nerve conduction velocity (EMG/NCV) study of her right foot was abnormal.

By decision dated February 22, 2018, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ 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.⁸ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the integrated Federal Employees' Compensation System.⁹

OWCP, however, may not deny an application for reconsideration solely because the application was untimely filed. It may consider an untimely application for reconsideration if the

⁵ *Supra* note 3.

⁶ 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).

⁷ 20 C.F.R. § 10.607.

⁸ *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).

⁹ *Id.* at Chapter 2.1602.4(b).

evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.¹⁰ In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.¹¹

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.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or demonstrate 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.¹⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ The Board has held that even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.¹⁶ OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁷ If clear evidence of error has not been presented, it should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹⁸

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP terminated her wage-loss compensation and medical benefits by decision dated November 21, 2014, and counsel did not request reconsideration until more than three years later. Accordingly, it properly found the November 30, 2017 request for

¹⁰ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ See *id.* at § 10.60b (b); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹³ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁶ A.R., Docket No. 15-1598 (issued December 7, 2015).

¹⁷ Supra note 8 at Chapter 2.1602.5a (October 2011).

¹⁸ *Id.*

¹⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

reconsideration untimely. Therefore, appellant must demonstrate clear evidence of error by OWCP in the termination of her wage-loss compensation and medical benefits.²⁰

The Board further finds that the evidence appellant submitted in support of her untimely request for reconsideration raises a substantial question as to the correctness of OWCP's November 21, 2014 merit decision and is sufficient to demonstrate clear evidence of error.

To determine whether appellant has demonstrated clear evidence of error, OWCP will conduct a limited review of the evidence submitted and arguments raised in support of the request in order to determine whether such evidence or argument is sufficient to show error in its prior decision.²¹ In its November 21, 2014 merit decision, OWCP terminated her wage-loss compensation and medical benefits, effective November 20, 2014, based on the June 25, 2014 report of Dr. Smith, a second-opinion examiner, and the July 8, 2014 report of Dr. Schwartz, another second-opinion examiner, who determined that she no longer had residuals or disability causally related to her accepted injuries. In support of her November 30, 2017 reconsideration request, appellant, through counsel, submitted a brief alleging that OWCP did not meet its burden of proof to establish that appellant's injury or disability had ceased. Counsel contended, *inter alia*, that Dr. Smith and Dr. Schwartz failed to address whether appellant's accepted conditions of right pleural effusion or right pneumonia had resolved. Accordingly, she asserted that OWCP improperly terminated appellant's wage-loss compensation and medical benefits because the medical evidence of record failed to establish that all of appellant's accepted conditions had resolved. Counsel requested that OWCP reverse the termination decision as her arguments had shown clear evidence of error on the part of OWCP. The Board finds that she has demonstrated clear evidence of error in this case.

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.²² In this case, OWCP terminated appellant's wage-loss compensation and medical benefits because she no longer had residuals or disability causally related to her accepted April 10, 2013 employment injury. It found that the weight of the medical evidence rested with Dr. Smith's June 25, 2014 and Dr. Schwartz' July 8, 2014 reports. Dr. Smith had opined that appellant's right radius fracture, right shoulder rotator cuff sprain, and right knee medial meniscus tear conditions had resolved and that she was able to work full duty. Dr. Schwartz had determined that she no longer had residuals or remained disabled due to her accepted right atrial fibrillation condition. The Board has reviewed the June 25, 2014 report of Dr. Smith and the July 8, 2014 report of Dr. Schwartz and notes that neither physician opined on whether appellant had residuals or remained disabled due to her accepted right pleural effusion or right pneumonia. Accordingly, the Board finds that appellant, through counsel, has raised a substantial question as to the correctness of the November 21, 2014 termination decision which determined that all of appellant's accepted

²⁰ *Supra* note 10.

²¹ *Supra* note 11; *see also George C. Vernon*, 54 ECAB 313 (2003).

²² *See K.N.*, Docket No. 13-0911 (issued August 21, 2013); *J.S.*, Docket No. 10-0385 (issued September 15, 2010).

injuries had resolved. Thus, OWCP abused its discretion in denying appellant's untimely request for reconsideration.²³

The Board finds that OWCP improperly denied appellant's request for reconsideration as she has demonstrated clear evidence of error in this case. The Board will reverse OWCP's February 22, 2018 decision and remand the case for an appropriate decision on the merits of her claim.

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error in OWCP's November 21, 2014 merit decision and thus, OWCP improperly denied her request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 10, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²³ See V.L., Docket No. 17-1493 (issued September 12, 2018) (where the Board found that the claimant had established clear evidence of error when she submitted a narrative statement explaining the factual inconsistencies relative to the occurrence of the alleged April 16, 2014 employment injury and submitted evidence confirming that she had an earlier reporting time on the date of the alleged injury).