

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

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| K.E., Appellant |) | |
| |) | |
| and |) | Docket No. 19-1020 |
| |) | Issued: November 5, 2019 |
| DEPARTMENT OF HOMELAND SECURITY, |) | |
| NATIONAL PROTECTION & PROGRAMS |) | |
| DIRECTORATE, Arlington, VA, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 9, 2019 appellant filed a timely appeal from a February 27, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 6, 2017, 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 February 7, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 5, 2012 appellant, then a 53-year-old management analyst, filed a traumatic injury claim (Form CA-1) alleging that on June 1, 2012 she broke a bone in her right foot and hurt her lower back and left knee when she slipped and fell down while in the performance of duty. She reportedly tripped on a board that was covered while walking to the parking garage. Appellant stopped work on June 4, 2012 and returned to full duty on July 23, 2012.

In a June 5, 2012 report, Dr. Jorge A. Mondino, an orthopedic surgeon, described the June 1, 2012 employment incident and provided examination findings. He noted swelling of the right ankle and tenderness on palpation and tenderness over the superolateral aspect of appellant's left knee. Dr. Mondino reported that examination of appellant's lumbar spine showed tenderness, mostly on the right paraspinal area and negative straight leg raise testing. He diagnosed acute lumbar strain, left knee sprain, and right ankle sprain.

OWCP accepted appellant's claim for lumbar sprain, left knee lateral ligament sprain, and right ankle sprain.

On October 20, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record to Dr. Donald B. Haskins, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a November 22, 2016 report, Dr. Haskins indicated that he had reviewed the SOAF and discussed her history of injury. He noted that appellant's claim was accepted for lumbar sprain, left knee lateral ligament sprain, and right ankle sprain. Upon examination of appellant's lumbar spine, Dr. Haskins reported her complaints of pain in the left buttock area. He observed normal gait and negative straight leg raise testing. Examination of appellant's left knee revealed full range of motion without effusion. Dr. Haskins also reported tenderness about the tarosmetatarsal articulation and mild supination of the right foot. He diagnosed resolved lumbar sprain, resolved ankle sprain, resolved left knee sprain, degenerative disc disease of the lumbar spine, and mid-foot pain. Dr. Haskins noted that there were no significant abnormal objective findings and indicated that the conditions of degenerative disc disease of the lumbar spine and foot arthritis were not related to the June 1, 2012 employment injury. He concluded that appellant no longer required medical treatment for her accepted lumbar sprain, left knee sprain, and right ankle sprain conditions and that she was capable of working full time.

On December 22, 2016 OWCP proposed to terminate appellant's medical benefits. It found that the weight of the medical evidence rested with the opinion of Dr. Haskins, the second-opinion examiner, who opined in a November 22, 2016 report that appellant no longer had residuals of her accepted June 1, 2012 employment injury. OWCP provided appellant 30 days to submit additional evidence and/or argument if she disagreed with the proposed termination.

OWCP received additional medical evidence. An August 27, 2016 report of a lumbar spine MRI scan showed intervertebral disc degeneration and facet osteoarthritis with mild spinal stenosis at L4-5.

In reports dated October 27 and December 19, 2016, Dr. Teresa M. Kerge, a Board-certified physiatrist, recounted appellant's complaints of low back pain radiating down her lower

extremities following a June 1, 2012 employment injury. She reported examination findings of tenderness to palpation of the lower lumbar facet joints, slight tenderness to palpation of the lower lumbar spine, tenderness to palpation of the bilateral greater trochanteric bursae, and tenderness to palpation of the bilateral sacroiliac (SI) joints. Dr. Kerge diagnosed low back, right knee, left knee, and right shoulder pain, lumbosacral spondylosis, and bilateral trochanteric bursitis.

In a January 4, 2017 report, Dr. David A. Zijerdi, a Board-certified orthopedic surgeon, noted right shoulder examination findings of full range of motion and positive Hawkin's and Neer's tests. He diagnosed right shoulder rotator cuff tendinitis and impingement.

In a January 11, 2017 report, Dr. Aaron J. Greenberg, a Board-certified orthopedic surgeon, related that appellant was treated for follow up of lumbar spondylosis, SI joint pain, trochanteric bursitis, and neuropathy. He recommended SI injections.

On February 7, 2017 OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective February 8, 2017. It found that the weight of the medical evidence rested with the November 22, 2016 second opinion report of Dr. Haskins who determined that appellant no longer had residuals or disability causally related to her accepted June 1, 2012 employment injury.

Following the termination decision, OWCP received a series of additional medical reports from Dr. Kerge dated February 6, 2017 to December 26, 2018 regarding her treatment of appellant for her right shoulder and lumbar conditions. Dr. Kerge provided examination findings and diagnosed right shoulder pain, right shoulder lesions, sacral and sacrococcygeal disorders, spondylosis without myelopathy or radiculopathy, and sacroiliitis.

In an April 17, 2017 report, Dr. Zijerdi also examined appellant for complaints of right upper extremity pain and numbness and diagnosed right shoulder rotator cuff tendinitis and impingement and right cubital tunnel syndrome.

On February 7, 2019 appellant, through counsel, requested reconsideration of the February 7, 2017 termination decision. In a February 6, 2019 letter, counsel requested reinstatement of appellant's medical benefits and compensation for residuals of her accepted injury and compensation for terminated benefits since February 8, 2017. She asserted that the June 1, 2012 emergency room hospital records showed that appellant had a chipped bone in her right foot and that even after appellant returned to work, she continued to receive medical treatment for ankle, foot, back, and knee pains, which were residuals of the June 1, 2012 employment injury. Counsel argued that OWCP should not rely on Dr. Haskins' November 22, 2016 second-opinion report as he failed to acknowledge appellant's chipped bone in her right foot. She also contended that Dr. Haskins could not provide an opinion on appellant's work-related residuals or disability as he did not evaluate appellant before the June 1, 2012 injury to determine what her baseline was at the time.

In a January 3, 2019 letter, Dr. Kerge related that she had treated appellant since October 2016 for complaints of low back pain radiating to her bilateral lower extremities, bilateral knee pain, right shoulder pain, and right elbow pain following a 2012 work injury. She noted that appellant's initial diagnoses were low back pain, lumbosacral spondylosis, sacral and

sacrococcygeal disorders, sacroiliitis, right and left knee pain, right shoulder pain, and greater trochanteric bursitis, bilaterally. Dr. Kerge described a September 22, 2016 work injury that aggravated appellant's June 1, 2012 initial injury and also caused issues with her right shoulder and elbow. She explained that she was unable to determine residuals of appellant's work injuries because she did not evaluate appellant prior to the injury to determine what her baseline was at the time.

In a January 18, 2019 letter, Dr. Raymon Aggarwal, a Board-certified internist, indicated that appellant had been his patient from 2004 to 2011. He related that as of her last visit in 2011, appellant was in good health and had no complaints regarding low back pain, bilateral right/left knee pain, right/left shoulder pain, right/left elbow pain, right/left calf pain, and right/left ankle pain.

By decision dated February 27, 2019, OWCP denied appellant's reconsideration request finding that it was untimely filed and failed to demonstrate that OWCP's February 7, 2017 decision was issued in error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.³ 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.⁴ 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 (iFECS).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

² 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).

³ 20 C.F.R. § 10.607; S.C., Docket No. 18-0126 (issued May 14, 2019).

⁴ *Id.* at § 10.607(a); L.W., Docket No. 18-1475 (issued February 7, 2019). 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).

⁵ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b).

⁶ 20 C.F.R. § 10.607(b).

⁷ *Id.*

and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review of the merits.⁸

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.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ The evidence submitted must not only be of sufficient probative value to create a conflict in 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.¹¹ 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.¹² OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹³

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.¹⁴

ANALYSIS

The Board finds that OWCP properly denied appellant's February 7, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On February 7, 2019 appellant requested reconsideration of the February 7, 2017 termination decision. As previously noted, OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision.¹⁵ As the last merit decision on this issue was the February 7, 2017 decision, appellant had one year from the date of this decision, which was February 7, 2018, to make a timely request for reconsideration with OWCP. Because appellant's reconsideration request was received on February 7, 2019, some two years after the February 7, 2017 OWCP decision, the Board finds that

⁸ *Id.* at § 10.608(b).

⁹ 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).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *V.L.*, Docket No. 17-1493 (issued September 12, 2018); *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹³ Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1602.5a (October 2011).

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ *Supra* notes 4 and 5.

her request for reconsideration was untimely filed.¹⁶ Consequently, appellant must demonstrate clear evidence of error by OWCP in the termination of her medical compensation benefits.¹⁷

The Board has reviewed the record and finds that appellant's arguments on reconsideration do not raise a substantial question as to the correctness of OWCP's February 7, 2017 merit decision or shift the weight of the evidence of record in her favor.

OWCP terminated appellant's compensation and medical benefits finding that the weight of the evidence rested with the November 22, 2016 second-opinion report of Dr. Haskins, who opined that appellant's accepted June 1, 2012 employment injuries had resolved. On reconsideration, counsel argued that OWCP improperly relied on Dr. Haskins' November 22, 2016 second-opinion report because he failed to acknowledge appellant's chipped bone in her right foot and he did not evaluate her before the June 1, 2012 employment injury to determine what her baseline was at the time. The Board finds, however, that Dr. Haskins provided a well-rationalized opinion that appellant's accepted June 1, 2012 injuries had resolved, which was based on a complete factual background, a review of the medical record, and physical examination findings. Therefore, at the time of OWCP's February 7, 2017 decision, the medical evidence of record was sufficient to justify the termination of appellant's compensation benefits.¹⁸ Appellant's argument on reconsideration, therefore, did not raise a substantial question concerning the correctness of OWCP's termination decision, and thus, failed to demonstrate clear evidence of error.¹⁹

The evidence submitted to the record following OWCP's February 7, 2017 merit decision consisted of several medical reports. To demonstrate clear evidence of error in the termination of appellant's medical benefits, the new evidence has to establish her continued need for medical treatment in order to treat her accepted June 1, 2012 lumbar, left knee, and right ankle sprain. The series of reports by Dr. Kerge from 2017 to 2019 and January 3, 2019 letter, Dr. Zijerdi's April 17, 2017 report, and Dr. Aggarwal's January 18, 2019 letter did not address the relevant issue of whether appellant had any continuing residuals or disability causally related to her accepted June 1, 2012 employment injury. Thus, these reports are insufficient to demonstrate error by OWCP.²⁰

Appellant has not submitted medical evidence sufficient to shift the weight of the evidence in her favor or 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.

¹⁶ See *L.C.*, Docket No. 18-1407 (issued February 14, 2019).

¹⁷ *Supra* notes 6 and 8.

¹⁸ See *L.T.*, Docket No. 17-0954 (issued January 12, 2018).

¹⁹ *Supra* note 4 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard); see also *A.F.*, Docket No. 18-0645 (issued October 26, 2018); *Dean D. Beets*, 43 ECAB 1153 (1992).

²⁰ See *E.B.*, Docket No. 18-1091 (issued December 18, 2018); *B.C.*, Docket No. 16-1404 (issued April 14, 2017); *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

Appellant further contends on appeal that the factual and medical evidence of record is sufficient to establish continuing employment-related residuals and disability and that Dr. Haskins' report did not constitute the weight of the medical opinion evidence. However, as noted, the Board does not have jurisdiction over the merits of the claim. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's termination decision for which review is sought.

CONCLUSION

The Board finds that OWCP properly determined that appellant's February 7, 2019 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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