

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 April 7, 1994 appellant, then a 44-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 7, 1994 she fell backwards and sustained injuries while in the performance of duty. She explained that the injury occurred when the computer table she was leaning against fell backwards which in turn caused her to fall. OWCP accepted the claim for lumbar strain and right vestibular dysfunction. Prior to the employment injury, the record reflects that appellant had a history of back and balance problems.⁴ Appellant stopped work on April 7, 1994 and returned to light-duty work on June 3, 1994. She retired on disability effective May 23, 1996. On March 20, 1997, in a signed election form, appellant elected to receive FECA benefits effective May 28, 1996 in lieu of Office of Personnel Management (OPM) benefits. OWCP accordingly placed appellant on the periodic compensation rolls.

OWCP scheduled appellant for second opinion examinations with orthopedic surgeons and otolaryngologists.⁵ It advised her that an appointment had been scheduled for her in order to assess the status of her accepted conditions, the extent of disability, and appropriate medical treatment. OWCP explained that appellant's entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed an examination. It scheduled an otolaryngologist second opinion appointment on June 20, 2011 and rescheduled the appointment on July 5 and August 10, 2011 either to accommodate appellant's requests to change the appointment or due to her failure to keep the appointment.

By letter dated November 29, 2011, OWCP referred appellant to Dr. Robert D. Woods, II, a Board-certified otolaryngologist, for an appointment on January 9, 2012 at 2:00 p.m., to determine the nature and extent of any residuals of her accepted employment-related conditions and whether she was capable of returning to full-duty employment. It also arranged transportation for her January 9, 2012 appointment. Appellant insisted that she needed to see a neurosurgeon due to her back conditions.

On January 10, 2012 QTC Medical Services, OWCP's scheduling contractor, advised OWCP that appellant had not appeared for her scheduled January 9, 2012 examination with Dr. Woods.

⁴ In 1972 appellant underwent a spinal fusion at the L4-S1 level, a result of nonemployment-related spondylolisthesis. In 1975, she had a fusion at the L5-S1 level. Appellant's balance problems date back to 1982.

⁵ Although appellant attended a May 17, 2011 rescheduled appointment, the record is devoid of a medical report for that appointment.

In a January 12, 2012 call, appellant again advised OWCP that she needed to see a neurosurgeon, not an otolaryngologist. She indicated that seeing any other kind of physician was a waste of time.

On January 12, 2012 OWCP provided notice to appellant that it proposed to suspend her wage-loss compensation and medical benefits, pursuant to 5 U.S.C. § 8123(d), based upon her failure to attend the scheduled January 9, 2012 second opinion examination. It advised her that she had 14 days to provide a written explanation of her reasons, with substantive corroborating evidence, for failing to attend the scheduled examination. OWCP explained that an employee's right to compensation under FECA shall be suspended during the period of a refusal or obstruction of an examination by a physician.

In a January 23, 2012 statement, appellant advised OWCP that she did not mind going to "legitimate physicians to which OWCP sent her." Appellant submitted copies of letters she sent to numerous physicians, a copy of an April 5, 2011 letter previously of record, and medical evidence pertaining to her back conditions.

An unsigned June 28, 2011 note was submitted from Avicenna Pain Relief, PLLC indicating that appellant's clinical status predisposed her to increased pain and distress and that traveling long distances would expose her to acute exacerbation of chronic pain. On the note, appellant handwrote that she wanted to comply with all orders from OWCP. She also indicated that she would like to be sent to a closer location for evaluation.

On January 31, 2012 OWCP acknowledged appellant's written statement agreeing to attend a second opinion examination. In a February 23, 2012 letter, it advised appellant that an appointment had been scheduled with a specialist in the field of otolaryngology or neurology in order to assess the nature of her employment-related conditions. OWCP also explained that her entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed the examination. In a February 27, 2012 telephone call to appellant, it clarified that she would need to see "an orthopedic and a neurologist and/or an otolaryngologist."

By decision dated February 29, 2012, OWCP finalized its proposed suspension of wage-loss compensation and medical benefits, effective February 27, 2012. It noted that it had directed appellant on November 29, 2011 to report for the examination scheduled on January 9, 2012 with Dr. Woods, but that she had not attended the examination or shown good cause for her failure to attend the examination. OWCP indicated that appellant had failed to establish good cause for her failure to attend the scheduled examination and therefore, pursuant to 5 U.S.C. § 8123(d), her compensation and medical benefits were suspended, effective February 27, 2012. It advised appellant that her benefits would be reinstated only after verification that she attended and fully cooperated with the directed examination.

Following the February 29, 2012 decision, in a March 9, 2012 letter, OWCP scheduled appellant's second opinion appointment with Dr. Nino R. Lentini, a Board-certified orthopedic surgeon, for March 16, 2012. It advised appellant that once it received confirmation that she had attended and cooperated in the second opinion examination, then it would reinstate her compensation. OWCP also made transportation arrangements for appellant's March 16, 2012

second opinion appointment. Appellant did not attend the rescheduled second opinion appointment.

On June 30, 2017 appellant requested an oral hearing by a representative of OWCP's Branch of Hearings and Review. By decision dated August 8, 2017, a hearing representative denied appellant's request for an oral hearing. She found that the request was untimely filed as it was not postmarked within 30 days of the issuance of the February 29, 2012 decision. The hearing representative also exercised her discretion and further found that the issue in the case could equally well be addressed through the reconsideration process.⁶

On February 15, 2018 appellant requested reconsideration. In her letter, she indicated that she had contacted OWCP when her compensation benefits abruptly stopped and contended that she had not been given a chance to appeal the decision. Appellant indicated that she wished to initiate the appeal as she had done in 2012. She alleged that she had previously sent an appeal request within the 30-day period, but was denied the right to do so. Appellant indicated that for the last six years she has lived with what she believed was "some form of retaliation for an injury she did not cause." She also indicated her desire to fully comply with OWCP's request to attend the second opinion evaluation.

In support of her request, appellant submitted a certified mail receipt dated April 2, 2012 along with a letter dated April 16, 2012 indicating that the certified receipt along with her January 23, 2012 letter, previously sent to OWCP with a copy attached, served as written proof that she had repeatedly gone to OWCP's physicians, but that she was close to total paraplegia due to her back conditions. In letters dated June 30, 2017 and March 6, 2018, appellant expressed her frustration with OWCP, its physicians, and the lack of follow-up on her back conditions. Diagnostic tests and medical reports, some previously of record, regarding appellant's back and balance conditions were also submitted.

By decision dated April 6, 2018, OWCP denied her request for reconsideration as 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.⁷ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁸ 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

⁶ On August 30, 2017 the August 8, 2017 decision was returned to OWCP with a notation which indicated that it was not deliverable as addressed and was unable to forward. The record reflects that appellant did not advise OWCP of her new address in writing until February 15, 2018.

⁷ 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).

⁸ 20 C.F.R. § 10.607.

year of the date of the decision for which review is sought.⁹ 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).¹⁰

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.”¹¹ To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.¹² The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. It is not enough to merely show that the evidence could be construed to produce a contrary conclusion.¹³ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted 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

OWCP’s procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁵ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

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

⁹ *Id.* at § 10.607(a). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹⁰ *Id.* at Chapter 2.1602.4b.

¹¹ 20 C.F.R. § 10.607(b).

¹² *Id.*

¹³ See *R.C.*, Docket No. 17-0198 (issued January 28, 2019); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ See *E.R.*, Docket No. 18-0667 (issued August 1, 2019); Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ See *E.R., id.; J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁶ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case.¹⁷ The most recent merit decision was OWCP's February 29, 2012 decision which suspended appellant's compensation benefits effective February 27, 2012. As her request for reconsideration was not received by OWCP until February 15, 2018, more than one year after the February 29, 2012 merit decision, the Board finds that it was untimely filed. Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having suspended her compensation benefits effective February 27, 2012.

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision of February 29, 2012. In that decision, OWCP suspended appellant's compensation benefits effective February 27, 2012 as she had not attended an OWCP directed second opinion evaluation with Dr. Woods, a Board-certified otolaryngologist.

Appellant claimed that she had previously sent an appeal request within the 30-day period, but was denied the right to do so. The record is devoid of any evidence that appellant had filed a request for reconsideration within one calendar year from OWCP's February 29, 2012 decision. The record also does not support appellant's contentions that she had repeatedly gone to OWCP's physicians.

In support of her untimely request for reconsideration, appellant contended that she was close to total paraplegia. She presented new factual and medical evidence. However such evidence is not relevant to the issue at hand as it does not support that OWCP's February 29, 2012 decision was incorrect at the time it was issued. Appellant submitted several diagnostic tests and medical reports regarding her back and balance conditions. However, a review of such reports fail to indicate whether her employment-related conditions prevented her from attending OWCP's directed appointment to Dr. Woods in January 2012. Thus, the Board finds that the evidence submitted in support of the untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in its February 29, 2012 decision.¹⁸ Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.¹⁹

CONCLUSION

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

¹⁷ 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁸ See *D.Y.*, Docket No. 19-0565 (issued August 13, 2019).

¹⁹ The record reflects that on March 12, 2018 appellant attended an orthopedic second opinion evaluation. By letter dated April 3, 2018, OWCP requested that appellant complete and return Form CA-1032, which was necessary prior to the reinstatement of her compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 28, 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