United States Department of Labor
Employees' Compensation Appeals Board

C.A., Appellant	)	
and	)	**Docket No. 19-0597**
	)	**Issued: October 4, 2019**
DEPARTMENTOF VETERANS AFFAIRS, BROOKLYN HARBOR HEALTHCARE SYSTEM MEDICAL CENTER, Brooklyn, NY, 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 January 24, 2019 appellant filed a timely appeal from a November 16, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 1, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

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.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On September 2, 2016 appellant, then a 48-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that, at 8:25 a.m. on August 29, 2016 upon arrival for her scheduled 8:30 a.m. shift, she stepped from her car and twisted her right ankle on concrete in the employing establishment's rear parking lot while in the performance of duty. In a September 2, 2016 statement, H.R., appellant's supervisor, controverted the claim as appellant stated on August 30, 2016 that she injured her ankle while walking in the parking lot, but noted on her claim form that she had injured herself while stepping from her car, and that she had not reported cracks in the concrete. An August 30, 2016 inspection revealed no cracks in the asphalt in the identified area.

In a report dated August 30, 2016, Dr. Gloria I. Ihenacho, a Board-certified internist, noted appellant's account of twisting her right ankle in the parking lot at 8:25 a.m. on August 29, 2016. She commented that appellant had sprained her right ankle approximately one year before while at home.[2] Dr. Ihenacho diagnosed a right ankle sprain. She returned appellant to light-duty work with standing and walking limited to two hours a day.

In a development letter dated September 7, 2016, OWCP informed appellant of the deficiencies in the medical evidence of record and of the type of evidence needed to establish her claim. It provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary information.

In response, appellant provided an August 29, 2016 statement contending that she had not reported that she had fallen. She provided photographs of a cracked asphalt surface. In a statement dated September 13, 2016, appellant noted that the employing establishment controlled the parking lot where the alleged incident occurred and that employees parked there for free. She further noted that on August 29, 2016 she reported the claimed injury to A.L., a physician assistant, and to two supervisors.

Dr. Jamila Butcher, an attending podiatrist, provided reports dated from September 2 to October 11, 2016 diagnosing a right lateral ankle sprain with partial ligament tear and holding appellant off work.[3] She returned appellant to restricted duty for six hours a day effective October 11, 2016.

On September 21, 2016 the employing establishment issued an authorization for examination and/or treatment (Form CA-16).

By decision dated October 17, 2016, OWCP accepted that the August 29, 2016 employment incident occurred in the performance of duty as alleged, but denied the claim as the medical evidence of record did not establish causal relationship.

[2] August 30, 2016 right ankle x-rays did not demonstrate acute fracture or dislocation.

[3] A September 29, 2016 magnetic resonance imaging (MRI) scan of the right ankle demonstrated a partial thickness tear of the anterior talofibular ligament (ATFL), tenosynovitis of the medial flexor tendons, peroneal tenosynovitis, and cartilage loss and marrow edema within the calcaneus.

On November 2, 2016 appellant requested a review of the written record by an OWCP hearing representative. She submitted additional evidence.

In support of her claim, appellant submitted a statement dated October 28, 2016 and two statements from coworkers.

In October 11, 2016 reports, Dr. Susan Paek, a podiatrist, diagnosed a right ankle sprain, partial-thickness ATFL tear, peroneal tenosynovitis, and cartilage loss and marrow edema within the calcaneus. She restricted appellant to working six hours a day and recommended that she wear athletic sneakers at work and a controlled ankle movement boot when off duty.

In a report dated October 19, 2016, Dr. Butcher limited appellant to working six hours a day. In a November 2, 2016 report, she opined that appellant had been totally disabled for work from August 29 to October 11, 2016 due to a right ankle sprain with an anterior talofibular ligament tear "that occurred at work." Dr. Butcher opined that enclosed medical literature explained how the accepted August 29, 2016 employment incident could cause the diagnosed injuries.

By decision dated March 1, 2017, an OWCP hearing representative affirmed the October 17, 2016 decision finding that the medical evidence of record did not contain sufficient medical rationale to establish causal relationship.

On April 12, 2017 appellant requested reconsideration. She noted that following an occupational injury to her left lower extremity on August 15, 2013 she overcompensated with her right lower extremity and sprained her right ankle. Appellant asserted that residual weakness from the prior sprain increased the severity of the August 29, 2016 injury. She submitted a March 22, 2017 statement from coworker E.R., noting that she told him on August 29, 2016 that she had sprained her right ankle in the parking lot that morning.

By decision dated June 19, 2017, OWCP denied reconsideration as the additional evidence submitted was not relevant to the medical issue of causal relationship.[4]

On November 2, 2018 appellant requested reconsideration. She noted that the pain management specialist who treated her following the August 15, 2013 injury was no longer available to treat her. Appellant contended that the employing establishment delayed approving a scheduled MRI scan to evaluate whether retained plastic screws from a frontal craniotomy would preclude the study. She submitted an August 29, 2016 report from Dr. Mikhail Korogluyev, an osteopathic physician, noting "an injury in the parking lot at her place of employment." In a July 7, 2017 report, Dr. Korogluyev released appellant to full duty as of July 17, 2017. Appellant also provided medical record release forms, copies of evidence previously of record, August 23, 2014 imaging studies, laboratory test result, and chart notes dated from 2006 to August 2014.

By decision dated November 16, 2018, OWCP denied appellant's request for further merit review finding that her request was untimely filed and failed to demonstrate clear evidence of

[4] In a letter received on July 27, 2018, appellant requested that OWCP reopen her claim and conduct additional medical development. She did not mention the June 19, 2017 decision or request reconsideration.

error. It found that the additional evidence she submitted had not established an error in the March 1, 2017 decision.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.[5] This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[6] 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.[7] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[8]

OWCP may not deny a reconsideration request solely because it was untimely filed. When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.[9] Its procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP. In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[10]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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

[5] 5 U.S.C. § 8128(a); *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *S.C.*, Docket No. 18-0126 (issued May 14, 2019); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[6] 20 C.F.R. § 10.607(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

[8] *S.C., supra* note 5; *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] *F.A.*, Docket No. 19-0321 (issued July 5, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.[11]

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 demonstrates 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.[12] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[13]

ANALYSIS

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

OWCP's regulations[14] and procedures[15] establish a one-year time limitation for requesting reconsideration, which begins on the date of the last OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[16] The most recent merit decision was OWCP's March 1, 2017 decision which found that the evidence of record was insufficient to establish causal relationship. As appellant's request for reconsideration was not received by OWCP until November 2, 2018, more than one year after the March 1, 2017 decision, the Board finds that it was untimely filed. Because her request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having denied her traumatic injury claim.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. OWCP denied her traumatic injury claim as the medical evidence of record failed to establish a causal relationship between the diagnosed right ankle conditions and the accepted August 29, 2016 employment incident.

In her request for reconsideration, appellant provided a statement indicating that a physician who treated her for a 2013 injury was no longer available and that an necessary MRI scan had been delayed to evaluate plastic screws from a prior surgery. She also submitted medical records dated prior to the claimed injury, August 29, 2016, July 7, 2017 reports from

[11] *S.C., supra* note 5*; J.W.,* Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns,* 57 ECAB 657 (2006).

[12] *S.C., id.; J.S.,* Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

[13] *S.C., id.; D.S.,* Docket No. 17-0407 (issued May 24, 2017).

[14] *S.C., id., J.W., supra* note 10; 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

[15] *Supra* note 7 at Chapter 2.1602.4 (February 2016); *see S.C., id.*; *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[16] 20 C.F.R. § 10.607(b); *see S.C., id.*; *Debra McDavid,* 57 ECAB 149 (2005).

Dr. Korogluyev, and copies of evidence previously of record. The Board finds that this evidence does not raise a substantial question as to the correctness of OWCP's last merit decision.

To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.[17] The evidence submitted does not manifests on its face that OWCP committed an error in denying appellant's traumatic injury claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's last merit decision. Thus, the Board finds that the evidence is insufficient to demonstrate clear evidence of error.

On appeal appellant contends that the claimed injury occurred on the employing establishment's premises and that an employing establishment physician had provided medical care. She also asserts that OWCP failed to advise her to request a change of physician. The Board notes that these arguments pertain to the merits of the claim, which are not before the Board on the present appeal.[18]

CONCLUSION

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

[17] *Supra* note 7 at Chapter 2.1602.5.a (February 2016); *see Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

[18] An authorization for examination and/or treatment form (Form CA-16) was completed by an employing establishment official on September 21, 2016 and purported to authorize treatment by Dr. Butcher, a podiatrist. Where an employing establishment properly executes a Form CA-16 authorizing medical treatment related to a claim for a work injury, the form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. *C.W.*, Docket No. 17-1293 (issued February 12, 2018). *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 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