

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

K.W., Appellant)	
)	
and)	Docket No. 19-1808
)	Issued: April 2, 2020
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, FEDERAL AIR)	
MARSHAL SERVICE, Chicago, IL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 27, 2019 appellant filed a timely appeal from an April 5, 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 July 14, 2015, to the filing of this appeal, pursuant

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.

to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

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

FACTUAL HISTORY

On May 12, 2014 appellant, then a 43-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on March 21, 2014 she injured her left breast while in the performance of duty. She explained that during a self-defense class she received numerous blows to the left side of her torso when she held a bag that was punched and kicked. Appellant noted that after the self-defense class and running on a treadmill to prepare for a mission readiness assessment she felt pain and swelling. She did not indicate on the claim form that she had stopped work. The employing establishment indicated that appellant was injured while in the performance of duty.

In a May 23, 2014 development letter, OWCP informed appellant that additional evidence was required in support of her claim. It advised her of the type of evidence necessary to establish her claim and attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested evidence.

In a May 14, 2014 narrative statement, appellant explained that she had undergone surgery on February 3, 2014 and returned to full-duty work in March 2014. During the week of March 17 through 21, 2014 she taught a self-defense course. While engaging in this training appellant placed the padded bags that were being punched and kicked up against her body on her left side and felt pain during the class, but since it was not debilitating she did not stop. She continued to experience pain and swelling and went to the doctor on April 8, 2014.

A May 14, 2014 attending physician's report (Form CA-20) from Dr. John Kim, a Board-certified plastic surgeon related that appellant was injured at work when students punched and kicked a bag she was holding. Dr. Kim noted that appellant had a preexisting condition of breast cancer, and his findings included a nonhealing left breast wound following a return to work after a mastectomy. He diagnosed a left mechanical complication due to breast prosthesis and checked the box marked "yes" indicating that he believed the diagnosed condition was caused or aggravated by an employment activity. Dr. Kim concluded that increased physical activity caused the opening

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence to OWCP following the April 5, 2019 decision. 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.*

of appellant's reconstructed breast. He indicated that he had first examined appellant on August 15, 2013 and continued to treat her through 2014.

May 21, 2014 hospital notes indicated that Dr. Kim performed a left breast revision with a local flap, a wound closure, and a left breast expander exchange. On May 30, 2014 Dr. Kim completed a work capacity evaluation (Form OWCP-5c) and indicated that appellant had reconstruction following surgery for breast cancer. He stated that prior to her reconstruction she also had radiation, which had complicated her healing.

In a June 13, 2014 letter to Dr. Kim, OWCP provided a statement of accepted facts (SOAF) and indicated that additional information was needed to distinguish between the treatment required by appellant's preexisting radiation treatment and a March 21, 2014 employment incident. It provided a questionnaire for his completion and afforded him 30 days to submit the requested evidence.

In a June 20, 2014 letter, Dr. Kim noted that appellant had breast cancer and radiation with reconstructive surgery. He related that she had reported that she experienced trauma on her breast which had been previously radiated and reconstructed. Dr. Kim stated that the trauma appellant experienced resulted in wound disruption, inflammation, and eventual exposure of the implant. He indicated that she then required another reconstruction surgery on May 21, 2014 because of the exposure caused by the blunt trauma appellant reported. Dr. Kim opined that appellant's diagnosed condition was aggravated by the trauma and caused the need for another surgery. He noted that radiated tissue is chronically vulnerable to healing problems, and that appellant needed to refrain from vigorous activity until she was healed.

By decision dated September 3, 2014, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish a causal relationship between the diagnosed condition and the accepted March 21, 2014 employment incident.

On September 30, 2014 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP continued to receive progress reports from Dr. Kim.

By decision dated July 14, 2015, an OWCP hearing representative affirmed the September 3, 2014 decision.

In an October 25, 2018 narrative medical report, Dr. Clifford Janke, Board-certified in emergency medicine, noted that appellant's medical history included a diagnosis of ductal carcinoma in situ of the left breast. He stated that she was treated with three lumpectomies on June 16, 29, and July 13, 2011. Appellant then underwent a six-week course of radiation on September 5, 2011 and was released to full-time regular-duty work on March 17, 2014.

Dr. Janke related that on March 17, 2014 appellant completed firearm training and fitness training session that included a run. After the run appellant felt pain and discomfort in her left breast and noticed redness and swelling. During additional training at work on March 18, 2014 the left side of appellant's body was struck multiple times. During another training session on March 20, 2014 appellant exposed her left side to threats. She was extremely sore afterwards and

her left breast was completely red. Dr. Janke noted that on March 21, 2014 during a self-defense course appellant's left breast and rib cage were directly impacted by blows from a strike pad that she held. Appellant estimated that during this course she first received 20 to 25 blows, then felt pain and paused to take ibuprofen, and then continued to receive around 20 more blows. After the course her left breast was red, warm to the touch, and swollen.

Dr. Janke listed appellant's work-related diagnoses as disruption of wound in the left breast, leakage of left breast prosthesis and implant, breast implant malfunction, mechanical complication of left breast prosthesis and implant, and left breast contusion. He summarized appellant's treatment by Dr. Kim and recounted that on April 8, 2014 Dr. Kim found attenuated skin on appellant's left side and indicated that her healing process and incision site were disrupted and that her implant was exposed.

Dr. Janke indicated that appellant's tissue was weakened by radiation, and he explained that trauma to compromised tissue results in poor healing because of the absence of blood vessels and inflammatory cells. He related that during the first week that appellant returned to work in March 2014 she suffered 40 to 50 blunt force traumas to her left breast and torso which caused wound disruption and inflammation and led to the opening and exposure of her left breast implant. Dr. Janke also noted that during appellant's March 2014 run at work her left breast moved in an up and down motion with every step, which stressed the wound and weakened the tissue by pulling it apart. He opined that appellant's disrupted wound healing then necessitated another surgery, and he concluded that the wound disruption, exposed implant, and surgical intervention were therefore work related. Dr. Janke additionally indicated that her work-related diagnoses caused appellant to be unable to work through June 2014.

On December 11, 2018 appellant requested a review of the written record.

By decision dated January 9, 2019, an OWCP hearing representative denied appellant's request for a review of the written record, finding that her request was not made within 30 days of the July 14, 2015 OWCP decision. The hearing representative further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

On January 13, 2019 appellant requested reconsideration.

By decision dated April 5, 2019, OWCP summarily denied appellant's reconsideration request, finding that it was untimely and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ 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

⁴ 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

decision for which review is sought.⁵ 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.⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁸ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as 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.¹⁴ 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.¹⁵

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁶ The claimant must present evidence which on its face shows that OWCP made

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ See *M.E.*, *supra* note 4; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ See 20 C.F.R. § 10.607(b); *M.E.*, *supra* note 4; *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); see also *id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

¹⁰ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); see *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

¹² *J.F.*, *supra* note 10; *J.D.*, *supra* note 10; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *J.F.*, *supra* note 10; *M.E.*, *supra* note 4; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ See *G.G.*, *supra* note 9.

an error. 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.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁹ Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons.²⁰

ANALYSIS

The Board finds that this case is not in posture for decision. In the instant case, OWCP provided no discussion of the new medical evidence submitted by appellant from Dr. Janke. Its failure to provide factual findings and explain the basis for its conclusion that appellant did not demonstrate clear evidence of error precludes the Board's review of the decision.

The Board therefore finds that the case is not in posture for decision because OWCP failed to make findings regarding the evidence submitted in support of the reconsideration request.²¹ OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.²² Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.²³ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.

For this reason, the case will be remanded to OWCP to enable it to properly consider all the evidence submitted at the time of the April 5, 2019 decision followed by an appropriate decision on whether appellant has demonstrated clear evidence of error.

CONCLUSION

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

¹⁷ *J.F.*, *supra* note 10; *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹⁸ *See M.E.*, *supra* note 4; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁹ 5 U.S.C. § 8124(a).

²⁰ 20 C.F.R. § 10.126.

²¹ *C.R.*, Docket No. 17-0964 (issued September 9, 2019).

²² *Id.*; *see also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.3d (February 2016).

²³ *Supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with this decision of the Board.

Issued: April 2, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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