

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

_____)	
G.M., Appellant)	
)	
and)	Docket No. 19-1395
)	Issued: February 6, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Venice, CA, Employer)	
_____)	

Appearances:
Appellant, pro se
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 June 10, 2019 appellant filed a timely appeal from a March 28, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision on the issue of recurrence, dated November 29, 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 28, 2019 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.*

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 July 25, 2014 appellant, then a 57-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that 14 years of casing, sorting, pulling, and delivering mail while in the performance of duty caused or aggravated her back condition. She noted that she first realized her condition and its relation to factors of her federal employment on June 27, 2014. OWCP accepted the claim for bilateral lumbar radiculopathy and lumbar spondylolisthesis. Appellant worked in a full-time modified capacity. On April 11, 2017 she began working reduced hours, based on the April 10, 2017 recommendation of Dr. Christopher P. DeCarlo, a physiatrist.

On April 17 and 30, 2017 appellant filed claims for compensation (Form CA-7) for disability for the period April 1, 2017 and continuing.

OWCP received a May 12, 2017 report from Dr. DeCarlo and a referral slip for a functional capacity evaluation (FCE) of appellant's lumbar spine condition. In the May 12, 2017 report, Dr. DeCarlo indicated that the reduction of her work hours was due to her continuing complaint of back pain at the end of her workday.

By decision dated June 15, 2017, OWCP denied appellant's recurrence claim, finding that the evidence of record was insufficient to establish that she was disabled due to a material change or worsening of her accepted employment-related conditions.

On September 1, 2017 appellant requested reconsideration. In support she submitted an August 16, 2017 report from Dr. DeCarlo and a June 29, 2017 FCE report of a diagnosis of unspecified sprain of the right shoulder joint. Dr. DeCarlo indicated that the FCE supported that appellant could only work four hours per workday.

By decision dated November 29, 2017, OWCP denied modification of its June 15, 2017 decision, finding that Dr. DeCarlo's report did not establish that appellant experienced a return or an increase in disability due to a change or worsening of her accepted employment-related conditions. It also indicated that the FCE, which was for testing of a diagnosis of unspecified sprain of the right shoulder joint, was of little probative value.

On March 2, 2018 appellant requested reconsideration, directing OWCP's attention to an attached copy of the FCE, which she noted was for her lower extremities. A copy of the FCE report was not received. OWCP also received a December 19, 2017 report from Dr. DeCarlo.

By decision dated March 9, 2018, OWCP denied reconsideration of the merits of the claim, finding that the evidence submitted was cumulative to evidence or documentation already of record.

OWCP subsequently received additional reports from Dr. DeCarlo dated May 25, July 24, and October 24, 2018; a previously-submitted June 29, 2017 FCE for the diagnosis of

radiculopathy -- lumbosacral region and spondylosis without myelopathy or radiculopathy -- lumbosacral region; a March 3, 2018 magnetic resonance imaging scan of the lumbar spine; a March 21, 2018 electromyogram and nerve conduction velocity study; March 2 and April 13, 2018 reports and a March 2, 2018 duty status report (Form CA-17) from Dr. Omar A. Mora Colon, a psychiatrist; and evidence pertaining to appellant's request for back surgery.

On February 12, 2019 appellant again requested reconsideration of its November 29, 2017 decision and submitted additional evidence.

In a February 1, 2019 report, Dr. Judith Kraft, a Board-certified family practitioner, indicated that sufficient medical evidence was provided to support that appellant had a return or increase of disability due to a change or worsening of her accepted employment-related condition. She summarized Dr. DeCarlo's reports of October 11, 2016 and April 10, 2017 and asserted OWCP erred as the reports contained objective findings other than pain. Specifically, Dr. Kraft noted that on October 11, 2016 appellant was able to squat about half way before eliciting increase pain of the low back, but on April 10, 2017 she was not able to squat even a third of the way without eliciting pain. She also noted that on October 11, 2016 appellant was able to heel-toe walk without pain over the calf; but on April 10, 2017, she had "slight but of problems" with heel-toe walking. Dr. Kraft also contended that OWCP erred in stating that the FCE on June 29, 2017 was for the upper extremities.

In Form CA-17's dated December 21, 2018 and February 1, 2019, Dr. Kraft noted "no satchel, no pushcart, bundle by bundle, [and] no overtime" per FCE June 29, 2014.

By decision dated March 28, 2019, OWCP denied appellant's February 12, 2019 reconsideration request, finding that it was untimely filed 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.³ 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.⁴ 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).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

review to determine whether it demonstrates clear evidence of error.⁷ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁸

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 prima facie shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁹

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.¹⁰ 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.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant's February 8, 2019 request for reconsideration was untimely filed.

The most recent merit decision regarding the denial of appellant's recurrence claim was OWCP's November 29, 2017 decision. As her request for reconsideration was not received by OWCP until February 12, 2019, more than one year after the November 29, 2017 decision, pursuant to 20 C.F.R. § 10.607(a), her request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying her claim.¹²

In the case of *William A. Couch*,¹³ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

⁹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ 5 U.S.C. § 8124(a).

¹¹ 20 C.F.R. §10.126.

¹² *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹³ 41 ECAB 548 (1990); see also *J.C.*, Docket No. 15-1666 (issued October 28, 2015).

before the final decision is issued. While OWCP referenced a February 1, 2019 report from Dr. Kraft in its March 28, 2019 decision, it did not reference a number of additional reports from Drs. DeCarlo and Colon, diagnostic studies, or a June 29, 2017 FCE pertaining to appellant's lumbar spine. As the Board's decisions are final as to the subject matter appealed,¹⁴ it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.¹⁵

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 March 28, 2019 decision followed by an appropriate decision on whether appellant has demonstrated clear evidence of error.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. However, the case is not in posture for decision with regard to whether appellant has demonstrated clear evidence of error.

¹⁴ 20 C.F.R. § 501.6(d).

¹⁵ *T.J.*, Docket No. 14-1854 (issued February 3, 2015); *Yvette N. Davis*, 55 ECAB 475 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 6, 2020
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