United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 19-1689**
	)	**Issued: February 21, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, 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 August 6, 2019 appellant filed a timely appeal from a May 6, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated November 2, 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 over 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.

FACTUAL HISTORY

On September 12, 2017 appellant, then a 49-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2017 she sustained an injury to her right lower

[1] 5 U.S.C. § 8101 *et seq.*

back while in the performance of duty. She explained that, after placing a package on a customer's porch, she felt a sharp pain on the right side of her lower back. On the reverse side of the claim form appellant's supervisor noted that it was "unknown" whether she was injured while in the performance of duty. Appellant stopped work on September 9, 2017 at 7:00 a.m. and returned on September 10, 2017.

In a September 11, 2017 medical note, Deldra Bolton, a nurse practitioner, provided that appellant was seen that day and could return to work on September 14, 2017.

In a September 12, 2017 statement, appellant indicated that on September 9, 2017 she was delivering a package that she placed on a customer's front porch, when she felt a sharp pain on the lower right side of her back. She slowly made her way back to her long-life vehicle (LLV) and took a couple of minutes to adjust before completing the remaining three hours of her deliveries. When she returned to the station, appellant clocked out as there were only two minutes remaining in her shift and she was told she had to be off by 7:00 p.m. She used over-the-counter medication to alleviate her pain, but indicated that it did not help her condition. Appellant noted that she sought treatment on September 11, 2017 where x-rays were performed and she was informed that she had a slipped disc on a top nerve that was causing her pain.

In an authorization for examination and/or treatment (Form CA-16) of even date, appellant's customer services manager, A.R., checked a box to indicate there was doubt as to whether her condition was caused by an injury in the performance of duty.

In a September 22, 2017 diagnostic report, Dr. Clint Waggoner, Board-certified in diagnostic radiology, performed a magnetic resonance imaging (MRI) scan of appellant's lumbar spine. The MRI scan revealed multilevel discogenic degenerative changes, most significant at L5-S1 with right paracentral disc herniation that effaces the existing S1 nerve root on the right. In a medical note of even date, Dr. Perry Savage, a Board-certified orthopedic surgeon, diagnosed appellant with other intervertebral disc displacement in the lumbar region and identified September 9, 2017 as the date of injury. He provided that she was unable to return to work.

In a development letter dated October 2, 2017, OWCP informed appellant that the evidence of record was insufficient to establish her traumatic injury claim. It noted that the evidence of record was insufficient to establish that she actually experienced the incident alleged to have caused her injury and no diagnosis of any condition related to her injury was provided. OWCP provided a questionnaire seeking further information related to the September 9, 2017 employment incident. It afforded appellant 30 days to submit the necessary evidence.

OWCP received additional evidence. In a September 16, 2017 medical note, Dr. Savage, indicated that appellant could return to work with restrictions consistent with light work and sitting 50 percent of her shift. He also noted that she was unable to deliver mail.

In medical reports dated September 18 and 22, 2017, Dr. Savage noted that appellant presented with pain in the lower back due to a September 9, 2017 injury at work where she placed a package on a porch and felt a sharp pain in her right lower back as she bent over and raised up. He observed tenderness around her midline and paraspinal area and limited lumbar flexion, extension, and rotation on examination. Dr. Savage also noted that a review of appellant's

diagnostic studies revealed a right-sided disc herniation and provided an impression of an intervertebral disc displacement in her lumbar region.

By decision dated November 2, 2017, OWCP denied appellant's traumatic injury claim, finding that the evidence submitted was insufficient to establish the factual component of fact of injury because she failed to provide the time the employment incident occurred as she did not respond to the questionnaire. It explained that, although she reported the date and place of the alleged injury, "[t]he time the incident happened was needed to determine whether or not [she] was in the performance of duty on the date and time the incident actually occurred." OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

OWCP continued to receive evidence. In a September 12, 2017 statement, the supervisor, A.R., explained that appellant reported that she had an incident on September 9, 2017. She asked appellant if she delivered the package by squatting at the knees or if she bent over at the waist and that appellant replied that she bent at the waist. A.R. also indicated that an onsite investigation was not performed because the incident was not reported at the time it occurred.

In a September 14, 2017 investigation interview form, appellant indicated that she was injured lifting the back door of her LLV to take a package to a back porch. She also explained that she did not report the incident on September 9, 2017 because her supervisor was rushing everyone out of the office when she returned.

A September 18, 2017 x-ray of appellant's lumbosacral spine showed narrowing with degenerative changes of the facet joints at multiple levels with an impression of other intervertebral disc displacement in her lumbar region.

In an October 5, 2017 e-mail, A.R. again recounted the history of appellant reporting her alleged September 9, 2017 injury. She indicated that, per appellant's response to a question, she did not use the proper bending/squatting techniques when delivering the package. A.R. also provided information indicating that the weight of the package in question weighed two pounds and three ounces and was delivered at 3:08 p.m. central time (CT).

In a November 6, 2017 medical report, Dr. Savage again noted appellant's lower back pain and explained appellant's options for further treatment.

In a February 14, 2018 letter, A.M., a postal service health and resource management specialist, controverted appellant's claim, noting that appellant provided two different causes of injury. She explained that appellant's Form CA-1 and medical records provided that she injured herself placing a package on a customer's front porch. However, in appellant's investigation interview she provided that she injured herself when she took the box out of the back of her LLV by lifting its back door.

In a February 15, 2018 medical report, Dr. Savage provided procedure notes detailing his administration of an interlaminar epidural steroid injection at L5-S1 in order to treat appellant's lumbar spondylosis and degenerative disc disease.

In a March 17, 2019 letter, received by OWCP on March 18, 2019, appellant requested reconsideration of OWCP's November 2, 2017 decision. She explained that, since her injury, she has not been able to lift over 15 pounds and has experienced pain and numbness in her lower back and legs. Attached to her reconsideration request, appellant provided medical reports dated from February 9, 2018 to January 25, 2019 from Dr. Savage detailing his treatment of her for lower back conditions.

In an April 11, 2019 statement, appellant noted that she was not made aware of the reason her claim was denied until March 27, 2019. She explained that the box she delivered on September 9, 2017 was very large and heavy and that she could not remember if the delivery was scanned properly after nearly two years. Appellant provided that she did not remember making a statement in her investigation interview that she delivered the package to a back porch or that the package was two pounds. She also provided that the reason she did not report her injury the same day was because no one was at the supervisor's desk when she returned to the station.

By decision dated May 6, 2019, OWCP denied appellant's request for reconsideration, 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.[2] 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.[3] The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.[4] Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System [iFECS]).[5] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.[6]

OWCP may not deny an application for review solely because the application was not timely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.[7] OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review,

[2] 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[3] 20 C.F.R. § 10.607(a).

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

[5] *Id*. at Chapter 2.1602.4(b) (February 2016).

[6] *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

[7] *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.[8]

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish 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.[9] The Board notes that clear evidence of error is intended to represent a difficult standard.[10] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[11] It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.[13] In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[14] The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.[15]

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.

An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[16] As appellant's March 17, 2019 request for reconsideration was not received until March 18, 2019, more than one year after the issuance of OWCP's last merit decision dated November 2, 2017, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its November 2, 2017 decision.[17]

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. On appeal appellant explained

[8] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

[9] *G.G.*, *supra* note 7.

[10] *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 6.

[11] *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

[12] *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

[13] *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

[14] *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

[15] *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

[16] 20 C.F.R. § 10.607(a).

[17] *Id*. at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

that she was not made aware of the reason her claim was denied until March 27, 2019. However, the record reflects that the November 2, 2017 notice of decision was mailed to the correct address of record and was not returned as undeliverable.[18] The Board has held that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.[19] Accordingly, without evidence to the contrary, the November 2, 2017 notice of decision is presumed to have arrived at appellant's mailing address.

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.[20] The remaining evidence and argument appellant submitted failed to raise a substantial question concerning the correctness of OWCP's decision.[21] The Board notes that OWCP denied her traumatic injury claim on a factual basis, finding that she failed to establish the time at which the September 9, 2017 employment incident occurred. Appellant submitted statements in which she discussed the incident and discounted the September 14, 2017 investigation interview.

The Board notes, however, that appellant did not explain how this argument raised a substantial question as to the correctness of OWCP's November 2, 2017 decision. Appellant submitted a number of documents, in support of her reconsideration request, including e-mails and letters sent by appellant's manager who discussed issues with her statements and provided information concerning the weight of the delivered package and time of delivery. The Board finds that, A.R.'s evidence is insufficient to establish clear evidence of error as it does not show that OWCP's denial of the claim on the factual basis was erroneous or raise a substantial question as to the correctness of OWCP's determination that appellant did not establish fact of injury.[22] The Board has held that the term clear evidence of error is intended to represent a difficult standard.[23] As such, the Board finds that this evidence is insufficient to show clear evidence of error in OWCP's November 2, 2017 decision.

Appellant also submitted medical evidence dated from September 16, 2017 to January 25, 2019 from Dr. Savage detailing his treatment of appellant for lower back pain. The Board notes, however, that the submission of this medical evidence does not establish clear evidence of error in OWCP's November 2, 2017 decision. The underlying issue of this case is not medical in nature.

[18] *K.F.*, Docket No. 18-0839 (issued November 19, 2018).

[19] *See A.J.*, Docket No. 18-0830 (issued January 10, 2019); *see also R.M.*, Docket No. 14-1512 (issued October 15, 2014); *V.M.*, Docket No. 06-0403 (issued December 15, 2006).

[20] *Supra* note 9.

[21] *See P.T.*, Docket No. 18-0494 (issued July 9, 2018).

[22] *See P.O.*, Docket No. 13-0092 (issued April 4, 2013).

[23] *Supra* note 10.

Rather, it is factual in nature because appellant's traumatic injury claim was denied due to her failure to establish fact of injury.

The Board finds that appellant's request for reconsideration does not show on its face that OWCP committed error when it found in its November 2, 2017 decision that appellant failed to establish fact of injury. For these reasons, OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.

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.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 2020
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