

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

_____)	
T.K., Appellant)	
)	
and)	Docket No. 19-1180
)	Issued: June 18, 2020
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
San Diego, CA, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On May 2, 2019 appellant, through counsel, filed a timely appeal from an April 4, 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 November 7, 2017, to the filing of this appeal, pursuant 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.

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.

² 5 U.S.C. § 8101 *et seq.*

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 February 17, 2017 appellant, then a 55-year-old internal revenue agent, filed an occupational disease claim (Form CA-2) alleging that she developed right lateral epicondylitis while performing repetitive motions, including lifting and pulling case files, and a computer, while in the performance of duty. She noted that she first became aware of her condition on January 31, 2017 and first realized its relation to her federal employment on February 6, 2017. On the reverse side of the claim form, the employing establishment noted that appellant stopped work on February 6, 2017.

In a February 27, 2017 development letter, OWCP advised appellant that additional evidence was required to establish her claim for compensation benefits. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

OWCP subsequently received medical records dated February 16, 2017 from Core Orthopedic Medical Center, signed by a physician assistant, which indicated that appellant was diagnosed with right lateral epicondylitis and was prescribed six to eight sessions of hand therapy.

In a February 17, 2017 narrative statement, appellant described her various work duties, which included pulling heavy workbags on wheels filled with documents, her laptop, and sometimes a portable printer. She also indicated that she grasped, separated, and sorted documents for 15 to 30 minutes each day. Additionally, appellant noted a prior history of bilateral carpal tunnel syndrome, which she was last treated for in February or March 1998.

In a February 17, 2017 memorandum, the employing establishment controverted appellant's claim, noting her leave usage and asserting that she had not reported any issues with her right elbow since January 2015.

On March 28, 2017 the employing establishment again controverted appellant's claim, noting in part her extensive leave usage and her limited field assignments.

OWCP subsequently received a report dated April 13, 2017, wherein Dr. Luke Bremner, a Board-certified orthopedic surgeon, related that appellant complained of right lateral elbow pain since January 31, 2017, which significantly worsened on February 6, 2017. Dr. Bremner noted that there was no injury associated with the onset of the pain, but it became severe when appellant pulled her rolling workbags. He indicated that her lateral epicondyle pain worsened by use of her wrist and hand, including lifting, grasping, and gripping. Dr. Bremner diagnosed right lateral epicondylitis and recommended physical therapy.

By decision dated May 11, 2017, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish causal relationship between her right elbow condition and her accepted factors of federal employment.

On September 15, 2017 appellant requested reconsideration. In an attached notarized statement dated September 8, 2017, she again detailed the factors of her federal employment which she believed caused her right elbow condition. With her request for reconsideration, appellant submitted progress reports dated May 11 and 31, and August 16, 2017 from Dr. Bremner, who reiterated appellant's diagnosis, current complaints, and work status. In his August 16, 2017 report, Dr. Bremner indicated that appellant reported that the increased amount of time she spent pulling her workbags caused her right elbow pain. He stated that if she developed the alleged symptoms after the increase of activity there would be an association, and her treatment should then be associated with an occupational disease.

By decision dated November 7, 2017, OWCP denied modification of its May 11, 2017 decision.

On April 2, 2018 appellant submitted a March 27, 2018 letter requesting a copy of her claim file, specifically including the claim challenge submitted by the employing establishment.

On June 21, 2018 appellant made two submissions to OWCP -- one dated June 1, 2018, and another November 28, 2017. Appellant's June 1, 2018 submission included a letter of even date addressed to the Department of Labor. In that letter, she noted her OWCP file number and challenged statements made by her manager which she believed were inaccurate or false. Appellant indicated that she had proof that the repetitive stress activity of pulling her workbags between her car and office significantly increased after she stopped teleworking, and she asserted that this increase caused her injury. She requested that OWCP provide her with an explanation as to how they failed to find causal relationship between the increased frequency of her pulling her workbags and the injury she sustained, and she noted that she did not comprehend how her injury could be caused by anything else. The November 28, 2017 submission included: a February 17, 2017 challenge made by her manager; a March 28, 2017 challenge by her manager; and her rebuttal to both challenges. In her rebuttal, appellant responded to the arguments of her supervisor S.T.

On January 14, 2019 OWCP received a January 9, 2019 letter from counsel, contending that his office had mailed appellant's June 1, 2018 "challenge and appeal" to OWCP "in June of 2018."

In a January 23, 2019 letter, OWCP confirmed that they had received the documentation on June 21, 2018, but noted that it did not indicate that appellant was filing an appeal or specify which appeal she wanted. It advised that, if she wanted to appeal OWCP's November 7, 2017 decision, she would need to specifically state so in writing and specify which type of appeal as well.

In a March 20, 2019 a letter to OWCP, counsel asserted that appellant had already filed for reconsideration of the November 7, 2017 decision when she previously provided additional new evidence.

By decision dated April 4, 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.³ This discretionary authority, however, is subject to certain restrictions.⁴ OWCP's regulations⁵ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁶ Timeliness is determined by the document receipt date as noted in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

When a request for reconsideration 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 OWCP's procedures provide that it 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.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate

³ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *id.* at § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

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

⁸ *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹¹ *V.G.*, *supra* note 5; see *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *S.T.*, *supra* note 8; see *C.V.*, *supra* note 9; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *S.T.*, *id.*; see *E.P.*, *supra* note 11; *Pasquale C. D Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁸

ANALYSIS

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

OWCP's procedures provide that the one-year period to file a reconsideration request as set forth in 20 C.F.R. § 10.607 begins on the next day after the date of the originally contested decision.¹⁹ As the most recent merit decision was OWCP's November 7, 2017 decision, appellant had until November 7, 2018 to request reconsideration. OWCP determined in its April 4, 2019 decision that she requested reconsideration on March 26, 2019, which was outside of the one-year time limitation. The Board finds, however, that appellant requested consideration on June 21, 2018.

In her June 1, 2018 letter, received by OWCP on June 21, 2018, appellant referenced her appropriate OWCP file number, indicated that she had new evidence relevant to her claim, and requested that OWCP provide her with an explanation as to how they failed to find causal relationship between the increased frequency of her pulling her workbags and the injury she sustained, as she could not comprehend how her injury could be caused by anything else. On June 21, 2018 OWCP also received new evidence from appellant in support of her claim.

The Board has held that a letter that does not contain the word reconsideration may constitute a constructive request for reconsideration.²⁰ In *Jack D. Johnson*, the Board found that

¹⁴ *V.G.*, *supra* note 5; *see C.V.*, *supra* note 9.

¹⁵ *See E.P.*, *supra* note 11; *Leona N. Travis*, *supra* note 13.

¹⁶ *Supra* note 11.

¹⁷ *D.G.*, *supra* note 10; *Leon D. Faidley, Jr.*, *supra* note 8.

¹⁸ *See C.V.*, *supra* note 9; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

²⁰ *I.C.*, Docket No. 14-170 (issued June 3, 2014).

a claimant's letter advising that he enclosed pertinent information related to his OWCP file number and his submission of new evidence constituted a reconsideration request.²¹ In *I.C.*, the Board found that the claimant's submission of additional evidence under the appropriate OWCP file number and request for OWCP to review the evidence constituted a request for reconsideration.²² Although appellant's June 21, 2018 submissions fail to mention the word reconsideration, appellant requested in her June 1, 2018 letter that OWCP review/explain its prior decision and she submitted additional evidence under the appropriate file number in support of her claim. The Board thus finds that appellant's June 1, 2018 letter constituted a request for reconsideration.²³

As appellant's June 21, 2018 request for reconsideration was received within one year of the November 7, 2017 OWCP decision, it was timely filed. The Board therefore finds that OWCP improperly denied her reconsideration request by applying the legal standard for cases for untimely requests for reconsideration. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).²⁴ Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request. After this and any other further development as deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

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

²¹ *Id.*

²² *See id.*

²³ *Id.*

²⁴ 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provides that a request for reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 18, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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