

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

D.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Mountain View, CA, Employer**

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**Docket No. 18-1112
Issued: January 17, 2020**

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 10, 2018 appellant filed a timely appeal from a May 2, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated September 8, 2011, which became final after 30 days of issuance and is not subject to further review.¹ As there was no merit decision issued by OWCP within 180 days of 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 to review the merits of appellant's 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 20 C.F.R. § 501.6(d); *see P.S.*, Docket No. 18-0718 (issued October 26, 2018).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 24, 1992 appellant, then a 32-year-old letter carrier, sustained an injury when her left knee struck the bumper of her postal vehicle while in the performance of duty. She declined medical attention and did not stop work at that time. OWCP accepted appellant's claim for left knee strain. It later expanded the acceptance of the claim to include right hip contusion and lumbosacral strain. OWCP paid appellant wage-loss compensation and granted a schedule award for permanent impairment of both lower extremities due to her back condition.

On May 7, 2001 appellant filed a notice of recurrence (Form CA-2a) claiming a recurrence of total disability from May 7 to June 30, 2001. OWCP further developed her claim including sending her to a second opinion physician.

In a decision dated November 29, 2001, OWCP denied appellant's claim for recurrence of disability commencing May 7, 2001. Appellant timely requested an oral hearing before an OWCP hearing representative.

By decision dated June 17, 2002, an OWCP hearing representative set aside the November 29, 2001 decision and remanded the case for further development. She determined that there was a conflict of opinion between appellant's treating physician and the second opinion physician as to whether appellant had residuals of her August 24, 1992 employment injury and whether she was totally disabled from August through October 2001.

On remand OWCP further developed the claim by referring appellant to a referee physician to resolve the conflict of opinion.

By *de novo* decision dated December 20, 2002, OWCP denied appellant's claim for a recurrence of disability commencing May 7, 2001. Appellant timely requested an oral hearing before an OWCP hearing representative.

By decision dated October 14, 2003, OWCP's hearing representative affirmed the December 20, 2002 decision, finding that appellant failed to meet her burden of proof to establish that she sustained a recurrence of disability on May 7, 2001 as a result of her August 24, 1992 employment injury.

On August 26, 2004 appellant requested reconsideration of the October 14, 2003 hearing representative's decision.

³ *Order Dismissing Appeal*, Docket No. 05-1915 (issued March 7, 2006), *denying petition for recon.*, Docket No. 05-1915 (issued November 30, 2006); *Order Dismissing Appeal*, Docket No. 09-1637 (issued November 23, 2009); Docket No. 09-1549 (issued February 23, 2010); Docket No. 11-0294 (issued September 8, 2011).

On November 12, 2004 appellant filed a Form CA-7, claim for compensation, for total disability commencing November 1, 2004. OWCP developed this claim as a recurrence of disability.

By decision dated November 18, 2004, OWCP denied modification of the October 14, 2003 decision denying appellant's claim for a recurrence of disability commencing May 7, 2001.

On January 21, 2005 OWCP denied appellant's claim for recurrence of disability commencing November 1, 2004.

In 2007 and 2008 appellant was treated by Dr. R. Thomas Grotz, a Board-certified orthopedist, for injuries to the left knee, right hip and lumbar spine.

On January 27, 2009 appellant, through her representative, requested reconsideration of OWCP's decision which denied her recurrence of disability beginning May 7, 2001.

On February 6, 2009 appellant filed a notice of recurrence (Form CA-2a), alleging that the employing establishment withdrew her limited-duty position effective November 14, 2008.

In a March 25, 2009 statement, appellant's postmaster noted that appellant was hired as a letter carrier in 1987 and sustained several injuries while employed. In 1998 she was offered a detail assignment in San Francisco and has not worked at the employing establishment since 1998. In May 2007 appellant's detail was ending and she was offered a permanent limited-duty offer on June 22, 2007 which she accepted on June 25, 2007 "under protest" but she never returned to work and has been in a leave without pay (LWOP) status since June 25, 2007. She was issued a notice of proposed separation due to disability on July 16, 2008 after being in a LWOP status for 365 days.

By decision dated April 27, 2009, OWCP denied appellant's January 27, 2009 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP received a notification of personnel action (Form SF-50) which noted that, effective December 4, 2008, appellant was separated from duty due to a physical inability to meet the demands of her position.

On June 1, 2009 appellant appealed to the Board.⁴ By decision dated February 23, 2010, the Board set aside the April 27, 2009 decision and remanded the case for further development.

On May 28, 2010 OWCP denied appellant's claim for a recurrence of disability on November 14, 2008 finding that the evidence of record was insufficient to establish that the employing establishment withdrew the light-duty assignment made to accommodate her work restrictions.

⁴ Docket 09-1549 (issued February 23, 2010).

By decision dated August 25, 2010, OWCP denied modification of the decision denying appellant's claim for a recurrence of disability commencing May 7, 2001.

OWCP subsequently received a magnetic resonance imaging (MRI) scan of the right knee dated May 16, 2007, which revealed lateral tibial subchondral cystic change, lateral patellar subluxation, fluid collection suggestive of synovial/ganglion cyst with no evidence of acute meniscal abnormality.

On November 11, 2010 appellant, through counsel, appealed to the Board. By decision dated September 8, 2011, the Board affirmed OWCP's May 28 and August 25, 2010 decisions, denying appellant's claims for a recurrence of disability beginning May 7, 2001 and November 14, 2008.⁵

On October 12, 2017 appellant requested reconsideration. She asserted that OWCP did not properly assemble her medical case record for the referral physicians, failed to provide complete and factual statement of accepted facts, erred in terminating her compensation and medical benefits, erred in not expanding her claim to include disc herniation, L5-S1 discopathy, and failed to pay a schedule award claim. Appellant contended that she continued to have permanent residuals of her injuries of August 24, 1992 and May 31, 1994.

Appellant submitted copies of evidence previously of record.

OWCP received a notice of removal or separation for disability dated May 28, 2009 noting that effective July 17, 2008 appellant was issued a notice of removal or separation for disability.

On April 24, 2018 appellant inquired as to the status of her reconsideration request. She asserted that the employing establishment provided inaccurate information to OWCP regarding her work, vocational rehabilitation, and injury status. Appellant further noted that she was separated or terminated by the employing establishment. She sought wage-loss compensation and medical benefits for her August 24, 1992 employment injury.

OWCP also received an MRI scan of the lumbar spine dated December 8, 2017 which revealed degenerative disc disease, and facet arthritis with foraminal narrowing at L3-4 and L5-S1.

By decision dated May 2, 2018, OWCP denied appellant's April 24, 2018 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation

⁵ Docket 11-0294 (issued September 8, 2011).

⁶ 20 C.F.R. § 10.607(a).

System (iFECS).⁷ 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.⁸

OWCP may not deny a request for reconsideration solely on the grounds that it was untimely filed. When a request for reconsideration is untimely filed, OWCP must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.⁹ OWCP's regulations and 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(a), if the claimant's request for reconsideration shows clear evidence of error on the part of OWCP.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 evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹

OWCP's procedures note and the Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made 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 sufficient to demonstrate 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 denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

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

⁸ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹¹ *Robert G. Burns*, 57 ECAB 657 (2006).

¹² Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹³ See *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

OWCP's regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.¹⁴ Because appellant's September 19, 2017 request for reconsideration was received on October 12, 2017, more than one year after the September 8, 2011 merit decision, OWCP properly determined that it was untimely filed.¹⁵ Therefore, appellant must demonstrate clear evidence of error on the part of OWCP.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP. In her reconsideration request, appellant asserted that OWCP did not properly assemble her medical case record for the referral physicians, did not provide complete and accurate statement of accepted facts, erred in terminating her compensation and medical benefits, erred in not expanding her claim, and failed to pay a schedule award. She contends that she continued to have permanent residuals of her August 24, 1992 and May 31, 1994 injuries. On April 24, 2018 appellant asserted that the employing establishment provided inaccurate information to OWCP regarding her work, vocational rehabilitation, and injury status. She further noted that she was separated or terminated by the employing establishment and sought wage loss and medical benefits for her August 24, 1992 injury. The Board finds that this does not demonstrate clear evidence of error as it does not raise a substantial question as to the correctness of OWCP's decisions denying appellant's claims for a recurrence of disability beginning May 7, 2001 and November 14, 2008.

On reconsideration appellant submitted evidence which was previously of record and considered by OWCP. As such this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and thus, these reports are insufficient to discharge appellant's burden of proof.

Appellant also submitted an MRI scan of the lumbar spine dated December 8, 2017. This report does not raise a substantial question as to the correctness of OWCP's decision as it does not address the relevant issue which was decided by OWCP, whether appellant sustained recurrences of disability beginning May 7, 2001 or November 14, 2008 causally related to the August 24, 1992 employment injury.

Consequently, OWCP properly found that appellant's October 12, 2017 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant argues that OWCP improperly determined that her reconsideration request was not timely filed and failed to demonstrate clear evidence of error. As previously noted, the last merit decision in this case was dated September 8, 2011. Because appellant's request for reconsideration was received on October 12, 2017, more than one year after the September 8, 2011 merit decision, OWCP properly determined that it was untimely filed.¹⁶ Appellant has not otherwise presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Id.* at § 10.607(a) (2011).

¹⁶ *Id.*

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 2020
Washington, DC

Patricia H. Fitzgerald, Deputy 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