

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

_____)	
T.W., Appellant)	
)	
and)	Docket No. 19-1821
)	Issued: May 15, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Ridgefield, NJ, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 23, 2019 appellant filed a timely appeal from a February 25, 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 February 5, 2018, 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 to review the merits of this claim.

ISSUE

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

FACTUAL HISTORY

On March 18, 2014 appellant, then a 42-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2014 she sustained a herniated disc in her back when

¹ 5 U.S.C. § 8101 *et seq.*

she picked up a package from the floor while in the performance of duty. No date of work stoppage was noted.

In a development letter dated May 29, 2014, OWCP informed appellant of the deficiencies of her claim and advised her of the type of factual and medical evidence necessary to establish her claim. It also provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary factual and medical evidence.

A March 13, 2014 magnetic resonance imaging (MRI) scan of appellant's lumbosacral spine demonstrated bulging discs at L3-4 and L5-S1.

Appellant began treatment with Dr. Benjamin S. Chouake, Board-certified in emergency and internal medicine, on January 27, 2014 with interment visits through July 24, 2014 for right-sided leg pain. Dr. Chouake initially noted that she presented with new pain in her right buttock with right lower back pain. He continued his diagnoses of lumbar strain and diagnosed a herniated nucleus pulposus (HNP) of the lumbosacral spine.

By decision dated June 30, 2014, OWCP denied appellant's claim finding that she had not established that the January 26, 2014 incident occurred as alleged. It noted that she had not responded to the factual questions contained in the May 29, 2014 development letter.

On July 1, 2014 OWCP received appellant's June 13, 2014 response to its development questionnaire and submitted a narrative account of the incident of January 26, 2014.

In a letter dated February 13, 2015, Dr. Chouake explained that the mechanism for appellant's injury on January 26, 2014 was bending down to pick up a package from the floor. He provided summaries of his medical reports from his previous encounters. Dr. Chouake diagnosed lumbar strain and HNP with bulging at L3-4, and L5-S1, based on appellant's MRI scan.

On June 29, 2015 appellant requested reconsideration of OWCP's June 30, 2014 decision.

By decision dated August 27, 2015, OWCP modified its prior decision to find that appellant had met her burden of proof to establish that the January 26, 2014 employment incident had occurred as alleged. However, it further found that the evidence of record was insufficient to establish that the accepted incident caused or aggravated her diagnosed lumbar strain and lumbar HNP.

On August 26, 2016 appellant requested reconsideration of OWCP's August 27, 2015 decision. With her request, she submitted a letter from Dr. Chouake dated February 23, 2016 who noted that she had been under his care for HNP of the lumbosacral spine, which occurred on January 26, 2014. Dr. Chouake reported that, at that time, appellant was a mail carrier who had been delivering mail for 14 years, and that, during the last 4 years, she was dropping off and picking up 150 to 250 packages per day. He opined that the process of her constantly bending to load and unload her vehicle caused severe back pain.

By decision dated November 16, 2016, OWCP accepted the condition of lumbar sprain as causally related to the accepted January 26, 2014 employment incident. It further found, however,

that the evidence of record was insufficient to establish that the additional condition of HNP of the lumbosacral spine at L3-4 and L5-S1 was causally related to the accepted employment injury.

On November 13, 2017 appellant requested reconsideration of OWCP's November 16, 2016 decision. With her request, she submitted a letter from Dr. Chouake dated November 9, 2017. Dr. Chouake recounted that appellant was first treated on January 27, 2014 for a work-related traumatic injury, which resulted from bending down to pick a package off the floor. At that time, appellant was diagnosed with lumbar strain. Dr. Chouake noted that, over time, wear and tear and age took a toll on her spine and disc cushions. He indicated that especially with the nature of appellant's work, bending and lifting packages "may have extremely affected [appellant's] back." Dr. Chouake observed that this wear and tear could cause the outer layer of the discs to bulge, which would manifest pain and discomfort, and that a herniated disc often evolved from a bulge. He advised that a November 3, 2017 lumbar spine MRI scan demonstrated a mild HNP at L3-4 and L4-5.

By decision dated February 5, 2018, OWCP reviewed the merits of appellant's claim, and but denied modification. It explained that, while Dr. Chouake had explained that wear and tear and age had caused her medical diagnosis, he had not provided an explanation of how bending to pick up a package on the floor on January 26, 2014 directly caused or aggravated her diagnosed HNP at L3-4 and L4-5.

On February 7, 2019 appellant requested reconsideration of OWCP's February 5, 2018 decision.

With her request, appellant submitted a report from Dr. Chouake dated February 4, 2019. This letter was almost identical to his letter of November 9, 2017, but added that the "current problem in [appellant's] lumbar area is, in medical probability, related to her injury of January 26, 2014."

By decision dated February 25, 2019, OWCP 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.

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 Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

² 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).

³ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

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.⁶ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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.¹³

OWCP's procedures provide that the term clear evidence of error is intended to represent a difficult standard.¹⁴ 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

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

⁵ See *M.E.*, *supra* note 2; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); see also *id.* at § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (February 2016).

⁸ *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).

⁹ *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

¹⁰ *J.F.*, *supra* note 8; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *Id.*

¹³ *J.F.*, *supra* note 8; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *Supra* note 4.

development, is not clear evidence of error.¹⁵ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

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.

OWCP's regulations establish a one-year time limit for requesting reconsideration, which begins on the date of the original merit decision.¹⁷ The most recent merit decision was OWCP's February 5, 2018 decision, which denied expansion of acceptance of appellant's claim to include the additional condition of a lumbar HNP. As OWCP received her request for reconsideration on February 7, 2019, more than one year after the February 5, 2018 merit decision, the Board finds that the request was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁸

In support of appellant's request for reconsideration, OWCP received an updated February 4, 2019 letter from Dr. Chouake.

The Board finds that, while Dr. Chouake added an opinion that appellant's herniated nucleus pulposus at L3-4 and L4-5 was related to the accepted incident of January 26, 2014, this opinion is insufficient to demonstrate that OWCP's February 5, 2018 decision was in error at the time it was issued.¹⁹ The term "clear evidence of error" is intended to represent a difficult standard and the evidence provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error in its February 5, 2018 decision.²⁰ The Board finds that this letter from Dr. Chouake is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a fundamental question as to the correctness of OWCP's decision denying her request for reconsideration.²¹

As the evidence submitted in support of appellant's untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of her claim or raise a substantial question that OWCP erred in its February 5, 2018 decision, the Board finds that OWCP properly denied her reconsideration request as it was untimely and failed to demonstrate clear evidence of error.

¹⁵ *P.H.*, Docket No. 19-1354, (issued March 13, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 4 at Chapter 2.1602.5(a) (February 2016).

¹⁶ *See M.E.*, *supra* note 2; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁷ *Supra* note 3.

¹⁸ *Id.*

¹⁹ *A.S.*, Docket No. 18-1556 (issued September 17, 2019); *L.B.*, Docket No. 19-0635 (issued August 23, 2019).

²⁰ *Supra* note 4 at Chapter 2.1602.5 (February 2016); *see also* 20 C.F.R. § 10.607(b).

²¹ *C.M.*, Docket No. 19-0585 (issued August 15, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2020
Washington, DC

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

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

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