

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

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| L.B., Appellant |) | |
| |) | |
| and |) | Docket No. 19-0632 |
| |) | Issued: September 25, 2020 |
| DEPARTMENT OF VETERANS AFFAIRS, |) | |
| WEST LOS ANGELES VA MEDICAL |) | |
| CENTER, Los Angeles, CA, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 29, 2019 appellant filed a timely appeal from an August 2, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has lapsed since the last merit decision, dated May 10, 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 to review the merits of this case.³

¹ Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated May 13, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0632 (issued May 13, 2020).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the August 2, 2018 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 of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 22, 2012 appellant, then a 58-year-old administrative officer, filed a traumatic injury claim (Form CA-1) alleging that on February 15, 2012 when walking in a hallway to her office, she slipped and fell on a sticky substance on the floor in a construction area where repairs were being made, injuring her hands, shoulder, neck, back, knees, and legs while in the performance of duty. She stopped work on the day of the alleged injury and returned to modified-duty work on February 21, 2012. OWCP accepted the claim for a neck sprain, right knee contusion, left elbow contusion, left shoulder sprain, and lumbosacral spondylosis without myelopathy. It subsequently expanded its acceptance of the claim to include a right medial meniscal tear.⁴

In an October 3, 2014 report, Dr. Clarence Shields, a Board-certified orthopedic surgeon, recommended right knee surgery to repair a complex lateral meniscal tear, and left shoulder arthroscopy to repair a small rotator cuff tear. In a report dated September 22, 2015, he held appellant off work six weeks due to degenerative joint disease of the cervical spine, lumbar sprain, and right knee. Appellant stopped work on September 23, 2015.

On September 23, 2015 appellant filed a claim for wage-loss compensation (Form CA-7) as she was in a leave without pay (LWOP) status for the period September 23 to November 4, 2015.

In a development letter dated September 24, 2015, OWCP advised appellant of the type of evidence required to establish her claim for wage-loss compensation for the period September 22 to November 4, 2014. It afforded her 30 days to provide the necessary evidence.

In response, appellant provided October 14 and 19, 2015 reports by Dr. Shields holding her off from work for six weeks due to right knee osteoarthritis.

On October 26, 2015 appellant filed a Form CA-7 as she was in an LWOP status during the period November 5 to December 2, 2015.

By decision dated November 3, 2015, OWCP denied appellant's claim for compensation for the period September 23 to December 2, 2015 "and continuing." It found that the medical

⁴ Appellant has a previously accepted traumatic injury claim under File No. xxxxxx141 that OWCP accepted for a lumbosacral strain on April 26, 2005. OWCP has administratively combined File No. xxxxxx141 with the present claim, File No. xxxxxx224, with File No. xxxxxx224 serving as the master file.

evidence of record did not establish that the accepted injuries disabled appellant from work during the claimed periods.⁵

On March 4, 2016 appellant requested reconsideration of the November 3, 2015 decision. She provided a January 5, 2016 report by Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon. Dr. Tauber diagnosed a torn right meniscus with degenerative arthritis, patellofemoral chondromalacia of the left knee, degenerative arthritis of the left shoulder with partial rotator cuff tear, and a cervical sprain with possible radiculopathy. He advised that appellant was totally disabled from work. Dr. Tauber submitted subsequent periodic reports finding appellant's condition unchanged.

On March 24, 2016 OWCP expanded its acceptance of the claim to include a partial left rotator cuff tear, left shoulder impingement syndrome, and left rotator cuff tendinitis.

On May 2, 2016 appellant filed a Form CA-7 as she was in an LWOP status during the period April 22 to June 23, 2016.

Appellant underwent authorized right knee arthroscopy on May 27, 2016.

In a development letter dated May 9, 2016, OWCP advised her of the type of evidence required to establish her claim for wage-loss compensation for the period April "20," 2016 "and continuing." It afforded her 30 days to provide the necessary evidence.

In response, appellant submitted February 9 and May 10, 2016 reports by Dr. Tauber reiterating previous diagnoses and finding her condition unchanged.

By decision dated June 2, 2016, OWCP denied modification of its prior decision.

On February 13, 2017 appellant requested reconsideration. She asserted that she was disabled from work for the period September 23, 2015 to May 26, 2016. Appellant submitted additional medical evidence.

In a November 7, 2013 report, Dr. Brett Leake, a Board-certified orthopedic surgeon, diagnosed a partial left rotator cuff tear.

In reports dated June 7 to August 2, 2016, Dr. Tauber found appellant totally disabled from work due to knee pain, shoulder pain, severe arthritis of the left shoulder, a torn right rotator cuff, and cervical radiculopathy diagnosed left C6 radiculopathy.

Dr. Lawrence R. Miller, a Board-certified internist, anesthesiologist and pain management specialist, diagnosed cervical spondylosis, left shoulder glenohumeral joint arthritis, status post

⁵ On December 18, 2015 OWCP referred appellant, the medical record, and a statement of accepted facts (SOAF) to Dr. Richard A. Rogachevsky, a Board-certified orthopedic surgeon, for a second opinion on the nature and extent of the accepted conditions. In a January 12, 2016 report, Dr. Rogachevsky opined that the accepted February 15, 2015 employment injury caused the left rotator cuff tear, right meniscal tears, and exacerbated preexisting cervical and lumbosacral degenerative disc disease. He recommended that appellant undergo a left rotator cuff and right meniscal repairs. Dr. Rogachevsky also noted permanent work restrictions.

right knee meniscectomy, and bilateral degenerative disease of the knees and feet in a report dated June 23, 2016.

In an October 7, 2016 report, Dr. Louis J. Volpicelli, a Board-certified orthopedic surgeon, diagnosed a cervical sprain, lumbosacral strain without myelopathy, left shoulder strain, left elbow contusion, right knee contusion, torn right medial meniscus, and status post right knee arthroscopy. He held appellant off from work and prescribed physical therapy.⁶ Dr. Volpicelli provided periodic reports through April 24, 2017 holding appellant off from work.

By decision dated May 10, 2017, OWCP denied modification of its June 2, 2016 denial of compensation from September 23 through December 2, 2015 and formally denied compensation to May 26, 2016.

On May 16, 2018 appellant requested reconsideration. She provided reports dated from May 11, 2017 to July 17, 2018 by Dr. Volpicelli holding her off from work due to left shoulder dysfunction. Dr. Volpicelli also continued to prescribe physical therapy.

Appellant also provided physical therapy treatment notes dated February 21, 2017 to May 22, 2018. She also submitted February 22 and March 2, 2018 imaging studies.⁷

On June 8, 2017 OWCP referred appellant, the medical record, and an updated SOAF to Dr. Frederic Nicola, a Board-certified orthopedic surgeon, to assess appellant's current work capacity. Dr. Nicola submitted a June 29, 2017 report, noting that appellant had stopped work on September 22, 2015 due to bilateral knee and left shoulder pain and underwent right knee arthroscopy on May 27, 2016. Dr. Nicola noted findings on examination, including bilaterally restricted shoulder motion, bilaterally positive Hawkins and impingement tests, bilaterally limited knee extension, and effusion and crepitus of the left knee. He diagnosed traumatic arthritis of the right knee, bilateral rotator cuff tears, bilateral glenohumeral arthritis, and residuals of cervical and lumbar sprains. Dr. Nicola opined that appellant was disabled from work as she required additional treatment for her right knee and bilateral rotator cuff surgery.⁸

OWCP paid appellant compensation on the periodic rolls commencing January 7, 2018.

On April 13, 2018 OWCP expanded its acceptance of the claim to include right medial and lateral meniscal tears, and traumatic arthropathy of the right knee.

By decision dated August 2, 2018, OWCP denied appellant's May 16, 2018 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁶ Appellant participated in physical therapy treatment from November 16, 2016 to March 16, 2017.

⁷ February 22, 2018 x-rays of the left shoulder showed narrowing of the subacromial space with a possible full-thickness rotator cuff tear. February 22, 2018 x-rays of the right knee showed moderately severe arthritis. A March 2, 2018 magnetic resonance imaging scan of the left shoulder demonstrated a partial-thickness supraspinatus tear, mild acromioclavicular osteoarthritis, and mild glenohumeral osteoarthrosis.

⁸ Appellant retired from the employing establishment effective October 17, 2017.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁹ 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.¹⁰ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECs)).¹¹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.¹³ 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 request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁵ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which 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 merely to 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 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.

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.

⁹ 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).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹² *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *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).

¹⁴ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 11 at Chapter 2.1602.5 (February 2016).

¹⁵ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 11 at Chapter 2.1602.5(a) (February 2016).

OWCP's regulations¹⁶ and procedures¹⁷ 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.¹⁸ The most recent merit decision was the May 10, 2017 OWCP decision, which affirmed the denial of her claim for wage-loss compensation from September 23, 2015 to May 26, 2016. As appellant's request for reconsideration was not received by OWCP until May 16, 2018, more than one year after the May 10, 2017 decision, it was untimely filed.¹⁹

In support of her untimely request for reconsideration, appellant provided reports from Dr. Volpicelli holding her off from work from May 11, 2017 to July 17, 2018. She also submitted the June 19, 2017 second opinion of Dr. Nicola. As he was not requested by OWCP to address the claimed period of disability, he did not provide medical rationale documenting appellant's work capacity prior to May 26, 2016. Additionally, she submitted physical therapy notes and imaging studies dated on and after February 21, 2017, subsequent to the claimed period of disability. As these reports do not address the period at issue, they do not raise a substantial question concerning the correctness of the May 10, 2017 OWCP decision, which denied appellant's claims for wage-loss compensation for the period September 23, 2015 to May 26, 2016.

The Board has held that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence that on its face shows that OWCP made an error.²⁰ The reports submitted on reconsideration are irrelevant to the claim as they do not address the issue of disability during the claimed period. They are, therefore, insufficient to demonstrate clear evidence of error in the May 10, 2017 OWCP decision.²¹

As appellant has not demonstrated clear evidence of error in OWCP's May 10, 2017 decision, the Board finds that OWCP properly denied appellant's untimely request for reconsideration.²²

On appeal appellant contends that the medical evidence of record is sufficient to establish her claim for disability compensation. This argument, however, pertains to the merits of the claim, which are not before the Board on the present appeal.

¹⁶ *F.N.*, Docket No. 18-1543 (issued March 6, 2019); 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁷ *Supra* note 11 at Chapter 2.1602.4 (February 2016); *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁸ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁹ 20 C.F.R. § 10.607(b); *see L.A.*, *supra* note 17; *Debra McDavid*, 57 ECAB 149 (2005).

²⁰ *G.B.*, Docket No. 19-1762 (issued March 10, 2020).

²¹ *S.C.*, *supra* note 15.

²² *See J.D.*, Docket No. 18-1765 (issued June 11, 2019).

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 August 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 25, 2020
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board