

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

_____)	
G.W., Appellant)	
)	
and)	Docket No. 20-0879
)	Issued: July 28, 2021
INTERNAL REVENUE SERVICE,)	
St. Louis, MO, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 12, 2020 appellant filed a timely appeal from a September 18, 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 August 3, 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 over the merits of this case.²

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 5 U.S.C. § 8101 *et seq.*

² The Board notes that OWCP received additional evidence following the September 18, 2019 decision. 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.*

FACTUAL HISTORY

On November 27, 2007 appellant, then a 58-year-old contact representative, filed a traumatic injury claim (Form CA-1) alleging that on that date, she sustained injuries to her right knee, left thigh, and buttocks, when she slipped and fell on a marble surface as she was entering an elevator while in the performance of duty. She stopped work on the alleged date of injury.

On April 18, 2008 OWCP accepted the claim for sacroiliitis and temporary aggravation of right knee osteoarthritis. It paid appellant compensation benefits on the supplemental rolls as of May 15, 2008, and on the periodic rolls effective August 24, 2014.

OWCP subsequently expanded acceptance of the claim to include lumbar sprain, permanent aggravation of bilateral knee arthritis, tear of medial meniscus of the right knee, anterior cruciate sprain of the right knee, and permanent aggravation of lumbar degenerative disc disease at L3-4, L4-5, and L5-S1.

On May 31, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF), and a series of questions for a second opinion examination with Dr. Thomas Albus, a Board-certified orthopedic surgeon, to obtain an assessment of appellant's work-related conditions.

In a June 16, 2016 report, Dr. Albus noted appellant's history of injury and treatment and performed an examination. He opined that she was no longer disabled from work as a result of the November 27, 2007 work injury. Dr. Albus opined that appellant's current difficulties with her knees were the result of symptoms secondary to degenerative arthritis of the knees. He indicated that she could perform the duties of her job, with the recommendation of allowing her to stand and move about freely a few times per day. Dr. Albus also recommended a lift inside the right heel, due to appellant's leg length discrepancy.

Following a July 26, 2016 notice of proposed termination of wage-loss compensation, by decision dated September 1, 2016, OWCP terminated appellant's entitlement to wage-loss compensation effective September 2, 2016. It found that the weight of the medical evidence rested with the second opinion physician, Dr. Albus, who found that appellant was no longer disabled from work as a result of the accepted injury.

Appellant thereafter filed a series of requests for reconsideration. By decisions dated November 16, 2016, March 24, 2017, and February 16 and August 3, 2018, OWCP denied modification, finding that the evidence of record was insufficient to establish continuing disability from work as a result of the November 27, 2007 injury.

On August 6, 2019 appellant again requested reconsideration.

In support thereof, appellant submitted reports dated July 25, October 9, November 28, 2018, and March 28 and July 31, 2019, from Dr. Bernard C. Randolph, Jr., a Board-certified internist. Dr. Randolph opined that the traumatic injury to the spine that she suffered on November 27, 2007, led to aggravation of her degenerative disc disease at L3-4, L4-5, and L5-S1. He indicated that appellant's condition had worsened over time as evidenced by recent imaging. Dr. Randolph noted that appellant continued to have significant functional disability related to her lumbar condition. He advised that she was unable to tolerate activities which involved frequent or

continual sitting and frequent or continual standing or walking. Dr. Randolph further noted that appellant was unable to lift beyond sedentary weight tolerances and opined that she remained disabled from performing her work duties at the employing establishment.

OWCP also received July 25, 2018 x-rays of appellant's lumbar spine and physical therapy notes dated August 7, 2018 through May 28, 2019.

In an October 31, 2018 report, Dr. Keith Odegard, a Board-certified orthopedic surgeon, diagnosed primary osteoarthritis of the left knee and status post total right knee replacement.

OWCP received a November 7, 2018 lumbar magnetic resonance imaging (MRI) scan which related findings of moderate bilateral recess stenosis, moderate left foraminal stenosis, and mild-to-moderate canal stenosis at L3-4, right paracentral disc extrusion without stenosis at L1-2, and additional multilevel spondylitic disease.

By decision dated September 18, 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. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which merit review is sought.⁴ Timeliness is determined by the document date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁵

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.⁶ 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 demonstrates clear evidence of error on the part of OWCP.⁷

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.⁸ The Board

³ 5 U.S.C. § 8128(a); *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Supra* note 5 at Chapter 2.1602.5(a) (February 2016).

⁸ *W.H.*, Docket No. 20-0395 (issued October 23, 2020); *T.W.*, Docket No. 19-1821 (issued May 15, 2020).

notes that clear evidence of error is intended to represent a difficult standard.⁹ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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.¹² The Board makes an independent determination as to 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, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The most recent merit decision was the August 3, 2018 OWCP decision. One year from Friday, August 3, 2018 was Saturday, August 3, 2019. Appellant had until Monday, August 5, 2019 to request reconsideration. As noted above, timeliness is determined by the received date in iFECS.¹⁴ As appellant's request for reconsideration was not received by OWCP until August 6, 2019, more than one year after the issuance of the August 3, 2018 merit decision, it was untimely filed. Consequently, the request must demonstrate clear evidence of error.¹⁵

The Board finds that the medical evidence submitted on reconsideration fails to demonstrate clear evidence of error on the part of OWCP. The underlying issue in this case is whether appellant had any continuing disability, as of September 2, 2016, due to the November 27, 2007 work injury. On reconsideration, appellant submitted reports dated July 25, 2018 through July 31, 2019 from Dr. Randolph, who opined that appellant was unable to lift beyond sedentary weight tolerances and remained disabled from performing her work duties at the employing establishment. While Dr. Randolph opined that appellant was disabled from work due to her work-related injury, he did not address whether she was disabled as of September 2, 2016.¹⁶ Likewise, Dr. Odegard in his October 31, 2018 report did not address appellant's disability status as of

⁹ *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

¹⁰ *Id.*

¹¹ *Id.*

¹² *R.K.*, *supra* note 9.

¹³ *Id.*

¹⁴ *Supra* note 5.

¹⁵ *Id.*

¹⁶ *E.R.*, Docket No. 19-1553 (issued April 22, 2021); *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Leona N. Travis*, 43 ECAB 227 (1991).

September 2, 2016.¹⁷ Therefore, these reports are insufficient to demonstrate clear evidence of error.¹⁸

Appellant also submitted July 25, 2018 x-rays of the lumbar spine and a November 7, 2018 lumbar MRI scan. Diagnostic test reports standing alone, however, do not address the issue of disability.¹⁹ OWCP also received physical therapy notes dating from August 7, 2018 through May 28, 2019. These notes have no probative value, however, as physical therapists are not considered physicians as defined under FECA.²⁰ Therefore, this evidence is also insufficient to demonstrate clear evidence of error.²¹

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.²² The reports submitted on reconsideration do not show that OWCP made a clear error in the termination of her wage-loss benefits. Thus, the Board finds that OWCP properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's August 6, 2019 request for reconsideration, as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *E.H.*, Docket No. 19-0365 (issued March 17, 2021); *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *M.C.*, Docket No. 16-1135 (issued September 11, 2017); *G.B.*, Docket No. 13-1260 (issued December 2, 2013).

²⁰ Section 8102(2) of FECA provides as follows: "physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); see *C.S.*, Docket No. 20-1354 (issued January 29, 2021); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *E.W.*, Docket No. 20-0338 (issued October 9, 2020); *Jane White*, 34 ECAB 515, 518 (1983) (physical therapists are not considered physicians under FECA).

²¹ See *supra* note 19.

²² *G.B.*, Docket No. 19-1762 (issued March 10, 2020).

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 28, 2021
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