

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

_____)	
M.C., Appellant)	
)	
and)	Docket No. 20-1515
)	Issued: June 23, 2021
DEPARTMENT OF THE ARMY, MADIGAN)	
ARMY MEDICAL CENTER, JOINT BASE)	
LEWIS-MCCORD, WA, Employer)	
_____)	

Appearances:
Kelly Craig, Esq., 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 10, 2020 appellant, through counsel, filed a timely appeal from a February 19, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated September 7, 2016, 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.³

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.*

³ The Board notes that appellant submitted additional evidence on appeal. 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 establish clear evidence of error.

FACTUAL HISTORY

On September 17, 2015 appellant, then a 45-year-old management assistant, filed a traumatic injury claim (Form CA-1) alleging that on September 1, 2015 she injured her head, left shoulder, side, arm, wrist, and knee, as well as her back, neck, and left rib when she slipped and fell on a wet or recently waxed floor on the way to the restroom at the employing establishment while in the performance of duty. She stopped work on September 2, 2015.

On September 2, 2015 appellant sought treatment in the emergency department of the employing establishment. She provided a history of falling at work with pain in the wrist, back, and head. Appellant noted that she took her migraine medication. David L. Driskell, a physician assistant, examined her and diagnosed concussion and brain injury.

Dr. Andrew Alan Bombardier, a general practitioner, examined appellant on September 8, 2015. He initially noted that appellant reported landing on her left shoulder, wrist, and knee, but was unsure if she hit her head and denied loss of consciousness. Dr. Bombardier reported that she was treated for a concussion and that she reported throbbing headaches daily. He further noted that appellant was experiencing photophobia with an anteriorly located headache. Dr. Bombardier diagnosed concussion with no loss of consciousness.

In his September 11 and 17, 2015 notes, Dr. Bombardier diagnosed a ground level fall with concussion occurring on September 1, 2015. He reported that appellant was experiencing daily headaches with photophobia and nausea. Dr. Bombardier again diagnosed concussion with no loss of consciousness. He recommended a head and brain computerized tomography (CT) scan. Appellant underwent a CT scan on September 11, 2015, which demonstrated no acute intracranial abnormality. Dr. Bombardier recommended a traumatic brain injury clinic for assessment and management on September 17, 2015. On September 24, 2015 he repeated his diagnosis of concussion without loss of consciousness.

On September 29, 2015 appellant sought treatment with Dr. Thomas C. Michels, a Board-certified family practitioner at the employing establishment. Dr. Michels provided a provisional diagnosis of headache and shoulder pain following a fall at work. He completed a work release note and recommended bed rest for two weeks and diagnosed post-traumatic stress reaction.

On October 13, 2015 OWCP accepted the claim for concussion without loss of consciousness.

Appellant sought treatment from a traumatic brain injury (TBI) clinic on October 14, 2015 and was examined by Leland Jurgensmeier, a clinical nurse case manager.

In October 16 and 27, 2015 notes, Dr. Stephen D. Clift, a Board-certified plastic surgeon, examined appellant, described her September 1, 2015 employment incident, and diagnosed migraine without aura, concussion without loss of consciousness, and mild cognitive impairment.

He noted that appellant had a history of migraines and recommended a neuropsychological evaluation.

On November 12, 2015 Dr. Michels examined appellant due to symptoms from her September 1, 2015 fall. He diagnosed prominent headache, aggravation of migraines, shoulder pain, wrist, and arm pain, as well as speech difficulties with associated problems with concentration and aggravation of her chronic anxiety. Dr. Michels noted that the initial visit to the emergency department did not describe head trauma. He found that appellant's headaches had improved immediately after her fall and currently occurred only three times per week.

In a December 30, 2015 letter, OWCP advised appellant that it proposed to rescind its prior acceptance of her claim for concussion without loss of consciousness because the claim was accepted in error. It noted that there was no medical evidence signed by a physician in support of the diagnosed condition.

Dr. Michels completed a December 20, 2015 report reviewing the medical records. He noted that appellant denied a loss of consciousness, but was uncertain if she hit her head on September 1, 2015.

On January 4, 2016 appellant requested that OWCP expand acceptance of her claim to include adjustment disorder with anxiety, migraine with aura, adult onset fluency disorder, personal history of TBI, reaction to severe stress, and strain of the left shoulder rotator cuff muscles.

Appellant sought treatment from Dr. Beverly R. Scott, a neurologist, for migraine with aura on January 5, 2016.

By decision dated February 3, 2016, OWCP finalized the proposed rescission of the acceptance of appellant's claim for concussion without loss of consciousness. It found that the condition had been erroneously accepted. On February 24, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Appellant testified before an OWCP hearing representative on May 23, 2016.

By decision dated September 7, 2016, OWCP's hearing representative found that OWCP had met its burden of proof to rescind acceptance of appellant's claim in accordance with 20 C.F.R. § 10.610.

On August 15, 2017 appellant submitted a letter referencing "new medical records for reconsideration." She provided notes dated February 8 and August 23, 2017 from Dr. Stacy L. Donlan, a Board-certified internist, addressing her post-concussive syndrome as well as medical records addressing her left shoulder adhesive capsulitis treatment.

On December 20, 2017 appellant noted that she had requested reconsideration in August 2017 and submitted medical documents.

On January 27, 2020 appellant again submitted new medical records for reconsideration.

By decision dated February 19, 2020, OWCP denied appellant's claim for reconsideration of the merits, finding that her request for reconsideration 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.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, the received date 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 Its 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, if the claimant's request for reconsideration 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

⁴ 5 U.S.C. § 8128(a); *L.H.*, Docket No. 19-1174 (issued December 23, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *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 *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹¹ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

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

¹³ *S.T.*, *id.*; *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 demonstrate 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 it abused its discretion in denying merit review in the face of such evidence.¹⁸

ANALYSIS

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

The last merit decision was the September 7, 2016 decision, which found that OWCP had properly rescinded acceptance of appellant's claim for concussion without loss of consciousness. The Board finds that the August 15, 2017 request is a timely reconsideration request of OWCP's September 7, 2016 merit decision affirming rescission of acceptance of her claim. As appellant's request for reconsideration was received by OWCP on August 15, 2017 within one year of the September 7, 2016 merit decision, it was timely filed. Therefore, OWCP should have applied the standard applicable to a timely reconsideration request as set forth in 20 C.F.R. § 10.606(b)(3) rather than the more stringent clear evidence of error standard for an untimely request for reconsideration set forth in 20 C.F.R. § 10.607(a). Because it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of the newly submitted evidence under the proper standard of review for a timely reconsideration request.¹⁹

Thus, the Board finds that the case shall be remanded for proper adjudication and application of the appropriate standard of review, to be followed by an appropriate decision.

¹⁴ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 11; *C.V.*, *supra* note 9; *Leon J. Modrowski*, *supra* note 9; *Jesus D. Sanchez*, *supra* note 9.

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

¹⁶ *L.B.*, *supra* note 14.

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

¹⁸ *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 *I.A.*, Docket No. 19-1910 (issued September 29, 2020); *A.K.*, Docket No. 20-0003 (issued June 2, 2020); *J.H.*, Docket No. 18-1367 (issued July 17, 2019); *E.S.*, Docket No. 17-0698 (issued July 14, 2017).

CONCLUSION

The Board finds that OWCP improperly 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.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2020 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 23, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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