United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, CENTRAL ARKANSAS VETERANS HEALTHCARE SYSTEM, JOHN L. McCLELLAN MEMORIAL VETERANS HOSPITAL, Little Rock, AR, Employer	)	**Docket No. 20-1300** **Issued: March 17, 2021**

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 15, 2020 appellant filed a timely appeal from a January 14, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from OWCP's last merit decision, dated November 6, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

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.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 12, 2018 appellant, then, a 47-year-old food service worker, filed an occupational disease claim (Form CA-2) alleging that she developed lateral epicondylitis due to factors of her federal employment, including repetitive lifting of milk crates. She indicated that she had complained to her supervisor regarding her pain and he and other coworkers assisted with the loading of milk crates for her, but she had to unload them. Appellant noted that she first became aware of her condition on March 1, 2018 and its relationship to her federal employment on April 9, 2018. She did not stop work.

A March 26, 2018 incident report indicated that appellant was injured that day in a non-patient setting as a result of the repetitive motion of lifting milk crates daily, which caused her right arm and elbow to tighten up.

In an April 9, 2018 progress note, Dr. Phillip A. Snodgrass, an emergency medicine specialist, noted that appellant reported that her right arm had been hurting from lifting milk crates at work. He provided diagnoses of right carpal tunnel syndrome and a right forearm strain.

In an April 9, 2018 duty status report (Form CA-17), Pamela V. Sherman, an advanced practice nurse (APN), diagnosed possible carpal tunnel syndrome.

In an April 11, 2018 medical note, Dr. Keith Cooper, Board-certified in family practice, provided work restrictions.

Dr. Snodgrass, in his April 12, 2018 medical note, diagnosed right lateral epicondylitis and provided work restrictions.

In an April 12, 2018 Form CA-17, Ms. Sherman also diagnosed right lateral epicondylitis.

OWCP received a progress note and a Form CA-17 dated April 23, 2018 from Chelsey L. Ross, an advanced practice registered nurse (APRN), who diagnosed right arm tendinitis, delineated appellant's work restrictions, and released appellant to return to work.

On April 26, 2018 the employing establishment controverted appellant's claim as the cause of her condition was unclear and there was no supporting medical evidence.

In a May 11, 2018 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor and an explanation of appellant's work activities. It afforded both parties 30 days to submit the necessary evidence.

In an April 11, 2018 medical report, Dr. Cooper diagnosed right lateral epicondylitis. He subsequently diagnosed right arm pain in a note dated April 20, 2018.

In a May 21, 2018 statement, E.S., appellant's supervisor, concurred with appellant's alleged account of her injury, noting that she complained of pain on April 1, 2018 after lifting milk

crates onto a cart. He noted that appellant was in the beverage position, which required increased repetitive motion. E.S. indicated that she lifted milk crates one at a time onto a cart, taking them to the tray line, and placed the milk into the milk box. Appellant also prepared beverages and poured them into at least 100 8-ounce cups, per meal daily. E.S. also indicated that appellant was picking up the milk crates two to three times a day, as well as lifting 22-ounce plastic containers of a beverage. He noted that these activities took her one and a half hours, twice a day, to perform.

OWCP received a position description for a food service worker.

In a June 4, 2018 response to OWCP's questionnaire, appellant asserted that she had previously complained of her pain many times over the years whenever she was in the beverage position, which required strenuous work. She noted that she performed her duties, including lifting milk crates, daily for three months. Appellant indicated that she continued working despite experiencing pain for a few weeks before it became too unbearable. She reported that she notified her supervisor that she needed medical assistance. Appellant asserted that she was never diagnosed with carpal tunnel syndrome and had no previous hand, wrist, or elbow injuries.

A June 8, 2018 magnetic resonance imaging (MRI) scan of the right elbow demonstrated changes consistent with a partial thickness tear of the common extensor tendon at the lateral epicondyle and increased signal intensity in the ulnar nerve.

In a June 14, 2018 medical note, Dr. Jeanine Andersson, a Board-certified orthopedic surgeon, indicated that appellant was under her medical care and requested that she be excused from work on that date. In a surgery order form of even date, she indicated that appellant's surgery date was July 20, 2018.

In a June 18, 2018 Form CA-17, Dr. Andersson diagnosed a right arm tendon tear.

By decision dated June 29, 2018, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish causal relationship between her diagnosed right lateral epicondylitis and the accepted factors of her federal employment.

On August 22, 2018 appellant requested reconsideration and submitted a May 24, 2018 x-ray of the right elbow which revealed traction osteophyte along the lateral epicondyle. In a patient history form of even date, appellant indicated that she developed pain in her right elbow after lifting a lot at work.

Dr. Andersson, in a May 24, 2018 medical report, indicated that appellant received corticosteroid injections, oral medication, and splinting for her symptoms. She conducted a physical examination and diagnosed right lateral epicondylitis following "work-related repetitive lifting," a common extensor origin tear, and right hand numbness and tingling consistent with cubital tunnel syndrome. In a medical note of even date, Dr. Andersson requested that appellant be excused from work on that date. She reiterated her findings and diagnoses in a medical report and note dated June 14, 2018.

A July 12, 2018 electromyogram/nerve conduction velocity (EMG/NCV) study demonstrated focal median neuropathy at the right wrist.

In a July 20, 2018 operative report, Dr. Andersson diagnosed right carpal tunnel syndrome, chronic lateral epicondylitis, and cubital tunnel syndrome. In a subsequent note dated July 23, 2018, she indicated that appellant could return to work on September 16, 2018. Dr. Andersson reiterated her previous findings and diagnoses in an August 3, 2018 medical report.

By decision dated November 6, 2018, OWCP denied modification of its June 29, 2018 decision.

On November 12, 2019 appellant requested reconsideration of the November 6, 2018 decision. She noted that the medical evidence showed that something was wrong with her arms resulting from work.

Appellant submitted an October 18, 2018 modified work assignment from the employing establishment.

A November 7, 2018 medical note from Dr. David A. Black, an orthopedic hand surgeon, indicated that appellant was under his medical care and could return to work on November 8, 2018 with restrictions.

In a November 8, 2018 Form CA-17, an unidentifiable healthcare provider noted work restrictions.

In a December 7, 2018 medical note, Dr. Black again indicated that appellant could return to work with restrictions.

A December 12, 2018 Form CA-17 from Ms. Ross diagnosed a tendon tear.

In a December 18, 2018 prescription slip, Dr. Cooper recommended that appellant avoid repetitive use of her right arm at work.

Dr. G. Frazier, a Board-certified orthopedic surgeon, recounted appellant's history of injury and medical treatment in a January 3, 2019 medical report. He conducted a physical examination and noted that appellant underwent surgical treatment on July 20, 2018 by Dr. Andersson. In a medical note of even date, Dr. Frazier indicated that appellant could return to work with light-duty restrictions.

A January 7, 2019 x-ray of the right wrist revealed no acute fracture and indicated that carpal bones were normally aligned.

A January 10, 2019 MRI scan of the right elbow demonstrated faint peritendinous edema at the common extensor origin associated with a small low-grade partial-thickness undersurface tear measuring five millimeters in anterior-posterior dimension. An EMG study of even date also revealed mild-to-moderate bilateral carpal tunnel syndrome.

In a medical report and note dated January 17, 2019, Dr. Frazier reiterated his findings and indicated that appellant received another injection that day and could return to work with light-duty restrictions.

On February 14, 2019 appellant received occupational therapy treatment.

In a February 14, 2019 medical report, Dr. Frazier diagnosed lateral epicondylitis, indicating that appellant's condition improved. In a March 14, 2019 medical report, he indicated that appellant continued to have right elbow pain despite treatments and work restrictions. Dr. Frazier opined that appellant would most likely continue to have some restrictions in her right upper extremity function. In a medical note of even date, he again indicated that appellant could return to work with light-duty restrictions.

In a May 30, 2019 letter, Dr. Cooper reported that appellant had multiple surgeries and medical treatments on her right arm, which had not improved. He opined that appellant must continue the same work restrictions until further evaluation.

By decision dated January 14, 2020, 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.[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] The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.[4] Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).[5] 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.[6]

OWCP may not deny a request for reconsideration solely because the application was not timely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.[7] OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit

[2] 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).

[3] 20 C.F.R. § 10.607(a).

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

[5] *Id*. at Chapter 2.1602.4(b) (February 2016).

[6] *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

[7] *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request demonstrates clear evidence of error on the part of OWCP.[8]

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.[9] The Board notes that clear evidence of error is intended to represent a difficult standard.[10] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[11] It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.[15]

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[16] and procedures[17] 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 OWCP's November 6, 2018 decision. As appellant's request

[8] *Id*. at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1602.5(a) (February 2016).

[9] *G.G.*, *supra* note 7.

[10] *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 6.

[11] *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

[12] *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

[13] *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

[14] *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

[15] *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

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

[17] *Supra* note 4 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.*, *supra* note 12; *Robert F. Stone*, 57 ECAB 292 (2005).

for reconsideration was not received by OWCP until November 12, 2019, more than one year after the November 6, 2018 decision, it was untimely filed.[19]

The Board further finds that appellant has not demonstrated clear evidence of error in the November 6, 2018 OWCP decision. The underlying issue is whether OWCP properly denied her occupational disease claim finding that the evidence of record was insufficient to establish causal relationship between her claimed medical conditions and the accepted factors of her federal employment. The Board finds that the argument and evidence submitted by appellant in support of her request for reconsideration did not raise a substantial question as to the correctness of the denial of her claim.

In support of her untimely request for reconsideration, appellant argued that the medical evidence of record established that she sustained an injury causally related to the accepted factors of her federal employment. The Board finds that her argument merely reiterates the arguments previously of record and do not demonstrate that OWCP erred in the issuance of its November 6, 2018 merit decision.[20]

Appellant also submitted medical reports and notes dated from November 7, 2018 to May 30, 2019 from Drs. Black, Cooper, and Frazier, noting right lateral epicondylitis and providing work restrictions. However, these reports do not raise a substantial question concerning the correctness of OWCP's November 6, 2018 decision as they do not demonstrate that the claim was improperly denied since they merely show that the evidence could have been construed to produce a contrary conclusion.[21]

Appellant also provided an April 9, 2018 Form CA-17 report by Ms. Sherman, an APN, a December 12, 2018 report from Ms. Ross, an APRN, as well as a February 14, 2018 occupational therapy report. Because nurses and occupational therapists are not considered physicians as defined under FECA, these documents cannot constitute competent medical evidence.[22] Likewise, diagnostic studies, dated January 7 and 10, 2019, standing alone, also lack probative value as they do not address whether the accepted employment factors caused or contributed to the diagnosed

[19] 20 C.F.R. § 10.607(b); *see J.M.*, Docket No. 19-1842 (issued April 23, 2020); *L.A.*, *supra* note 17; *Debra McDavid*, 57 ECAB 149 (2005).

[20] *See M.M.*, Docket No. 20-0961 (issued December 9, 2020).

[21] *See T.T.*, Docket No. 19-1624 (issued October 28, 2020).

[22] 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See id.* at § 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); *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *P.H.*, Docket No. 19-0119 (issued July 5, 2019); *T.K.*, Docket No. 19-0055 (issued May 2, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See J.R.*, Docket No. 19-0812 (issued September 29, 2020) (an occupational therapist is not considered a physician under FECA).

conditions.[23] Therefore, this evidence is insufficient to shift the weight of the evidence and raise a substantial question as to the correctness of OWCP's decision.

Lastly, appellant submitted a November 8, 2018 Form CA-17 from an unidentifiable healthcare provider. The Board has held that reports that bear illegible signatures cannot be considered probative medical evidence because they lack proper identification that the author is a physician.[24] Thus, this report is also insufficient to raise a substantial question concerning the correctness of the November 6, 2018 merit decision.

The Board has held that the term clear evidence of error is intended to represent a difficult standard.[25] None of the evidence submitted demonstrates on its face that OWCP committed an error in denying appellant's claim for an occupational disease in its November 6, 2018 decision. The Board thus finds that the argument and evidence submitted on reconsideration do not demonstrate clear evidence of error on the part of OWCP in its November 6, 2018 merit decision.[26]

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.

[23] *M.C.*, Docket No. 19-1074 (issued June 12, 2020); *N.B.*, Docket No. 19-0221 (issued July 15, 2019).

[24] *J.P.*, Docket No. 19-0197 (issued June 21, 2019).

[25] *A.M.*, Docket No. 20-0143 (issued October 28, 2020).

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

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 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