

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

_____)
A.B., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Powder Springs, GA, Employer)
_____)

Docket No. 20-0561
Issued: November 24, 2021

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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 14, 2020 appellant, through counsel, filed a timely appeal from an August 1, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated May 24, 2018, 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.

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.*

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 December 1, 2017 appellant, then a 48-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 9, 2017 she injured her lower back and sustained an emotional condition when she was attacked by a coworker who violently pushed her in the back while in the performance of duty. She stopped work the same day. On the reverse side of the claim form, R.P., appellant's postmaster, contended that appellant was not in the performance of duty when injured. Rather, the injury was caused by a third party as a result of appellant's willful misconduct. R.P. noted that he witnessed a portion of the events.

In a November 29, 2017 medical note, Mia Wolfrey, a licensed clinical social worker, indicated that appellant was seen in her office and requested that appellant be excused from work that day.

Rebekah Woolery, a licensed clinical social worker, indicated in a December 1, 2017 note that appellant was seen in her office that day and recommended that appellant remain off work until December 9, 2017.

In a December 12, 2017 letter, the employing establishment controverted appellant's claim contending that she had not established fact of injury.

Appellant also submitted a position description detailing her duties as a rural carrier.

In a development letter dated December 21, 2017, OWCP advised appellant that it required additional factual and medical evidence to establish her claim. It attached a questionnaire, requesting that she provide a detailed description of the employment incident that she believed to have contributed to her alleged conditions. OWCP also requested that appellant submit a narrative medical report from her physician, which contained a detailed description of findings and diagnoses, explaining how the reported incident caused or aggravated her medical conditions. In a separate development letter of even date, it requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, regarding appellant's traumatic injury claim. OWCP afforded both parties 30 days to respond.

In a November 9, 2017 statement, R.P., explained that at approximately 9:15 a.m. a meeting was called for all rural carriers and rural carrier associates to be held in the breakroom. He noted that, as appellant walked to the breakroom and stopped in the doorway, L.S., appellant's coworker, pushed appellant with either her hand or her shoulder.

Dr. Jeffrey Klopper, a Board-certified psychiatrist, reported on December 29, 2017 that he evaluated appellant for psychiatric management and noted that she was admitted with post-traumatic stress disorder (PTSD). Appellant related that she had been bullied at work since November 9, 2017 and that she was hit in the back by a coworker. Dr. Klopper recorded her

history of chronic back pain and a herniated disc at L4-5. He diagnosed chronic back pain due to L4-5 herniated disc and PTSD. In a treatment plan of even date, appellant indicated that she had experienced anxiety, panic, rumination and obsessive thoughts, paranoia, compulsive checking of locks, rage episodes, mood swings, and nightmares as a result of emotional and physical abuse she received from two coworkers.

In a December 31, 2017 response to OWCP's development questionnaire, appellant asserted that she had no sources of stress outside of her federal employment. She explained that, since the incident, she had replayed the event and experienced bouts of anger, depression, sleeplessness, and anxiety. Appellant indicated that she had no prior emotional conditions, had never been under the care of a psychiatrist or psychologist, had never been hospitalized for an emotional condition, and did not take any medication for an emotional condition. When asked about her confrontation with her coworker, she stated that there was no personal animosity between herself and her coworker by way of personal association away from work. Appellant asserted that she was verbally and physically assaulted by two employees and that she would have witnesses prepare statements in support of her allegation.

In an undated grievance form, appellant explained that on January 5, 2018 the postmaster informed her that a statement would be prepared and placed in a mailbox, but this never occurred. She also alleged that management refused to complete her workers' compensation paperwork.

Appellant also submitted multiple illegible medical notes dated December 29, 2017.

In an undated statement, R.P. explained that he called a meeting for rural carriers and was unaware that appellant and L.S. were "in the middle of an argument." He reported that witnesses informed him that appellant stopped in the doorway and blocked the doorway when L.S. approached. R.P. noted that he saw L.S.'s hand impact appellant's mid-to-lower back as she pushed past appellant to enter the room. Appellant and L.S. exchanged additional words until they were instructed to stop arguing. R.P. claimed that the argument was regarding an "off the job" disagreement.

By decision dated January 31, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury or medical condition arose during the course of employment and within the scope of compensable work factors as defined by FECA.

On February 27, 2018 appellant requested reconsideration of OWCP's January 31, 2018 decision. In an attached statement, she argued that on November 9, 2017 she was in the performance of duty when she was harassed, teased, and called derogatory names by two coworkers. Appellant asserted that the employment incident was not precipitated by a personal incident outside of the work environment, but was related to verbal comments related to her clothing, hygiene, and job performance. She indicated that she was not the initiator of the verbal comments or the physical incident where she was impacted in the lower back area by her coworker.

OWCP received a statement from J.F., a coworker, recounting instances in which one of her fellow employees also made uncomfortable comments about her clothing and hygiene.

In a February 12, 2018 statement, R.P. asserted that appellant was confronted on November 9, 2017 by another employee while she was in the performance of duty. He noted that appellant and L.S. were involved in a verbal argument before they were called into the breakroom for a meeting. R.P. reported that, as they were walking to the breakroom, appellant stopped in front of the door and the contact occurred as L.S. attempted to move past her to enter the room.

By decision dated May 24, 2018, OWCP denied modification of its January 31, 2018 decision. It found that the “incident did not arise out of employment” as appellant did not establish that the incident was not due to personal matters. OWCP noted that she had not submitted any comments regarding what was stated during the incident as it pertained to her work, nor had she submitted any witness statements about her work.

On May 29, 2019 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a May 23, 2019 statement, counsel asserted that appellant’s attached statement of even date, as well as new medical evidence, was sufficient to establish her claim. She also cited Board case law to support appellant’s position that the employment incident was compensable because the quarrel would not have taken place in the absence of the parties’ employment at the employing establishment. Counsel argued that because appellant’s federal employment created the conditions between her and her coworker, and there is no other connection between them outside of their federal employment, appellant’s injury occurred while in the performance of duty.

In an attached May 23, 2019 statement, appellant explained that before the claimed employment incident she had no issues with emotional or psychological conditions and that her PTSD and depression were a direct result of the claimed November 9, 2017 incident. Although she previously had issues with a herniated disc, she asserted that the push from her coworker resulted in an aggravation to that area. Appellant detailed her history of employment beginning in 1996, including two previous back injuries that she claimed were under control prior to the claimed November 9, 2017 employment incident. She described her relationship with her coworkers involved in the incident as of a professional nature and limited to the workplace. Appellant then detailed the events of the November 9, 2017 incident in which she claimed she was verbally harassed when she refused to give the telephone number of a mutual acquaintance to L.S. and another coworker. She noted that she was subsequently struck in the lower back by L.S. after she stopped and stood in the doorway to the breakroom deciding which direction to walk.

OWCP also received an October 23, 2018 medical report, wherein Dr. Dayna London, Board-certified in physical medicine, evaluated appellant’s complaints of lower back pain and muscle spasms following a November 9, 2017 workplace altercation. Appellant related that as she entered the breakroom she felt a sharp object like an elbow jab into her lower back. She reported daily pain of the left side of her lumbar area with posterior radiation into her lower left extremity. Dr. London diagnosed low back pain and spondylosis without myelopathy or radiculopathy, lumbar region.

In a May 30, 2019 medical report, Dr. London amended her October 23, 2018 medical report and explained that, in her medical opinion, the November 9, 2017 employment incident aggravated appellant’s preexisting lumbar spondylosis. She described the causes and effects of

spondylosis and asserted that a traumatic injury, such as a forceful impact, can accelerate the progression of changes to the spine by causing additional damage to the degenerating hard and soft tissues. Dr. London opined that when appellant was struck in the back at work the force of the impact put pressure on appellant's spine and caused the additional damage.

Appellant also submitted copies of Dr. Klopper's December 29, 2017 medical evidence, as well as December 29 and 30, 2017 medical notes with illegible signatures.

By decision dated August 1, 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 review is sought.⁴ 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.⁵ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).⁶ 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.⁷

OWCP may not deny a request for reconsideration solely because the request was not timely 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.⁸ 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.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and

³ 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).

⁴ 20 C.F.R. § 10.607(a).

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

⁶ *Id.* at Chapter 2.1602.4(b) (February 2016).

⁷ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

⁸ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

⁹ *Id.* at § 10.607(b); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹⁰ *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *see Dean D. Beets*, 43 ECAB 1153 (1992).

must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁶ 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 development, is not clear evidence of error.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁹ The last merit decision was dated May 24, 2018. Appellant had one year from the date of that decision, *i.e.*, Friday, May 24, 2019, to request reconsideration. As her request for reconsideration was received by OWCP on May 29, 2019 more than one year

¹¹ *Id.*; *see also Leona N. Travis*, 43 ECAB 227 (1999).

¹² *J.D.*, *supra* note 10; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *L.W.*, *supra* note 3; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ *G.G.*, *supra* note 8; *see also* 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

¹⁷ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹⁸ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁹ *Supra* note 4.

after the issuance of its May 24, 2018 merit decision, it was untimely filed.²⁰ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim.²¹

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its May 24, 2018 decision. The underlying issue is whether appellant met her burden of proof to establish a traumatic injury in the performance of duty, as alleged. The Board finds that the argument and evidence submitted by her in support of her request for reconsideration did not raise a substantial question as to the correctness of the denial of her claim.²²

In support of her request for reconsideration, appellant submitted a May 23, 2019 statement, wherein she described her relationship with her coworkers involved in the incident as of a professional nature and limited to the workplace. She then detailed the events of the November 9, 2017 incident in which she claimed she was verbally harassed when she refused to give the telephone number of a mutual acquaintance to L.S. and another coworker. Appellant noted that she was subsequently struck in the lower back by L.S. after she stopped and stood in the doorway to the breakroom deciding which direction to walk. As previously noted, clear evidence of error is intended to represent a difficult standard.²³ The evidence must shift the weight in appellant's favor.²⁴ Appellant's May 23, 2019 statement is largely repetitive of her December 31, 2017 and February 27, 2018 statements previously of record. While she added some additional detail regarding the subject of the verbal altercation with her coworkers in that she had refused to provide the telephone number of a mutual acquaintance, she did not indicate whether this discussion was job related. OWCP also received medical evidence in support of her untimely request for reconsideration. However, that evidence is irrelevant as the underlying issue in this case is factual in nature.²⁵ Therefore, the argument and evidence submitted on reconsideration are insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in the issuance of its May 24, 2018 decision.²⁶ Accordingly, OWCP properly denied her reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On appeal, counsel argues that OWCP erred, reasoning that her May 29, 2019 request for reconsideration was submitted on May 23, 2019. However, as noted above, timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in iFECS.²⁷ As explained above, appellant's request for reconsideration was not

²⁰ *Supra* note 5 at Chapter 2.1602.4(b) (February 2016). *See also* 20C.F.R. § 10.607 (2011); *see also* C.B., Docket No. 13-1732 (issued January 28, 2014).

²¹ *Supra* note 8 at § 10.607(b); S.M., Docket No. 16-0270 (issued April 26, 2016).

²² *See* P.T., Docket No. 18-0494 (issued July 9, 2018).

²³ *Supra* note 16.

²⁴ *Supra* note 15; *see also* R.S., Docket No. 18-0505 (issued July 24, 2018).

²⁵ N.V., Docket No., 20-0781 (issued November 18, 2020).

²⁶ *Supra* note 15.

²⁷ *Supra* note 20.

received into iFECS until May 29, 2019, more than one year after OWCP's May 24, 2019 decision. Therefore, OWCP properly determined that her reconsideration request was untimely filed.

CONCLUSION

The Board finds that 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.

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 24, 2021
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