

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

R.P., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
DUBLIN VA MEDICAL CENTER, Dublin, GA,
Employer**

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**Docket No. 21-0720
Issued: February 4, 2022**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On April 12, 2021 appellant filed a timely appeal from an April 7, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision on the recurrence issue, dated October 22, 2019, 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 7, 2021 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 recurrence claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On October 23, 2018 appellant, then a 45-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on September 26, 2018 she sustained bilateral arm and shoulder pain, and back pain radiating to her lower extremities while assisting a co-worker prepare a patient for care. She stopped work and returned on November 8, 2018. OWCP accepted the claim for lower back muscle, fascia, and tendon strain.

The record contains a duty status form (Form CA-17) dated December 28, 2018 from Dr. Harvey Jones, a physician Board-certified in general surgery and internal medicine. Dr. Harvey diagnosed L4-5 herniated disc with sciatica. He provided work restrictions which included no lifting.

On January 2, 2019 appellant accepted a transitional limited-duty practical nurse assignment, which was based on the lifting restriction provided by Dr. Jones.

The record contains a Form CA-17 and a narrative report dated July 29, 2019 from Dr. Jones. In the July 29, 2019 narrative report, Dr. Jones noted appellant's history of injury and medical treatment. He related appellant's physical examination findings and diagnosed sciatica, obesity, L5-S1 bulging disc, lumbar intervertebral disorders with myelopathy, lumbosacral intervertebral disc displacement, bilateral sciatica, and L4-5 herniated disc. In a Form CA-17 of even date, Dr. Jones provided work restrictions of no lifting and up to one-half hour of sitting, standing, walking, climbing, bending/stooping, twisting, pulsing/pushing, simple grasping, reaching above the shoulder, and fine manipulation.

On August 19, 2019 appellant filed a claim for compensation (Form CA-7) for disability from work for the period July 29 through August 9, 2019.

In an August 22, 2019 development letter, OWCP provided a definition of a recurrence of disability. It advised appellant of the factual and medical evidence necessary to establish her claim, provided a questionnaire for her completion, and afforded her 30 days to submit additional evidence.

On August 27, 2019 appellant was seen by Dr. Daniel W. Moore, a Board-certified neurological surgeon. Dr. Moore related that appellant was seen for complaints of leg and low back pain, and difficulty walking. He noted appellant's physical and magnetic resonance imaging (MRI) scan examination findings and diagnosed lumbar radiculopathy, and bilateral sciatica.

By decision dated October 22, 2019, OWCP denied appellant's recurrence claim, finding that the evidence of record was insufficient to establish causal relationship between her claimed disability and the accepted lower back muscle, fascia, and tendon strain. It explained that appellant

had not established that she was disabled due to a material change/worsening of the accepted employment-related conditions.

In a May 6, 2020 letter, Anslie Prudhome, a certified nurse practitioner, related that appellant was evaluated that day for a September 26, 2018 employment injury. On examination, she reported bilateral L1-5 paraspinal tenderness on palpation along the iliac crests, lumbar pain with range of motion (ROM), bilateral greater trochanters, and bilateral piriformis. Ms. Prudhome indicated that appellant was temporarily totally disabled from work.

OWCP thereafter received a number of reports from treating physician, Dr. Victor Osisanya, Board-certified in physical medicine and rehabilitation. In reports dated May 6, June 9, July 15, August 17, September 17, October 10, November 24, and December 28, 2020, Dr. Osisanya noted that appellant injured her neck and low back on September 26, 2018 while performing her work duties. He provided examination findings and reviewed the results of diagnostic testing. In addition to the accepted condition of lumbar strain, Dr. Osisanya listed as upgraded diagnoses cervical strain, cervical radiculopathy, lumbar region intervertebral disc displacement, lumbosacral intervertebral disc displacement, and lumbar radiculopathy. He related:

“[W]ith reasonable degree of medical certainty, the injuries that patient sustained are traumatic in nature as they are a direct result of her work-related accident and happened acutely within one shift. The nature of patient’s job makes her susceptible to joint, muscle, and ligament issues.... More specifically, cervical and lumbar spine joints, paraspinal muscles, ligaments and soft tissues were stretched beyond normal muscle strength when patient reached outwards to push the patient over to her coworker. This led to a cervical strain (S16.1XXA-Cervical strain) and lumbar strain which are common from this mechanism. Also, leaning patient to help push him on his side, placed her spine at an anatomical disadvantage which put unnatural stress on her spine which led to increased loading forces on the cervical and lumbar spine which has caused inflammatory reaction in the cervical and lumbar paraspinals muscles, tendons and discs, and increasing intra discal pressure which led to bulging/herniated discs in her cervical and lumbar spine.”

Dr. Osisanya also completed CA-17 forms on the same dates indicating that appellant was unable to return to work.

On December 15, 2020 OWCP referred the case record to District Medical Adviser, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, and requested that he provide an opinion as to whether the accepted employment incident was competent to cause the additional diagnoses reported by Dr. Osisanya. In a December 16, 2020 report, Dr. Harris, reviewed appellant’s medical records and recommended that OWCP expand acceptance of the claim to include lumbar intervertebral disc displacement and lumbar radiculopathy. He also related that the medical evidence of record did not document that appellant sustained injury to her cervical spine or had treatment for her cervical spine prior to the evaluation by Dr. Osisanya on November 24, 2020. Dr. Harris explained that while Dr. Osisanya provided a diagnosis of cervical

strain, his reports did not document any ongoing problems with the cervical spine other than complaints of cervical spine pain during examination.³

On March 10, 2021 appellant requested reconsideration of the October 22, 2019 decision, contending that she returned to work on November 8, 2018 not November 8, 2019 and that she did not return to a full-duty shift as noted in the decision, that her paperwork had been misplaced by the employing establishment, and at no point did she return to her date-of-injury job. She further noted that her work schedule was amended to light-duty work following her submission of a work excuse from her chiropractor. Appellant also submitted: a September 7, 2018 employing establishment incident report; a Form CA-17 dated September 27, 2018; a September 30, 2018 report of employee's emergency treatment; an October 19, 2018 MRI scan by Dr. Jack M. Considine, a Board-certified diagnostic radiologist diagnosing L5-S1 moderate bilateral foraminal narrowing and L4-5 mild bilateral recess and mild bilateral foraminal narrowing; work excuse notes dated October 3 and 22, 2018 from Dr. Stacey Ashley, a chiropractor; e-mail correspondence dated October 26, 2018 noting her OWCP claim number; and a duplicate copy of limited-duty job offer which she accepted on January 2, 2019.

OWCP also received a March 1, 2021 report from Dr. Dominic Seymour, a specialist in physical medicine and rehabilitation, documenting that he had examined appellant as a new patient on that date.

By decision dated April 7, 2021, OWCP denied appellant's March 10, 2021 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It included a list of the evidence that appellant submitted, with the receipt date, and discussed each document in reaching its determination that appellant did not 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 This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

³ On January 28, 2021 OWCP expanded the acceptance of appellant's claim to include L4-5, L5-S1 lumbar radiculopathy and L4-5, L5-S1 other intervertebral lumbar region disc displacement.

⁴ 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).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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.⁸ 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.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ 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 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

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

OWCP's regulations¹³ and procedures¹⁴ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to

⁸ 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).

⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also *id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

¹⁰ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹² *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

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

¹⁴ *Supra* note 6 at Chapter 2.1602.4 (February 2016); see *L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Velletta C. Coleman*, 48 ECAB 367, 370 (1997).

reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ The most recent merit decision pertaining to appellant's recurrence claim was dated October 22, 2019. As OWCP received her request for reconsideration on March 10, 2021, more than one year after the October 22, 2019 decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying her recurrence claim.

The Board further finds that the case is not in posture for decision with regard to whether appellant has demonstrated clear evidence of error.

On reconsideration, appellant submitted a March 1, 2021 report from Dr. Seymour, documenting that he had examined appellant as a new patient on that date. The Board, having duly considered the matter, notes that in denying appellant's reconsideration request, OWCP failed to consider Dr. Seymour's March 1, 2021 report. OWCP listed the evidence submitted by appellant, including receipt dates, and reviewed them, but neither included nor discussed Dr. Seymour's report. Because Board decisions are final with regard to the subject matter appealed,¹⁶ it is crucial that OWCP address all of the relevant evidence received prior to the issuance of its final decision.¹⁷ As OWCP did not review Dr. Seymour's March 1, 2021 report in its April 7, 2021 decision, the Board finds that this case is not in posture for decision.¹⁸ On remand, OWCP shall review all of the evidence that was of record at the time of its April 7, 2021 decision. Following this and other such further development as deemed necessary, it shall issue an appropriate decision.

CONCLUSION

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

The Board further finds that the case is not in posture for decision with regard to whether appellant failed to demonstrate clear evidence of error.

¹⁵ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *Id.* at § 501.6(d).

¹⁷ *See B.C.*, Docket No. 15-1222 (issued October 20, 2015); *William A. Couch*, 41 ECAB 548, 553 (1990).

¹⁸ *See M.N.*, Docket No. 20-0110 (issued July 7, 2020); *Y.B.*, Docket No. 20-0205 (issued July 7, 2020); *H.H.*, Docket No. 14-1985 (issued June 26, 2015).

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 4, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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