

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 3, 2013 appellant, then a 40-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she twisted her left ankle when she stepped off a porch while delivering a package while in the performance of duty. She stopped work on April 3, 2013.

On September 18, 2013 OWCP accepted the claim for a left ankle sprain and strain. On November 4, 2013 it expanded the acceptance of the claim to include closed dislocation of the left ankle. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing November 26, 2013. On December 6, 2013 appellant underwent OWCP-authorized left ankle arthroscopy with extensive debridement, lateral stabilization with primary ligamentous repair, and left ankle syndesmotic repair with internal fixation. OWCP paid her wage-loss compensation on the periodic rolls from February 9 through May 3, 2014. On December 4, 2015 appellant underwent OWCP-authorized arthroscopic debridement of the left ankle, stabilization of left ankle syndesmosis with tightrope, debridement of left posterior tibial tendon with application of graft, and debridement of left peroneus brevis tendon with application of graft. OWCP continued to pay her wage-loss compensation for total disability on the supplemental and periodic rolls.

Appellant returned to full-duty work on May 12, 2016.

On September 28, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging disability as her left ankle had worsened on September 24, 2017, with ankle instability and difficulty ascending stairs. She stopped work on September 25, 2017.

In a September 28, 2017 report, Dr. Nathan Ullom, a podiatrist, noted that appellant had sustained a recent left ankle sprain, with symptoms similar to the April 3, 2013 employment injury. He opined that the recent sprain was "more likely than not" a reaggravation of the April 3, 2013 left ankle injury. Dr. Ullom held appellant off work.

In a development letter dated October 12, 2017, OWCP advised appellant of the deficiencies of her recurrence claim. It advised her of the type of evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted September 26, 2017 reports by Dr. Ullom noting that she had reinjured her left ankle while walking on uneven surfaces through sticker bushes. Dr. Ullom diagnosed a calcaneofibular ligament sprain of the left ankle. He prescribed physical therapy.

In a duty status report (Form CA-17) dated October 24, 2017, Dr. Ullom limited appellant to modified-duty work with no standing or walking.

In a November 8, 2017 report, Dr. Ullom opined that appellant had sustained a reinjury of the previously repaired surgical sites in the left ankle. He noted that he could not determine conclusively if appellant's previous left ankle injury "had a causative effect regarding her most recent injury of the same structures." Dr. Ullom recommended additional physical therapy. He provided a November 21, 2017 chart note indicating continued left ankle symptoms.

By decision dated January 4, 2018, OWCP denied appellant's claim for recurrence of disability as the medical evidence of record was insufficient to establish causal relationship between any disability commencing September 25, 2017 and the accepted April 3, 2013 left ankle injury.

OWCP subsequently received additional medical evidence.

In a September 5, 2017 report, Dr. Ullom noted that appellant presented for removal of sutures placed after scraping her left leg on a piece of metal one week earlier while cleaning out her garage.

In an October 24, 2017 report, Dr. Ullom noted appellant's symptoms of increased left ankle pain. On examination of the left foot and ankle, he found tenderness to palpation of the fourth metatarsal shaft, medial ankle, and lateral ankle. Dr. Ullom diagnosed a left calcaneofibular ligament sprain and left ankle pain of unspecified chronicity and left foot pain.

In a January 23, 2018 Form CA-17, Dr. Ullom restricted appellant to sedentary-duty work. In an April 24, 2018 report, he reiterated previous diagnoses. Dr. Ullom ordered a magnetic resonance imaging (MRI) scan of the left ankle, performed on May 8, 2018, which demonstrated postoperative changes related to a distal tibiofibular syndesmotom repair, mild tibialis posterior tendinopathy with possible tenosynovitis, and possible mild Achilles tendinopathy. He provided a September 12, 2018 Form CA-17 noting continued left ankle symptoms and restricting appellant to sedentary-duty work.

Appellant also provided November 19, December 11, 2018 reports by Marcia Kucera, a nurse practitioner.

On January 7, 2019 appellant requested reconsideration and submitted a January 7, 2019 report by Dr. Erik Christopher Lilja, a podiatrist. Dr. Lilja noted a history of a left ankle injury five years previously, a reinjury in September 2016, and two left ankle surgeries. He obtained left ankle x-rays, which demonstrate a preserved syndesmosis, tightrope in appropriate placement on the ankle, no talar dome lucency, no os peroneum, and no stress fracture. On examination, Dr. Lilja found decreased light touch sensitivity in the left dorsal foot above the third, fourth, and fifth toes, decreased sensitivity in the sural nerve, and altered sensitivity in the left hallux dorsally. He diagnosed internal derangement of the left ankle and chronic left ankle pain. Dr. Lilja opined that appellant's left ankle instability, which had resulted in numerous falls and injuries, was directly attributable to the April 3, 2013 employment injury.

By decision dated January 16, 2019, OWCP denied appellant's request for reconsideration of the merits of the recurrence claim.

OWCP subsequently received additional medical evidence. In a January 16, 2019 report, Dr. Jimmy Cui, Board-certified in physiatry and pain management, provided a history of injury and treatment and noted findings on examination. He obtained an electromyogram (EMG) study, which demonstrate no obvious evidence of peroneal neuropathy, tarsal tunnel syndrome, or lumbar radiculopathy, although small fiber polyneuropathy remained possible as appellant had a history of diabetes. Dr. Cui diagnosed left ankle pain, paresthesia of the left leg, and a history of two ankle surgeries.

On April 3, 2019 appellant requested reconsideration and submitted reports by Ms. Kucera dated from January 8 through April 22, 2019.

By decision dated May 1, 2019, OWCP denied modification.

On May 9, 2019 appellant requested reconsideration of OWCP's May 1, 2019 decision. She noted that she had submitted new copies of Ms. Kucera's reports with a "doctor's signature and stamp on every page."³ Appellant also submitted a May 9, 2019 report by Ms. Kucera.

By decision dated June 12, 2019, OWCP denied modification of its May 1, 2019 decision.

On February 11, 2020 OWCP received a January 30, 2020 MRI scan of the left ankle ordered by Dr. Lilja, which demonstrated prior fixation of distal tibia fibula syndesmosis, slight widening of the anterior distal tibial fibular syndesmosis, and a sprain and/or low grade partial thickness tear involving the anterior tibiofibular ligament.⁴

On May 5, 2020 appellant requested reconsideration of the "previous denial." She provided an April 30, 2020 statement asserting that OWCP's prior decision denying her claim was incorrect. Appellant contended that a recent MRI scan ordered by Dr. Lilja constituted additional relevant evidence.

In a May 7, 2020 informational letter, OWCP notified appellant that it would take no action on her May 5, 2020 reconsideration request as it was not clear from her letter which decision or issues were involved. It advised her that she must submit a written request within one year of the date of the decision to be reconsidered, identifying the decision and issues upon which reconsideration was requested, and also provide pertinent new and relevant evidence or argument.

In response, appellant submitted a June 2, 2020 report by Dr. Ullom, who noted that appellant had accidentally broken her left hallux when she kicked something with her left foot. Dr. Ullom diagnosed left ankle impingement syndrome, chronic left ankle pain, a plantar neuroma of the left foot, and an ingrown left big toenail.

In a June 10, 2020 report, Dr. Ullom opined that appellant's October 2016 left ankle injury was related to her previous ankle injury and surgery on a more likely than not basis. He noted that

³ These documents do not appear in the imaged case record.

⁴ Appellant also submitted October 28, 2019 reports by Ms. Kucera.

a diagnostic injection had relieved appellant's symptoms, indicating that she had left ankle impingement syndrome. Dr. Ullom recommended arthroscopic debridement of the left ankle with peroneus brevis tendon repair.

On October 13, 2020 appellant again requested reconsideration. She asserted that the new reports from Dr. Ullom were sufficient to establish her claim for recurrence of disability.⁵

By decision dated June 23, 2021, OWCP denied appellant's October 13, 2020 request for reconsideration of its June 12, 2019 decision, 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.⁶ 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.⁷ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

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.¹⁰ Its 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.¹¹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹²

⁵ Appellant also provided coworker statements contending that the employing establishment should have offered appellant a modified position, and copies of reports previously of record.

⁶ 5 U.S.C. § 8128(a); *A.M.*, Docket No. 20-0143 (issued October 28, 2020); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁹ *S.M.*, Docket No. 19-1166 (issued October 16, 2020); *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ See 20 C.F.R. § 10.607(b); *A.M.*, *supra* note 6; *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ See *S.M.*, *supra* note 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 8 at Chapter 2.1602.5 (September 2020).

¹² *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).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹³ 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.¹⁴

ANALYSIS

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

The case record reflects that appellant first requested reconsideration of the June 12, 2019 decision on May 5, 2020. Appellant's April 30, 2020 letter, received by OWCP on May 5, 2020, specifically requested reconsideration of OWCP's "previous denial." At that time, the most recent prior OWCP decision of record was the June 12, 2019 decision.

As appellant filed a request for reconsideration within one year of OWCP's June 12, 2019 merit decision, the Board finds that OWCP improperly denied her reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).¹⁵

Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for timely

¹³ *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 8 at Chapter 2.1602.5a (September 2020).

¹⁴ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *George C. Vernon*, 54 ECAB 319 (2003).

¹⁵ 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provide that a request reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

reconsideration requests.¹⁶ Following this and other such further development, OWCP shall issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2021 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 9, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ *M.W.*, Docket No. 21-0841 (issued October 26, 2021); *P.S.*, Docket No. 20-1 192 (issued July 20, 2021); *E.S.*, Docket No. 17-0698 (issued July 14, 2017); *Jack D. Johnson*, 57 ECAB 593 (2006); *Vicente P. Taimanglo*, 45 ECAB 504 (1994).