

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

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| R.P., Appellant |) | |
| |) | |
| and |) | Docket No. 22-0686 |
| |) | Issued: September 30, 2022 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Indian Orchard, MA, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 30, 2022 appellant filed a timely appeal from a February 7, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated January 14, 2021, 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.

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 May 1, 1998 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 30, 1998 she sustained a lower back sprain while in the performance of duty. She noted that she picked up a tray of mail while loading her vehicle and felt sharp pain in her lower back. Appellant stopped work on May 2, 1998 and returned to work on May 11, 1998. OWCP accepted the claim for lumbar sprain and displacement of lumbar intervertebral disc without myelopathy. It subsequently accepted that appellant sustained recurrences of disability on February 25 and April 16, 1999. OWCP paid appellant wage-loss compensation on the supplemental rolls, commencing February 25, 1999, and on the periodic rolls, commencing June 16, 2002.

By decision dated January 14, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits, effective January 31, 2021, based upon the second opinion of Dr. Robert Moskowitz, a Board-certified orthopedic surgeon, who opined that appellant no longer had residuals, disability, or need for medical treatment due to her accepted April 30, 1998 employment injury. Dr. Moskowitz attributed her disability to age, morbid obesity, and non-work-related conditions.

On January 31, 2022 appellant requested reconsideration.

In support of her reconsideration request, appellant submitted a January 19, 2022 letter in which she informed Dr. Julio Martinez-Silvestrini, an attending Board-certified physiatrist, that she had an appointment with him on January 25, 2022. She requested that Dr. Martinez-Silvestrini complete a yearly form regarding her disability status. Appellant also informed him that Dr. Moskowitz failed to conduct a thorough medical examination.

Appellant annotated Dr. Moskowitz' October 7, 2020 report with a handwritten note dated January 24, 2022. She disagreed with Dr. Moskowitz' finding that her pain was due to old age and not to her accepted employment injury.

In a November 27, 2001 letter, appellant related a history of her medical treatment, commencing October 9, 2001.

Appellant also submitted a May 4, 1998 return-to-work form with an illegible signature that provided a diagnosis of acute lumbar strain with bilateral radiculitis.

In an August 25, 2000 referral form, Dr. Arthur Krulewitz, an internist, referred appellant to Dr. Nicholas T. Spellman, a Board-certified physiatrist, for evaluation and treatment of her low back pain.

In a February 17, 2019 attending physician's report (Form CA-20), Dr. Martinez-Silvestrini noted a history of the April 30, 1998 employment injury and diagnosed spinal stenosis. He checked a box marked "Yes" indicating that the diagnosed condition was caused or aggravated by an employment activity. Dr. Martinez-Silvestrini also advised that appellant was totally disabled from work, commencing November 17, 2000.

Appellant also resubmitted medical evidence and correspondence previously of record.

OWCP, by decision dated February 7, 2022, denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.² Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).³ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴

OWCP may not deny a request for reconsideration solely because it was untimely 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.⁵ 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 claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁷ Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on

² 20 C.F.R. § 10.607(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁴ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

⁵ 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Supra* note 2. *See also supra* note 3 at Chapter 2.1602.5a (September 2020).

⁷ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁸ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ *Id.*

the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹¹

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹² The claimant must present evidence that on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³

ANALYSIS

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.

OWCP received appellant's request for reconsideration on January 31, 2022, more than one year after the last merit decision dated January 14, 2021. Appellant's request was, therefore, untimely filed. Consequently, she must demonstrate clear evidence of error.¹⁴

The Board further finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP properly terminated her wage-loss compensation and medical benefits, effective January 31, 2021, because she no longer had residuals or disability causally related to her accepted April 30, 1998 employment injury. That issue is medical in nature. The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of the termination of her compensation.¹⁵

In a January 19, 2022 letter to Dr. Martinez-Silvestrini and a January 24, 2022 handwritten annotation to Dr. Moskowitz' October 7, 2020 second opinion report, appellant contended that the weight of the medical evidence did not rest with the opinion of Dr. Moskowitz because he failed to conduct a thorough medical examination and improperly found that her pain was due to old age rather than the April 30, 1998 employment injury. As a lay person, appellant is not competent to render a medical opinion and, therefore, her opinion has no probative value on a medical issue.¹⁶

¹¹ *Id.*

¹² *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *see also* 20 C.F.R. § 10.607(b); *supra* note 3 at Chapter 2.1602.5 (September 2020).

¹³ *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹⁴ *Supra* notes 4 and 5.

¹⁵ *See E.K.*, Docket No. 21-1144 (issued February 3, 2022); *S.D.*, Docket No. 17-1450 (issued January 8, 2018); *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁶ *See E.H.*, Docket No. 19-0365 (issued March 17, 2021); *B.C.*, Docket No. 16-1404 (issued April 14, 2017); *James A. Long*, 40 ECAB 538 (1989).

The Board finds, therefore, that the arguments appellant submitted did not raise a substantial question concerning the correctness of OWCP's January 14, 2021 merit decision.

In a November 27, 2001 letter, appellant related a history of the medical treatment she received, commencing on October 9, 2001. This evidence does not establish error on the part of OWCP in its January 14, 2021 decision.

Dr. Martinez-Silvestrini, in a February 7, 2019 Form CA-20 report, checked a box marked "Yes" indicating that appellant's diagnosed spinal stenosis resulted from the April 30, 1998 employment injury and found that she was totally disabled from November 17, 2000 through the date of his report. The Board has held, however, that an opinion on causal relationship, which consists of a physician checking a box in response to a form question, without supporting medical rationale explaining how the employment activity caused the diagnosed condition, is of little probative value.¹⁷ Thus, Dr. Martinez-Silvestrini's report is insufficient to demonstrate clear error on the part of OWCP in rendering its January 14, 2021 decision.

Dr. Krulewitz' August 25, 2000 referral form referred appellant to Dr. Spellman for evaluation and treatment of her low back pain. However, he did not provide an opinion that appellant continued to suffer residuals or disability from the accepted condition of lumbar sprain as of January 14, 2021. Thus, this evidence does not raise a substantial question as to the correctness of OWCP's decision.¹⁸

The record contains a May 4, 1998 return-to-work form from a provider with an illegible signature who diagnosed acute lumbar strain with bilateral radiculitis. The Board has held that a report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence as the author cannot be identified as a physician.¹⁹ For this reason, the May 4, 1998 return-to-work form is insufficient to demonstrate clear evidence of error.

The record also contains a physical therapy report dated May 6, 2020. The Board has held that reports from a physical therapist are of no probative value as they do not constitute competent medical evidence.²⁰ Consequently, this report is insufficient to demonstrate clear evidence of error by OWCP with respect to the underlying medical issue.

¹⁷ See *P.W.*, Docket No. 18-0638 (issued October 9, 2018).

¹⁸ See *S.J.*, Docket No. 21-0217 (issued December 16, 2021); *S.P.*, Docket No. 17-1708 (issued February 23, 2018).

¹⁹ See *I.G.*, Docket No. 20-0812 (issued October 19, 2020); *K.C.*, Docket No. 18-1330 (issued March 11, 2019); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

²⁰ Section 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. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *Y.B.*, Docket No. 21-0092 (issued October 15, 2021); *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).

Appellant also resubmitted medical evidence and correspondence previously considered by OWCP. The Board notes, however, that duplicative and cumulative medical evidence does not raise a substantial question as to the correctness of OWCP's January 14, 2021 decision.²¹

For these reasons, the Board finds that the arguments and evidence submitted by appellant in connection with her untimely request for reconsideration are insufficient to shift the weight of the evidence in her favor or raise a substantial question that OWCP erred in the issuance of its January 14, 2021 decision. Accordingly, OWCP properly denied her reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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 February 7, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

²¹ *Supra* note 12. See also *L.F.*, Docket No. 20-1431 (issued May 3, 2022); *C.C.*, Docket No. 21-0896 (issued December 2, 2021); *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *G.B.*, Docket No. 18-1629 (issued April 15, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).