United States Department of Labor
Employees' Compensation Appeals Board

T.J., Appellant	)	
	)	
and	)	**Docket No. 22-1159**
	)	**Issued: April 7, 2023**
U.S. POSTAL SERVICE, OZONE PARK CARRIER ANNEX, Brooklyn, NY, Employer	)	
	)	

Appearances:
Thomas S. Harkins, Esq, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 1, 2022 appellant, through counsel, filed a timely appeal from a May 5, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 8, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (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, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 20, 2019 appellant, then a 45-year-old city carrier assistant 1, filed a traumatic injury claim (Form CA-1) alleging that on August 19, 2019 she sustained a low back strain when she lifted a heavy mail parcel into her postal vehicle while in the performance of duty. She stopped work on the date of the claimed injury. In an accompanying statement, appellant provided additional details regarding the August 19, 2019 incident, noting that she lifted and handled four boxes filled with mail and two bins filled with mail parcels.

Appellant submitted an August 20, 2019 note from Dr. Juan Zequeira-Diaz, a Board-certified emergency medicine specialist, regarding appellant's visit on that date. Dr. Zequeira-Diaz indicated that appellant would be able to return to work in three days. She also submitted an authorization for examination and/or treatment (Form CA-16) dated August 21, 2019, completed by an employing establishment official.

In an August 29, 2019 development letter, OWCP notified 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. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted additional statements in which she described the August 19, 2019 employment incident. She also submitted August 20, 2019 documents pertaining to her hospital visit on August 20, 2019. In a duty status report (Form CA-17) dated September 3, 2019, Dr. Landis Barnes, an osteopath and Board-certified internist, diagnosed lumbar sprain/strain and recommended work restrictions.

In a September 24, 2019 report, Dr. Barnes discussed the August 19, 2019 employment incident, and diagnosed lumbar sprain/strain. He noted that appellant's "work-related accident includes a back injury due to heavy lifting at work."

By decision dated October 10, 2019, OWCP accepted that appellant established the August 19, 2019 employment incident in the form of lifting and handling heavy mail, as alleged. However, it denied her claim, finding that she failed to submit sufficient medical evidence to establish a diagnosed medical condition casually related to the accepted employment incident.

On February 28, 2020 appellant requested reconsideration of the October 10, 2019 decision.

Appellant submitted August 20 and 27, 2019 reports from hospital visits on those dates. In a September 3, 2019 report, Dr. Barnes discussed the August 19, 2019 employment incident, reported physical examination findings, and diagnosed lumbar sprain/strain, rule out herniated lumbar disc, and lumbar radiculopathy. He opined, "[w]ithin a reasonable degree of medical

certainty, the above[-]referenced accident is the competent producing cause of injuries sustained and the need for further treatment."

In an October 15, 2019 attending physician's report (Form CA-20), Dr. Barnes provided a brief history of the August 19, 2019 employment incident, diagnosed lumbar sprain/strain and lumbar radiculopathy, and opined that appellant experienced constant pain due to the heavy lifting at work. He indicated by checking a box marked "Yes" that the diagnosed conditions were causally related to accepted employment incident. In an October 15, 2019 Form CA-17, Dr. Barnes provided work restrictions.

A September 9, 2019 magnetic resonance imaging (MRI) scan of the lumbar spine showed mild desiccation at L5-S1. A September 24, 2019 electromyogram/nerve conduction velocity (EMG/NCV) study of the lower extremities revealed normal results.

By decision dated May 8, 2020, OWCP denied modification of its October 10, 2019 decision.

On February 5, 2022 appellant, through counsel, requested reconsideration of the May 8, 2020 decision. In an accompanying statement, counsel argued that the medical evidence of record, including the reports of Dr. Barnes, established appellant's claim for an August 19, 2019 employment injury.

Appellant submitted an October 15, 2019 report from Dr. Barnes who discussed the August 19, 2019 employment incident, reported physical examination findings, and diagnosed lumbar sprain/strain. He opined, "[w]ithin a reasonable degree of medical certainty, the above[-]referenced accident is the competent producing cause of injuries sustained and the need for further treatment."

In a December 27, 2019 report, Dr. Barnes discussed the August 19, 2019 employment incident, reported physical examination findings, and diagnosed lumbar sprain/strain. He opined that appellant's injuries were directly related to her employment-related diagnosis. Dr. Barnes maintained that, when appellant was lifting heavy boxes on August 19, 2019, the pain was transferred to her back and she felt a strain. He asserted that appellant's injuries were "consistent with the physical examination of the sprain or strain of the muscle." Dr. Barnes also indicated that appellant's back spasms were consistent with lifting heavy objects. He noted, "[a]gain, her diagnosis is causally related to her work and work-related diagnosis due to lifting heavy boxes at work, causing transfer of pain to the lower back."

In April 2, May 1, June 5, and July 10, 2020 reports, Dr. Barnes described the August 19, 2019 employment incident, reported physical examination findings, and diagnosed lumbar sprain/strain and lumbar radiculopathy. He opined, "[w]ithin a reasonable degree of medical certainty, the above[-]referenced accident is the competent producing cause of injuries sustained and the need for further treatment."

In an August 28, 2020 report, Dr. Barnes described the August 19, 2019 employment incident, reported physical examination findings, and diagnosed lumbar sprain/strain and lumbar radiculopathy. He noted, "Patient diagnosis casually related to her work and work-related diagnosis."

By decision dated May 5, 2022, 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] 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).[5] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[6]

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.[7] If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.[8]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[9] The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.[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 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 request for reconsideration bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.[12] To demonstrate clear

[3] 5 U.S.C. § 8128(a); *see also A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

[4] 20 C.F.R. § 10.607(a).

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

[6] *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).

[7] *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

[8] *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b).

[9] *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

[10] *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

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

[12] *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

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.[13]

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.[14] The claimant must present evidence which on its face shows that OWCP made an error.[15] 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.[16] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[17]

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.

A request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.[18] As appellant's request for reconsideration was not received by OWCP until February 5, 2022, more than one year after issuance of its May 8, 2000 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its May 8, 2000 decision.

The Board further finds that appellant has not demonstrated clear evidence of error. In support of her untimely reconsideration request, appellant, through counsel, argued that the medical evidence of record, including the reports of Dr. Barnes, an attending physician, established her claim for an August 19, 2019 employment injury. The Board finds, however, that this unsupported argument does not raise a substantial question as to the correctness of OWCP's May 8, 2000 decision, a decision which OWCP reached after evaluating the medical evidence of record.[19]

Appellant submitted several reports in which Dr. Barnes described the August 19, 2019 employment incident, reported examination findings, and diagnosed low back conditions.

In October 15, 2019, April 2, May 1, June 5, July 10, and August 28, 2020 reports, Dr. Barnes described the August 19, 2019 employment incident, reported physical examination

[13] *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

[14] *See supra* note 5 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

[15] *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

[16] *Id.*

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

[18] *See supra* note 4.

[19] *See supra* notes 11 and 13.

findings, and diagnosed lumbar sprain/strain and lumbar radiculopathy. He opined, "[p]atient diagnosis casually related to her work and work-related diagnosis."

The Board finds, however, that the submission of these reports does not establish clear evidence of error in OWCP's May 8, 2020 decision. Dr. Barnes' reports contain conclusory statements on the causal relationship between the diagnosed conditions and the August 19, 2019 employment incident, and do not raise a substantial question concerning the correctness of OWCP's May 8, 2000 decision.

As noted, clear evidence of error is intended to represent a difficult standard.[20] Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.[21] The argument and medical evidence submitted by appellant does not shift the weight of the evidence in the present case in her favor.

The Board finds that the evidence submitted on reconsideration does not demonstrate on its face that OWCP committed error when it found in its May 8, 2000 decision that appellant had not established an August 19, 2019 employment injury.[22] Therefore, OWCP properly denied appellant's untimely request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

[20] *See supra* notes 13, 14, and 16.

[21] *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

[22] *See S.F.*, Docket No. 09-0270 (issued August 26, 2009).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2022 decision of the Office of Workers' Compensation Programs is affirmed.[23]

Issued: April 7, 2023
Washington, DC

Alec J. Koromilas, 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

[23] The Board notes that the case record contains a Form CA-16. A properly completed Form CA-16 form authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).