

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

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A.M., Appellant)	
)	
and)	Docket No. 20-1466
)	Issued: January 3, 2023
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Waco, TX, Employer)	
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Appearances:
Sarah Toben, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 30, 2020 appellant, through counsel, filed a timely appeal from a February 4, 2020² nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated February 2, 2017, to the filing of this

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 The Board notes that appellant, through counsel, specifically appealed OWCP's February 4, 2020 nonmerit decision. Although OWCP's March 27, 2020 merit overpayment decision is within the Board's jurisdiction, she has not appealed that decision. Therefore, the Board will not address the March 27, 2020 merit decision in this appeal. 20 C.F.R. § 501.3(c)(4); *see E.R.*, Docket No. 20-1110 (issued December 23, 2020).

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.⁴

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 May 19, 2016 appellant, then a 70-year-old carrier/clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained arthritis of the bilateral hands, feet, hips, and wrists causally related to factors of her federal employment which included repetitive work duties of pushing and pulling equipment, lifting trays, tubs, and bags of mail, walking, stooping, bending, and reaching above the shoulders without restrictions since 2012. She indicated that she first became aware of her condition on or about May 1, 2012 and its relationship to her federal employment on April 29, 2016. A supervisor indicated that appellant continued to work a modified assignment.

By decision dated August 8, 2016, OWCP accepted appellant's claim for internal derangements of the bilateral knees, bilateral carpal tunnel syndrome (CTS), and plantar fascial fibromatosis.

On August 29, 2016 appellant filed a claim for compensation (Form CA-7) for leave without pay from August 18 through September 15, 2016. On October 3, 2016 she filed a Form CA-7 claiming compensation for leave without pay for the period September 15, 2016 and continuing.

By decision dated October 13, 2016, OWCP denied appellant's claim for wage-loss compensation for the period August 18, 2016 and continuing. It noted that her claim had been accepted for internal derangements of the bilateral knees, bilateral CTS, and plantar fascial fibromatosis. OWCP found that the medical evidence of record failed to support disability during the period claimed.

In an appeal request form received on November 7, 2016 appellant requested a review of the written record before OWCP's Branch of Hearings and Review.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the February 4, 2020 decision appellant submitted additional evidence to OWCP. 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.*

On December 12, 2016 appellant filed a Form CA-7 claiming compensation for leave without pay from September 16, 2016 and continuing.

In a letter dated December 28, 2016, OWCP replied to the Form CA-7 dated December 16, 2016. It noted that appellant's request for compensation for September 16, 2016 and continuing was not payable and advised referring to the appeal rights contained in its October 13, 2016 decision.

By decision dated February 2, 2017, a representative of OWCP's Branch of Hearings and Review affirmed the October 13, 2016 OWCP decision, finding that appellant had not submitted sufficient medical evidence to establish disability for work for the period August 18, 2016 and continuing. She noted that appellant's claim had been accepted for internal derangements of the bilateral knees, bilateral CTS, and plantar fascial fibromatosis, but foot arthritis had not been accepted as work related. It stated that as the latter condition had not been accepted as work related, as appellant's physician had not differentiated appellant's symptoms from her underlying rheumatoid arthritis or age-related arthritis, and as appellant's physician had not explained what caused appellant's condition to worsen on August 18, 2016 such that appellant could not perform duties of her federal employment, OWCP appropriately denied the claim for compensation.

On April 4, 2017 appellant underwent OWCP-approved right hand carpal tunnel surgery.

On April 27, 2017 appellant filed Forms CA-7 claiming compensation for leave without pay for the period January 21 through April 4, 2017. On May 1, 2017 she filed a Form CA-7 claiming compensation for three hours of leave buy back on April 28, 2016.

In a letter dated May 8, 2017, OWCP replied to the Forms CA-7 dated April 27, 2017. It noted that appellant's request for compensation for January 21 through April 4, 2017 was not payable and advised her that she should refer to the appeal rights contained in its February 2, 2017 decision.

On June 13, 2017 appellant filed Forms CA-7 claiming compensation for leave without pay for the period April 4 through June 17, 2017.

On July 25, 2017 appellant underwent OWCP-approved endoscopic plantar fasciotomy of the right foot.

By letter dated August 17, 2017, OWCP informed appellant that she would receive wage-loss compensation on the periodic rolls for wage loss due to disability for work. Appellant's first payment was for the period April 4 through July 22, 2017 and her regular payment began with the period July 23 through August 19, 2017.

On February 2, 2018 appellant underwent OWCP-approved endoscopic plantar fasciotomy for treatment of plantar fasciitis of the left foot.

In a statement of accepted facts (SOAF) dated March 28, 2018, OWCP noted that appellant's claim was accepted for internal derangements of the bilateral knees, bilateral CTS, plantar fascial fibromatosis, lesion of the left ulnar nerve, primary osteoarthritis of the right ankle,

foot, and first carpometacarpal joint of the right hand, and injury of the right ulnar nerve at the forearm level.

On October 15, 2018 appellant underwent an OWCP-approved right knee trochlear microfracture surgical procedure and medial femoral condyle chondroplasty. On November 16, 2018 she underwent an OWCP-approved first metatarsophalangeal joint arthrodesis of the right foot and harvest of bone marrow aspirate of the right tibia.

On May 9, 2019 appellant returned to work at eight hours per day in a limited-duty modified city carrier position.

On November 7, 2019 appellant, through counsel, requested reconsideration of the decision of February 2, 2017. Counsel noted that he was supplementing her January 27, 2018 request for reconsideration. Appellant's letter dated January 27, 2018 was attached, the record does not reflect that this letter was previously received by OWCP. Counsel further noted that her claim had originally been accepted for internal derangements of the bilateral knees, bilateral CTS, and plantar fascial fibromatosis, and that OWCP indicated in a SOAF dated March 28, 2018 that the claim included primary osteoarthritis of the right ankle, foot, and first carpometacarpal joint of the right hand, lesion of the left ulnar nerve, and injury of the right ulnar nerve at the forearm level. He attached medical reports and argued that they established appellant's disability for work from August 18, 2016 through April 3, 2017. In an attached letter dated September 5, 2019, Dr. Pedro Loreda, a Board-certified general and hand surgeon, opined that she was unable to return to work from August 18, 2016 through April 3, 2017 due to her work-related conditions of unilateral primary osteoarthritis of the right first carpometacarpal joint of the hand, bilateral CTS, a lesion of the left ulnar nerve, a right arm injury at the forearm level, primary osteoarthritis of the right hand and foot, bilateral plantar fibromatosis, and bilateral derangements of the knees. He noted that at work, appellant performed highly repetitive tasks on a daily basis including repetitive gripping, turning, bending, twisting, lifting, and carrying and that her duties included: loading, sorting, casing, and carrying mail of up to 70 pounds, prolonged standing and walking, and delivering mail. Dr. Loreda opined that these duties were strenuous and highly repetitive and that her accepted conditions developed as a result of these repetitive activities over a prolonged period of time. He stated that appellant's accepted conditions prevented her from performing job duties with or without restrictions including casing, sorting, and delivering mail as she struggled with increased pain and functional limitations in her feet, knees, arms, and hands. Gripping, sorting, and casing mail was difficult for her given her bilateral CTS and osteoarthritis of the first carpometacarpal joint of the right hand. As a result of these increased symptoms, Dr. Loreda stated that appellant was taken off work entirely during this time period. He noted that performing work in any capacity during this time period, even sedentary desk work, would have certainly caused further aggravation of her feet, knee, arm, and hand conditions. Dr. Loreda opined within reasonable medical certainty that appellant was totally disabled and unable to work from August 18, 2016 through April 3, 2017 due to her accepted conditions. Appellant also attached additional medical reports dated from May 1, 2012 through January 31, 2020.

In an SOAF dated January 31, 2020, OWCP indicated that appellant's claim was accepted for the conditions noted in its SOAF of March 28, 2018, as well as abscess of the right tendon sheath of the right hand and right knee tear of the medial meniscus.

By decision dated February 4, 2020, OWCP denied appellant's request for reconsideration as untimely and failing to present 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.⁵ 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.⁶ 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).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

OWCP may not deny a reconsideration request 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.⁹ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.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.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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

⁵ 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *See M.E.*, *supra* note 5; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *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).

¹⁰ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

¹¹ *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); *see Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Id.*; *see also Leona N. Travis*, 43 ECAB 227 (1999).

¹³ *J.F.*, *supra* note 11; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

the new evidence demonstrates clear error on the part of OWCP.¹⁵ 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.¹⁶

OWCP's procedures provide that the term clear evidence of error is intended to represent a difficult standard.¹⁷ 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.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The last merit decision in this case was dated February 2, 2017. Appellant had one year from that decision to request reconsideration. As her reconsideration request was not received until November 7, 2019, more than one year after the February 2, 2017 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the February 2, 2017 decision.

The Board further finds that appellant has demonstrated clear evidence of error by OWCP in its February 2, 2017 decision.

To determine whether appellant has demonstrated clear evidence of error, OWCP will conduct a limited review of the evidence submitted and arguments raised in support of the request in order to determine whether such evidence or argument is sufficient to show error in its prior decision.²⁰ Appellant stopped work on August 18, 2016 and returned to limited-duty work for eight hours per day on May 9, 2019. In its February 2, 2017 decision, OWCP denied her claim for compensation for leave without pay for the period August 18, 2016 and continuing. It explained that appellant had not submitted sufficient medical evidence to establish disability for work for the claimed period, in part because her diagnosed foot arthritis had not been accepted as work related. As of April 4, 2017, OWCP placed appellant on the periodic rolls for wage-loss due to disability for work. In a SOAF dated March 28, 2018, it noted that her claim had been accepted for internal derangements of the bilateral knees, bilateral CTS, plantar fascial fibromatosis, lesion of the left

¹⁵ *Id.*

¹⁶ *J.F.*, *supra* note 11; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁷ *Supra* note 7.

¹⁸ *P.H.*, Docket No. 19-1354, (issued March 13, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹⁹ *See M.E.*, *supra* note 5; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²⁰ *See* 20 C.F.R. § 10.60b (b); *V.M.*, Docket No. 18-1184 (issued July 10, 2019); *Nelson T. Thompson*, 43 ECAB 919 (1992).

ulnar nerve, primary osteoarthritis of the right ankle, foot, and first carpometacarpal joint of the right hand, and injury of the right ulnar nerve at the forearm level. In a SOAF dated January 31, 2020, OWCP indicated that appellant's claim was accepted for the conditions noted in its SOAF of March 28, 2018, as well as abscess of the right tendon sheath of the right hand and right knee tear of the medial meniscus.

The Board has held that the evidence submitted with an untimely reconsideration request must relate to the issue presented and the evidence that was before OWCP at the time of the prior decision.²¹ On reconsideration, counsel provided a full list of appellant's accepted conditions, including primary osteoarthritis of the right ankle and foot which were noted as accepted conditions in the SOAF. Also submitted was a September 5, 2019 letter from Dr. Loreda, who opined that she was unable to return to work from August 18, 2016 through April 3, 2017 due to her work-related accepted conditions of unilateral primary osteoarthritis of the right first carpometacarpal joint of the hand, bilateral CTS, a lesion of the left ulnar nerve, a right arm injury at the forearm level, primary osteoarthritis of the right hand and foot, bilateral plantar fibromatosis, and bilateral derangements of the knees. The Board has reviewed counsel's request for reconsideration and the September 5, 2019 letter from Dr. Loreda. OWCP denied appellant's claim for compensation on February 2, 2017 in part because foot arthritis was not an accepted condition under her claim, but later generated a SOAF including primary osteoarthritis of the right ankle and foot. Counsel noted that this condition had been accepted as work related by OWCP and Dr. Loreda attributed her disability for the period August 18, 2016 through April 3, 2017 due to her accepted conditions, including primary osteoarthritis of the right hand and foot. Accordingly, the Board finds that appellant, through counsel, has raised a substantial question as to the correctness of the February 2, 2017 decision denying her claim for compensation for disability from work beginning August 18, 2016. Thus, OWCP abused its discretion in denying appellant's untimely request for reconsideration.²²

The Board finds that OWCP improperly denied appellant's request for reconsideration as she has demonstrated clear evidence of error in this case. The Board will reverse OWCP's February 4, 2020 decision and remand the case for an appropriate decision on the merits of her claim.

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error in OWCP's February 2, 2017 merit decision and, thus, OWCP improperly denied her request for reconsideration of the merits of her claim.

²¹ See *V.M., id.*; *K.N.*, Docket No. 13-0911 (issued August 21, 2013); *J.S.*, Docket No. 10-0385 (issued September 15, 2010).

²² See *V.L.*, Docket No. 17-1493 (issued September 12, 2018); *D.M.*, Docket No. 18-0385 (issued September 4, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2020 decision of the Office of Workers' Compensation Programs is reversed and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 3, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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