

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

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| D.S., Appellant |) | |
| |) | |
| and |) | Docket No. 22-1254 |
| |) | Issued: June 28, 2023 |
| U.S. POSTAL SERVICE, NORTHWEST |) | |
| PROCESSING & DISTRIBUTION CENTER, |) | |
| Rochester, NY, 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 August 24, 2022 appellant filed a timely appeal from a July 14, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated June 1, 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 to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the July 14, 2022 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.*

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 December 1, 2020 appellant, then a 53-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on November 20, 2020 she sustained a low back strain after she threw a parcel into an all-purpose container while in the performance of duty. She stopped work on the date of the claimed injury.

On November 20, 2020 the employing establishment issued an authorization for examination and/or treatment (Form CA-16), authorizing appellant's treatment at a hospital emergency department for a back injury.

OWCP received a November 21, 2020 emergency room report by Patrick Carbary, a physician assistant, containing aftercare instructions for back pain.³

On November 23, 2020 Dr. Dylan L. Norton, Board-certified in emergency medicine, completed an attending physician's report, Part B of a Form CA-16. He diagnosed low back pain. Dr. Norton prescribed medication and restricted appellant to lifting no more than 20 pounds.

In a report of even date, Dr. Norton recounted a history of a November 20, 2020 employment incident when appellant threw a heavy box and heard a "pop" in her back, followed by the onset of left-sided low back pain radiating into the posterior aspect of the thigh. He diagnosed lumbosacral strain, muscle spasm, herniated lumbar disc, nerve impingement, radiculopathy, and sciatica.

Appellant returned to full-time, modified-duty work on November 23, 2020.

In reports dated December 31, 2020, Dr. Joanne Wu, a Board-certified family practitioner, recounted a history of a November 8, 2020 employment incident when appellant sustained a lift and twist injury when handling a package weighing 30 to 40 pounds. She noted that November 23, 2020 lumbosacral x-rays demonstrated mild disc space narrowing at L3-4 and L4-5, mild spurring throughout the lumbar spine, normal alignment of the lumbar spine, and no fracture or dislocation. Dr. Wu diagnosed chronic midline low back pain with bilateral sciatica. She returned appellant to full-time work with lifting restricted to 20 pounds and limited bending and twisting. Dr. Wu prescribed medication.

In a February 11, 2021 report, Dr. Wu noted that appellant's symptoms had improved. She diagnosed chronic midline low back pain with bilateral sciatica.

³ November 21, 2020 lumbar x-rays demonstrated mild loss of disc height at L3-4 with mild endplate spurring, and normal alignment at L1 through L5.

OWCP also received reports dated March 9, 2021 by Danielle Marie Lazzaro, a nurse practitioner.

In a March 16, 2021 report of a March 9, 2021 examination, Dr. Dieter Affein, Board-certified in occupational medicine, diagnosed acute right-sided low back pain with right-sided sciatica.

In an April 23, 2021 development letter, OWCP informed appellant of the deficiencies of her traumatic injury claim. It advised her of the type of factual and medical evidence necessary and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In response, appellant submitted a development questionnaire dated May 13, 2021, alleging that she sustained a lumbar injury when she lifted and threw a 50-pound box, with severe pain symptoms for three weeks following the incident.

OWCP also received February 23 and March 16, 2021 reports by Dr. Wu diagnosing lumbar disc herniation, lumbar radiculopathy.⁴

In reports dated April 12 and 21, 2021, Dr. Affein diagnosed acute right-sided low back pain, right-sided sciatica, and acute right knee pain. He provided work restrictions.⁵

By decision dated June 1, 2021, OWCP accepted that the November 20, 2020 employment incident occurred as alleged and that a medical condition was diagnosed in connection with the incident. However, it denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish causal relationship between her diagnosed lumbar conditions and the accepted November 20, 2020 employment incident.

OWCP also received a May 13, 2021 report by Taylor James Indivero, a physician assistant.⁶

In reports dated June 7 and 28, 2021, Dr. Rami Elshaar, a Board-certified orthopedic surgeon, recounted a November 8, 2020 employment injury to the right knee while lifting heavy boxes. He diagnosed an acute medial meniscus tear of the right knee and recommended surgical repair.

⁴ OWCP also received a March 29, 2021 work status report with an illegible signature, and a March 29, 2021 report by Ms. Lazzaro.

⁵ Appellant also submitted imaging studies. A March 7, 2021 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated multilevel degenerative disc disease and facet arthropathy, a small focal right-sided disc protrusion/herniation at L5-S1 with mild bilateral foraminal narrowing. An April 29, 2021 right knee x-ray demonstrated a small joint effusion and mild tricompartmental degenerative change.

⁶ A May 21, 2021 MRI scan of the right knee demonstrated a posterior root tear of the medial meniscus with a seven mm extrusion, superior surface tear of the body of the lateral meniscus along the inner margin, mild insertional tendinopathy of the popliteus tendon, mild osteoarthritis, small joint effusion, mildly complex Baker's cyst with evidence of acute partial rupture, edema within the superolateral aspect of Hoffa's fat pad, intact cruciate and collateral ligaments, intact tendons, and no fracture or dislocation.

In reports dated June 17 through October 14, 2021, Dr. Boris M. Shmigel, a Board-certified general surgeon, recounted a November 23, 2020 employment incident. He answered “Yes” indicating support for causal relationship between appellant’s diagnosed conditions and the November 23, 2020 employment incident.

On November 5, 2021 appellant requested reconsideration.

By decision dated November 10, 2021, OWCP denied appellant’s request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Thereafter, OWCP received reports dated from November 4, 2021 through May 26, 2022 by Dr. Shmigel, noting that appellant “sustained an injury to [appellant’s] back and knee” on November 23, 2020. In response to questions excerpted from a state workers’ compensation form, he answered “Yes” to indicate that the incident appellant described was the competent cause of the diagnosed conditions. Dr. Shmigel noted work restrictions.

In a January 20, 2022 report, Dr. Elshaar recounted that on November 8, 2020 appellant experienced the onset of low back pain while lifting heavy boxes at work, with subsequent right knee pain. He diagnosed medial meniscus root tear. Dr. Elshaar opined that the root tear was “likely the cause of [appellant’s] mechanical symptoms and pain in her knee after this traumatic injury.”

In a March 4, 2022 report, Dr. Matthew Charles Kruppenbacher, an osteopath Board-certified in physiatry, recounted that on November 20, 2020 appellant threw a box, “heard a pop in [appellant’s] back,” and experienced the immediate onset of low back pain into the right gluteal region and posterior thigh. He noted findings on examination and diagnosed intervertebral disc disorder and lumbosacral radiculopathy. Dr. Kruppenbacher prescribed physical therapy.

In a May 18, 2022 report, Dr. Kruppenbacher noted that appellant was involved in a motor vehicle accident on May 13, 2022 and experienced “a bit of an increase in pain level” but no new symptoms. He diagnosed intervertebral disc disorder with radiculopathy of lumbosacral region, axial low back pain consistent with intervertebral disc disease at L5-S1 vs. L4-5 vs. L3-4, and right lower extremity pain consistent with S1 radicular pain secondary to herniated nucleus pulposus vs. somatic referral from axial low back pain.

On June 27, 2022 appellant requested reconsideration.

Thereafter, OWCP received a February 19, 2021 chart note by Dr. Wu regarding medication for knee pain, and February 23, 2021 notes by Dr. Wu prescribing medication, noting work restrictions, and scheduling a lumbar MRI scan.

In a May 26, 2022 report, Dr. Shmigel noted that appellant had sustained a back injury and knee injury on November 23, 2020 and would undergo right knee surgery and a lumbar injection. He answered a question “Yes” indicating his support for causal relationship between the accepted November 23, 2020 employment incident and the diagnosed conditions.

Appellant also submitted copies of November 21 and 23, 2020 reports previously of record.

By decision dated July 14, 2022, OWCP denied appellant's June 27, 2022 request for reconsideration of, 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.⁷ 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).⁸ 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.⁹

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.¹⁰ 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 the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹¹

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.¹² Evidence that does not raise a substantial question as to 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 the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁵ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on

⁷ 20 C.F.R. § 10.607(a).

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

⁹ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

¹⁰ 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).

¹¹ *Supra* note 7. *See also supra* note 8 at Chapter 2.1602.5a (September 2020).

¹² 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).

¹³ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁵ *Id.*

the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁶

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁷ 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 insufficient to demonstrate clear evidence of error.¹⁸

ANALYSIS

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.

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.¹⁹ As appellant's request for reconsideration was received by OWCP on June 27, 2022 more than one year after OWCP's June 1, 2021 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP.²⁰

The Board finds that the medical evidence submitted on reconsideration is insufficient to demonstrate clear evidence of error in OWCP's June 1, 2021 decision.²¹ On reconsideration, appellant submitted additional medical reports by Dr. Shmigel dated November 4, 2021 through May 26, 2022, a report by Dr. Elshaar dated January 20, 2022, and reports by Dr. Kruppenbacher dated March 4 and May 18, 2022. She also submitted chart notes by Dr. Wu dated February 19 and 23, 2021. However, even 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 insufficient to demonstrate clear evidence of error.²² As

¹⁶ *Id.*

¹⁷ *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *see also* 20 C.F.R. § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (September 2020).

¹⁸ *R.P.*, Docket No. 22-0686 (issued September 30, 2022); *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *A.S.*, Docket No. 15-1598 (issued December 7, 2015).

¹⁹ *Supra* note 7.

²⁰ *See supra* note 12.

²¹ *M.D.*, Docket No. 22-0542 (issued August 17, 2022); *R.W.*, Docket No. 21-1164 (issued April 5, 2022); *A.S.*, Docket No. 18-1556 (issued September 17, 2019); *L.B.*, Docket No. 19-0635 (issued August 23, 2019).

²² *See supra* note 18.

such, this evidence does not raise a substantial question as to the correctness of OWCP's June 1, 2021 merit decision.²³

Appellant also resubmitted copies of November 21 and 23, 2020 reports previously of record at the time of OWCP's June 1, 2021 decision.²⁴ The Board has held that evidence, which duplicates or repeats evidence already in the case record does not raise a substantial question as to the correctness of OWCP's decision.²⁵

As noted above, clear evidence of error is intended to represent a difficult standard.²⁶ 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.²⁷

As appellant's request for reconsideration does not demonstrate on its face that OWCP committed error in its June 1, 2021 decision, the Board finds that OWCP properly determined that she did not demonstrate clear evidence of error.²⁸

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.

²³ See *L.S.*, Docket No. 22-0541 (issued October 3, 2022); see also *D.R.*, Docket No. 21-0061 (issued May 24, 2021).

²⁴ See *R.W.*, *supra* note 21.

²⁵ See *A.M.*, Docket No. 17-1434 (issued January 2, 2018); see *D.B.*, Docket No. 16-0539 (issued May 26, 2016).

²⁶ See *supra* note 12; see also *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²⁷ *E.L.*, Docket No. 22-0631 (issued October 31, 2022); see also *J.S.*, *id.*

²⁸ The Board notes that the employing establishment issued a Form CA-16, dated November 20, 2020. A completed Form CA-16 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. See 20 C.F.R. § 10.300(c); *V.S.*, Docket No. 20-1034 (issued November 25, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 28, 2023
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