

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

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S.B., Appellant)	
)	
and)	Docket No. 13-507
)	Issued: June 19, 2013
U.S. POSTAL SERVICE, SALT LAKE)	
PERFORMANCE CLUSTER, Salt Lake City, UT,)	
Employer)	
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Appearances: *Case Submitted on the Record*
David J. Holdsworth, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 2, 2013 appellant, through her attorney, filed a timely appeal of the October 12, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely filed and lacking clear evidence of error. Because more than 180 days have elapsed from the most recent merit decision dated September 27, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant objected to OWCP's finding that her claim was not timely filed. She argued that she was not informed of any change in the regulations with regard to how a timely filing would be calculated. Appellant contended that her appeal letter was mailed on September 24, 2012 and that she had no control over when that document was received. Finally, she contends that she met the clear evidence of error standard.

FACTUAL HISTORY

Appellant, a former letter carrier, had three claims before OWCP. When she was 36 years old, she filed a claim alleging that strenuous continual manipulation of her thumbs and fingers has created thumb basal joint ligament strain. OWCP accepted this claim, with a date of injury of December 26, 1996, for left index finger contusion and left index finger infection and later updated with bilateral thumb basal joint ligament strains and bilateral carpal tunnel syndrome.² It also accepted appellant's claim for a left index finger blood clot, with a date of injury of May 12, 1998.³ OWCP accepted a third claim, date of injury of July 1, 1998, for Raynaud's syndrome.⁴ All three claims were combined under the current OWCP File No. xxxxxx526. OWCP paid appropriate compensation benefits.

The record reveals that appellant was offered a limited-duty position. The record further reveals that the employing establishment withdrew her light-duty position under the National Reassessment Process (NRP) effective August 26, 2010. Subsequently, appellant filed a claim for compensation commencing August 26, 2010.

OWCP declared a conflict between appellant's treating physician, Dr. David Shaskey, a Board-certified internist with Board-certified subspecialties in rheumatology and sports medicine, and the second opinion physician, Dr. Mark A. Jones, a Board-certified surgeon with a subspecialty in vascular surgery, with regard to appellant's work limitations. It referred appellant to Dr. Robert Hansen, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Hansen was asked to list which diagnosed conditions were employment-related conditions, list the limitations attributable to the employment-related conditions and determine appellant's ability to perform the duties of a letter carrier. In an October 7, 2010 report, he listed his diagnoses as limited CREST autoimmune vasculitis with vasospasm secondary to cold exposure and Raynaud's syndrome with a history of intermittent finger ulceration. Dr. Hansen noted that there were no disabling residuals from appellant's accepted employment injuries, but that, if appellant was required to be exposed to cold, she would be expected to suffer residuals of Raynaud's syndrome and possible finger ulceration due to vasospasm secondary to cold exposure. He opined that her current symptoms of stiffness in her hands and tightness were related to underlying autoimmune vasculitis and limited scleroderma.

After giving appropriate notice, by decision dated March 4, 2011, OWCP terminated appellant's medical and wage-loss compensation benefits effective that date as the medical

² OWCP File No. xxxxxx403.

³ OWCP File No. xxxxxx978.

⁴ OWCP File No. xxxxxx526.

evidence established that the residuals or disability due to her accepted, employment-related conditions had resolved. It stated that it denied her “claim for compensation benefits for recurrence of disability and total wage loss” under NRP effective August 26, 2010 and continuing.

In a December 14, 2010 report, Dr. Shaskey noted that appellant had a 13-year history of limited scleroderma/CREST syndrome. He noted that this resulted in severe Raynaud’s phenomena and that she has had numerous digital ulcers and near gangrene of her fingers. Dr. Shaskey opined that the condition was exacerbated by cold exposure as well as repetitive hand activities and this aggravated her Raynaud’s phenomena, which led to numerous digital ulcers and loss of tissue/gangrene of numerous fingers. He indicated that it was his strong opinion that appellant’s CREST syndrome was not caused by her work, but it has been permanently aggravated by her work.

In a report dated December 14, 2010, Dr. Tracy Frech, a rheumatologist,⁵ noted that she took care of appellant for systemic sclerosis and that she believed that the cold weather exacerbated appellant’s Raynaud’s and that subsequent vasculopathy was hastened by this exposure. She indicated that environmental trigger to Raynaud’s is well described and was made worse by her employment. As such, Dr. Frech concluded that appellant continued to suffer from an employment-related injury, and would support her claims that her job exposure caused both an aggravation and acceleration of her course.

Appellant requested an oral hearing before an OWCP hearing representative, which was held on July 11, 2011.

In an August 2, 2011 report, Dr. Shaskey noted that, when appellant returned to limited-duty work with limited exposure to cold weather, she was able to stop the progression of the gangrene, digital ulcerations as well as the loss and damage of the tissue on her fingers. He opined that this was the most effective treatment, and noted that the tissue loss due to the gangrene is what changed the issue to a permanent aggravation.

By decision dated September 27, 2011, the hearing representative affirmed the termination of compensation and medical benefits, as the weight of the medical evidence established that appellant’s employment-related residuals had resolved.

In an undated report received by OWCP on October 11, 2011, Dr. Shaskey noted that it was well established that not only cold exposure but repetitive activities and especially vibratory insults can lead to Raynaud’s, and that this was clearly the case for appellant, as she had numerous large digital ulcers precipitated by repetitive activities at work, cold exposure and vibratory insults. He noted that the marked scarring and chronic pain in nearly all her digits was due to these recurrent digital ulcers that were clearly exacerbated by her work exposure. Dr. Shaskey opined that this has resulted in permanent aggravation of her underlying scleroderma manifested by multiple digital ulcers, scarring and chronic pain. He opined that it was absolutely necessary that she change her job to prevent future digital ulcers and potential further loss of her digits.

⁵ The Board was unable to confirm whether Dr. Frech is Board-certified.

In an August 23, 2012 update, Dr. Frech stated that it was her professional opinion that the repetitive use of appellant's hands and the temperature in which she worked and employment-related stress both caused and exacerbated appellant's digital ulcers. She opined that appellant now has a permanent condition.

By letter dated September 19, 2012, appellant, through her attorney, requested reconsideration. This letter was received by OWCP on October 3, 2012. Appellant's attorney contended that new evidence showed that Dr. Hansen's conclusion that the injury-related residuals have resolved was flawed based on new medical evidence in the report of Dr. Frech. He contended, *inter alia*, that appellant's work for the employing establishment involved being exposed to cold weather conditions which caused appellant to develop cold-induced vasospasm of the fingers and nonhealing digital ulcerations eventually causing auto amputation of the tips of the index and middle fingers. Dr. Hansen also argued that her work involved fine manipulation on a repetitive basis, which also contributed to nonhealing digital ulcerations. He noted that OWCP accommodated appellant's restrictions from 1999 until August 26, 2010, but since that time appellant has not been accommodated and missed many days and weeks due to her condition. Dr. Hansen contended that, due to the unpaid leave for an indefinite period of time, appellant accepted a job with the Department of Veterans Affairs, and appellant separated from the employing establishment on December 31, 2011. He contended that appellant should be entitled to compensation for wage loss for the difference between what she had been earning with the employing establishment and what she is earning at the Department of Veterans Affairs.

By decision dated October 12, 2012, OWCP denied appellant's request for reconsideration as it was not timely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁸ OWCP 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

⁶ 20 C.F.R. § 10.607(a).

⁷ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ To show 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁵

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹⁶ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁷

⁹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). 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. *Id.* at Chapter 2.1602.3c.

¹⁰ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ See *Leona D. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁶ 5 U.S.C. § 8123(a).

¹⁷ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. OWCP regulations were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹⁸ In the instant case, the last merit decision was the hearing representative's decision dated September 27, 2011. OWCP did not receive appellant's request for reconsideration until October 3, 2012, over one year after the September 27, 2011 decision. Accordingly, the request for reconsideration was not timely filed.¹⁹

The Board finds that, as the hearing representative's decision was issued on September 27, 2011, after the change in the regulations, appellant's request for reconsideration must have been received by September 27, 2012. As it was received on October 3, 2012, appellant's request was not timely, and appellant must demonstrate clear evidence of error by OWCP in denying her request for reconsideration.

Appellant has not shown clear evidence of error. The new reports submitted by Dr. Hansen and Dr. Frech are basically repetitive of their earlier reports. Dr. Frech's August 23, 2012 report wherein she indicated that the repetitive use of appellant's hand and the temperature at which she worked caused and exacerbated appellant's digital ulcers is basically repetitive of her earlier report of December 14, 2010 wherein she noted that the cold weather exacerbated appellant's Raynaud's syndrome and that the subsequent vasculopathy was hastened by her employment. Dr. Shaskey's new but undated report also was repetitive of his earlier conclusions that cold exposure and repetitive activities led to Raynaud's and that this resulted in permanent aggravation of appellant's underlying scleroderma.

To establish clear evidence of error, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The new opinions of Drs. Frech and Hansen are insufficient to overcome the special weight given the opinion of Dr. Hansen as the impartial medical specialist who concluded that there were no employment-related residuals. The Board finds that the evidence and argument submitted on reconsideration is insufficient to *prima facie* shift the weight of the evidence and raise a substantial question that OWCP erred in its September 27, 2011 decision. Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

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

¹⁸ 20 C.F.R. § 10.607.

¹⁹ *But cf. J.P.*, Docket No. 12-1596 (issued March 27, 2013) (where the Board found appellant's reconsideration request of a pre-August 29, 2011 merit decision, to be timely filed. The case was remanded to enable OWCP to review the evidence under the proper standard for timely reconsideration requests). *See also* 20 C.F.R. § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2012 is affirmed.

Issued: June 19, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board