United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 15-0989**
	)	**Issued: July 29, 2015**
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, Annandale, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 30, 2015 appellant filed a timely appeal from a January 21, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of October 24, 2011 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence following the January 21, 2015 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt,* 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits because her request was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On February 8, 2010 appellant, then a 50-year-old enforcement assistant, filed an occupational disease claim alleging that she developed right hand and wrist pain as a result of repetitive clerical work, including moving boxes and employing cabinets of legal folders. She first became aware of her condition and realized it resulted from her employment on May 29, 2009. The record indicates that appellant intermittently used sick and annual leave, but did not stop work.

Appellant received treatment from Dr. Terence B. Thompson, a Board-certified family practitioner. In a handwritten February 26, 2010 prescription note, Dr. Thompson related her complaints of a hand injury and lower back pain and noted that she was off work from February 22 to April 19, 2010. In a June 18, 2010 work status note, he requested that appellant remain off work until August 22, 2010.

By letter dated April 2, 2010, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested a detailed description of the employment-related activities which she believed caused her condition and a medical report from a physician with examination results, a medical diagnosis, and an opinion based on medical rationale on the cause of her medical condition.

In a decision dated May 7, 2010, OWCP denied appellant's claim. It found that the factual evidence was not sufficient to identify the specific employment factors that she believed caused her alleged condition and that the medical evidence failed to demonstrate that she sustained a diagnosed condition as a result of factors of her employment.

Appellant requested reconsideration, received by OWCP on June 29, 2010. In a May 10, 2010 statement, appellant reported that she began to work for the employing establishment on September 5, 2007 doing physically exhausting labor such as emptying cabinets of legal folders, packing folders, loading boxes of folders onto the carrier, and unloading the boxes to another part of the office. She described how from 2007 to 2010 she organized boxes and folders, created an inventory list of over 700 close folders and uniform system of files, and worked as an assistant. Appellant stated that her daily duties caused her physical pain and exhaustion. She related that a couple of months prior she experienced dizziness and had no coordination between her head, neck, and upper and lower extremities. Appellant also noted that she often experienced muscle spasms in her arm and hand when walking, sitting, or leaning.

Appellant submitted medical reports from 2007 and 2008. In an October 26, 2007 note, Dr. Shaliman Eivazzadeh, a Board-certified family practitioner, stated that appellant was examined for severe myalgia of both hands because of overuse. On April 7, 2008 appellant was examined in the emergency room by Dr. Mai Lai, Board-certified in emergency medicine, for

complaints of back pain after she did some gardening. Dr. Lai indicated that she could return to work on April 9, 2008.

Appellant also provided various diagnostic reports. In a March 4, 2010 diagnostic report, Dr. Satoshi Tateshima, a Board-certified diagnostic radiologist, stated that appellant had a dilation of the distal left supraclinoid internal carotid artery and that a magnetic resonance imaging (MRI) scan revealed evidence of hemorrhage or other pathology. In a May 21, 2010 MRI scan of the lumbar spine, Dr. Brian F. King, a Board-certified diagnostic radiologist, noted appellant's complaints of chronic low back pain from a lifting injury. He observed broad-based posterior 2 to 3 millimeter (mm) annular disc bulge resulting in mild late recess stenosis, slight compression of the L5 nerve roots, and mild L4 neural foraminal stenosis. In a June 10, 2010 electromyography and nerve conduction study examination, Dr. A. Elizabeth Bloze, Board-certified in physical medicine and rehabilitation, diagnosed right carpal tunnel syndrome with denervation with no evidence of right Guyon's, cubital or radial tunnel syndrome.

In a May 26, 2010 report, Dr. Judy F. Lane, a chiropractor, examined appellant for evaluation and treatment related to musculoskeletal problems that she had experienced for the past three to four months. She noted that appellant was extremely disturbed about her work environment and overwhelmed by her workload. Dr. Lane diagnosed lumbosacral somatic dysfunction, radicular neuritis, cervical somatic dysfunction, and upper extremity somatic dysfunction.

On June 3, 2010 appellant was examined by Dr. Bloze, who related appellant's complaints of pain in the low back radiating down both legs and pain in her right hand and wrist. Dr. Bloze noted that appellant had a history of intermittent back pain since 2008 and that a recent MRI scan of the lumbar spine revealed a two mm disc protrusion at L4-5. She diagnosed possible right carpal tunnel syndrome. Dr. Bloze reported that appellant believed that her low back pain was a result of lifting boxes at work.

In a June 4, 2010 prescription note, Dr. Richard E. Nussbaum, a Board-certified orthopedic surgeon, stated that appellant was seen in the office on May 26, 2010 for lumbar spine complaints. He noted a diagnosis of lumbar spine disc displacement.

Appellant was also examined by Dr. Paul Simic, a Board-certified orthopedic surgeon, who noted in a June 9, 2010 report that she complained of right hand pain and numbness for the past three months. Upon examination, Dr. Simic observed mild tenderness to palpation volarly and intact extensor mechanisms and flexor digitorum superficials. Sensation was intact to light touch and motor examination was 5/5 throughout. Dr. Simic diagnosed right hand carpal tunnel syndrome.

On July 26, 2010 Lydia Morales, one of appellant's supervisors, responded and provided comments about appellant's May 10, 2010 statement. She stated that appellant began to work as an enforcement assistant in September 2007. Ms. Morales noted that, almost immediately after appellant began to work, she began wearing a wrist bandage and stated that it was for support and comfort and was not related to her employment. She reported that the employing establishment could not corroborate or confirm several incidents where appellant described that she felt pain because she failed to report it to her supervisor. Ms. Morales stated that appellant

was informed to always request help when a task involved moving or carrying heavy boxes or similar material.

In a handwritten August 16, 2010 statement, appellant related that she needed surgery to correct carpal tunnel syndrome induced by adverse work conditions. She requested information on the status of her case in order to determine how to pay for the surgery.

By decision dated September 16, 2010, OWCP affirmed the May 7, 2010 denial decision with modification. It accepted that appellant's duties included lifting and moving boxes, assembling materials for use in a training session, and removing and replacing old file folder labels and that she was diagnosed with right carpal tunnel syndrome. OWCP denied her claim finding insufficient medical evidence to establish that her right carpal tunnel syndrome was causally related to factors of her employment.

Appellant submitted reconsideration requests which were received by OWCP on February 28 and July 26, 2011. She provided another statement describing in detail her various work duties at the employing establishment and noted her disagreements with her supervisors' July 26, 2010 statement.

In November 4, 2010 and July 8, 2011 reports, Dr. Simon Lavi, an orthopedic surgeon, reviewed appellant's description of her job duties and the medical treatment she received for her low back and bilateral wrist pain. He conducted an examination and diagnosed lumbar discopathy and bilateral carpal tunnel syndrome. Dr. Lavi opined that appellant's complaints were related to the continuous activities performed while working at the employing establishment.

By decisions dated May 26 and October 24, 2011, OWCP denied modification of OWCP's denial decisions.

Appellant again requested reconsideration, received by OWCP on October 29, 2014.

In a February 21, 2014 neurosurgical consultation report, Dr. Fredric L. Edelman, a Board-certified neurological surgeon, noted appellant's complaints of dizziness as a result of harassment at work from 2007 to 2008. He reviewed various medical records and conducted an examination. Dr. Edelman observed full range of motion of the neck and no tenderness. He also reported that eye movements, facial sensation, and cranial nerves were normal. Dr. Edelman diagnosed dizziness, anxiety and depression, and incidental left supraclinoid carotid dilation.

Appellant was also examined by Sheelah Muhammad, a physician assistant, who in a March 28, 2014 report noted that appellant was under the care of a neurologist and psychiatrist. Ms. Muhammad reviewed appellant's history and conducted an examination. She observed no scoliosis or deformities in appellant's back and full range of motion of the extremities. Ms. Muhammad diagnosed benign essential hypertension, migraine without aura, dizziness and giddiness, and unspecified hyperlipidemia.

Appellant provided several diagnostic reports. In a May 23, 2014 x-ray of the right ankle, Dr. Severiano Valenzuela, a Board-certified diagnostic radiologist, noted that no fracture was seen and that alignment and joint space were well preserved. In an April 17, 2014 MRI scan

of the brain, Dr. Bonnie Freitas, a Board-certified diagnostic radiologist, who specializes in neuroradiology, observed stable fusiform dilation of the left supraclinoid segment with extension of fusiform dilation into an aneurysm at the origin of the left posterior communicating artery.

In reports dated May 28 and June 11, 2014, Dr. Peter A. Lucero, a family practitioner, examined appellant for complaints of moderate to severe pain to the right wrist and neck pain radiating to the upper extremity. He related that she was diagnosed with carpal tunnel syndrome seven years ago and now experienced depression and anxiety due to the constant pain. Dr. Lucero stated that appellant had seen a lot of specialists for the past year for her multiple problems, primarily headaches and dizziness. He noted diagnoses of hyperlipidemia, migraine without aura, major depressive affective disorder, and cerebral aneurysm. Dr. Lucero further reported that about one week ago appellant fell down and injured her right ankle. Upon examination, he observed right wrist tenderness and weakness to grip. Tinel's sign was positive and straight leg raise testing was restricted due to pain. Dr. Lucero diagnosed bilateral carpal tunnel syndrome, chronic neck and low back pain, and multilevel disc bulges. He recommended that appellant follow up at the office in two months.

Appellant also received medical treatment from Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon. In reports dated September 24 and October 4, 2014, Dr. Tauber noted that she began to work for the employing establishment in September 2007 as an enforcement assistant and that he reviewed a detailed description of her employment activities. He related that appellant's job duties included assisting financial analysts, cleaning offices, typing, operating a computer, and sending and mailing reports and that her physical requirements consisted of prolonged sitting, repetitive movement of the upper extremities, lower extremities, repetitive gripping, grasping, and fine finger manipulation. Dr. Tauber reviewed her medical history and reported her complaints of constant headaches, constant neck pain radiating into her upper back and shoulders, and constant lower back pain. He reported that appellant was documented to have bilateral carpal tunnel syndrome, narrowing of the central canal and a disc bulge, and disc protrusion at L4/5 and stenosis at L4/5.

Dr. Tauber opined that all of appellant's pathology was industrial in that she carried out extensive repetitive motion duties. He stated that she carried out strenuous duties such as repetitive lifting, carrying, gripping, and grasping in the course of her employment. Dr. Tauber reported that these strenuous duties not only resulted in appellant's carpal tunnel syndrome, but contributed to and likely caused pathology in her cervical and lumbar spine. He noted that appellant had provided him with extensive records which documented the nature of her strenuous and repetitive duties including having to reach up and pull folders and deal with as many as 700 legal folders. Dr. Tauber concluded that she had bilateral carpal tunnel syndrome and cervical radiculopathy with cervical stenosis and a disc protrusion as a result of her repetitive work duties.

By decision dated January 21, 2015, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.[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] The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.[5]

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.[6] In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[7] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.[8]

To establish 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.[9] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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.[12]

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[3] *Id*. at § 10.607.

[4] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

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

[7] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[8] *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

[9] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

[10] *Jimmy L. Day*, 48 ECAB 652 (1997).

[11] *Id.*

[12] *Annie L. Billingsley*, 50 ECAB 210 (1998).

ANALYSIS

The only decision before the Board is the January 21, 2015 nonmerit decision, in which OWCP denied appellant's request for reconsideration because her request was untimely filed and failed to establish clear evidence of error. On October 24, 2011 OWCP denied modification of the May 26, 2011 decision denying appellant's occupational disease claim. In a letter received by OWCP on October 29, 2014, appellant requested reconsideration. The Board finds that more than one year elapsed from the most recent OWCP merit decision dated October 24, 2011, to appellant's request for reconsideration received on October 29, 2014.[13] Thus, appellant's request for reconsideration is found to be untimely filed.

The Board also finds that appellant failed to establish clear evidence of error. Along with her request for reconsideration appellant provided various medical reports not previously reviewed. In reports dated September 24 and October 4, 2014, Dr. Tauber reviewed her history and noted that her job duties included assisting financial analysts, cleaning offices, typing, operating a computer, and sending and mailing reports and that her physical requirements consisted of prolonged sitting, repetitive movement of the upper extremities, lower extremities, repetitive gripping, grasping, and fine finger manipulation. He reported that appellant was documented to have bilateral carpal tunnel syndrome, narrowing of the central canal and a disc bulge, and disc protrusion at L4/5 and stenosis at L4/5. Dr. Tauber stated that she carried out strenuous duties such as repetitive lifting, carrying, gripping, and grasping in the course of her employment. He opined that these strenuous duties not only resulted in appellant's carpal tunnel syndrome, but contributed to and likely caused pathology in her cervical and lumbar spine. Dr. Tauber concluded that she had bilateral carpal tunnel syndrome and cervical radiculopathy with cervical stenosis and a disc protrusion as a result of her repetitive work duties.

The Board notes that while Dr. Tauber's opinion is generally supportive of a causal relationship between appellant's bilateral carpal tunnel syndrome and lumbar conditions and her employment duties as an enforcement assistant, it does not establish clear error on the part of OWCP in denying her occupational disease claim. The report fails to show that OWCP committed an error in denying the claim nor does it raise a substantial question as to the correctness of OWCP's decision.

The additional medical reports by Drs. Lucero, Freitas, Thompson, Edelman, and Valenzuela are likewise insufficient to shift the weight of evidence in favor of appellant's claim. While the medical reports contain findings on examination and provide a medical diagnosis of her condition, they do not raise a substantial question that OWCP erred by denying her occupational disease claim. Therefore, the Board finds that appellant has not presented clear evidence of error on the part of OWCP.

OWCP procedures note 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

[13] Pursuant to OWCP regulations, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought. 20 C.F.R. § 10.607(a).

have created a conflict in medical opinion requiring further development is not clear evidence of error.[14] In this case, the medical reports appellant submitted in support of her untimely request for reconsideration are insufficient to shift the weight of evidence in favor of her claim or raise a substantial question that OWCP erred by denying her occupational disease claim. None of the evidence submitted manifests on its face that OWCP committed an error in denying her claim. Therefore, the Board finds that appellant has not presented clear evidence of error on the part of OWCP.

On appeal, appellant reviewed the evidence she had submitted and alleged that the evidence was sufficient to establish her occupational disease claim. As previously explained, however, the Board does not have jurisdiction over the merits of the occupational disease issue of the claim. It can only make a determination regarding the January 21, 2015 nonmerit decision of OWCP. Accordingly, the Board finds that OWCP properly declined to reopen appellant's claim because her request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits because it was untimely filed and failed to show clear evidence of error.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (October 2011).

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 29, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board