

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

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R.S., Appellant)	
)	
and)	Docket No. 18-0505
)	Issued: July 24, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Coldwater, MI, Employer)	
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Appearances:
Capp P. Taylor, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 8, 2018 appellant, through counsel, filed a timely appeal from a July 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated January 13, 2016, to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

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 July 17, 2015 appellant, then a 44-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained severe disc desiccation at L5-S1, bilateral neural foraminal narrowing, and a tear at L4-5 on the right side causally related to factors of her federal employment. She attributed her condition to lifting, carrying, and falls at work, including a fall that resulted in a fractured pelvis. Appellant stopped work on July 17, 2015.

A June 25, 2015 magnetic resonance imaging (MRI) scan study revealed severe L5-S1 degenerative disc disease, mild foraminal narrowing, and a right foraminal annular tear at L4-5.

In a July 15, 2015 work excuse, Dr. Charles Whitaker, who is Board-certified in family practice, found that appellant could not work pending a neurosurgery consultation.

By decision dated September 15, 2015, OWCP denied appellant's occupational disease claim. It found that she had not established a diagnosed medical condition causally related to the accepted work factors.

On October 5, 2015, appellant requested reconsideration and submitted a form report dated September 10, 2015 from Dr. Hunter Brumblay, a Board-certified neurosurgeon. Dr. Brumblay diagnosed lumbar degenerative disc disease, severe at L5-S1, a loss of disc height, and neural foraminal narrowing. He indicated that appellant's symptoms began a couple of years earlier after a fall, and found that she was totally disabled from work from August 19 to October 21, 2015.³

By decision dated January 13, 2016, OWCP denied modification of its September 15, 2015 decision. It found that the medical evidence submitted was insufficient to establish that appellant sustained a diagnosed condition or disability as a result of the identified work factors.

Dr. Brumblay, on June 27, 2017, described appellant's job duties and noted that she fractured her pelvis in 2014. He discussed the findings on the June 25, 2015 MRI scan study of the lumbar spine. Dr. Brumblay opined that the degeneration at L5-S1 was too significant to be attributable to age-related changes. He found that appellant's extensive walking, climbing stairs, bending, and lifting while performing her work duties "would certainly have contributed at the site of L5-S1 and the foraminal narrowing bilaterally." Dr. Brumblay opined that she was disabled from her usual employment for the period September 2, 2015 until March 31, 2016.

On July 13, 2017 appellant, through counsel, requested reconsideration. Counsel asserted that the newly submitted June 27, 2017 medical report from Dr. Brumblay clearly explained how the diagnosed conditions were related to employment factors.

³ Appellant also submitted a form report completed by a nurse practitioner.

By decision dated July 19, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that she had not submitted evidence sufficient to raise a substantial question regarding the correctness of its denial of her occupational disease claim.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁸ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁹ To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP,¹⁰ is positive, precise, and explicit and manifests on its face that OWCP committed an error.¹¹ The evidence must not only be of sufficient probative value to create a conflict in the medical opinion or demonstrate a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought.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. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹³

⁴ 5 U.S.C. § 8128(a); *see also* *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *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).

⁹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹⁰ *See A.M.*, Docket No. 17-1434 (issued January 2, 2018); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *See D.D.*, Docket No. 17-1750 (issued March 8, 2018); *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *See J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations¹⁴ and procedures¹⁵ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was issued by OWCP on January 13, 2016. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since OWCP did not receive her request until July 13, 2017, it was filed outside of the one-year time period and, thus, untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁶

The Board finds that appellant has not demonstrated clear evidence of error by OWCP in its January 13, 2016 decision. OWCP denied her occupational disease claim after finding that the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted work factors.

Appellant did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its January 13, 2016 decision.¹⁷ In a report dated June 27, 2017, Dr. Brumblay attributed her extensive disc degeneration at L5-S1 in part to her work duties, and found that she was disabled from September 2, 2015 until March 31, 2016. While Dr. Brumblay's opinion provides some support for causal relationship, it is insufficient to raise a substantial question as to the correctness of OWCP's decision.¹⁸ The submission of 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, does not constitute clear evidence of error.¹⁹ It is not enough to show that evidence could be construed so as to produce a contrary conclusion.²⁰ Instead, the evidence must shift the weight in appellant's favor.²¹ The Board finds that the evidence submitted does not rise to the level of clear evidence of error.

On appeal counsel asserts that Dr. Brumblay's June 27, 2017 report is sufficient to meet the standard of proof imposed by an untimely request for reconsideration. As discussed, however,

¹⁴ See *supra* note 4; see *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.4 (February 2016); see also *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁶ 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

¹⁷ See *D.F.*, Docket No. 17-0745 (issued March 14, 2018).

¹⁸ See *A.M.*, Docket No. 17-1900 (issued February 22, 2018).

¹⁹ See *D.D.*, *supra* note 11; *D.G.*, 59 ECAB 455 (2008).

²⁰ See *D.D.*, *supra* note 11.

²¹ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

this report is not sufficient to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's January 13, 2016 decision.²²

Appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying her claim. The evidence, consequently, is insufficient to demonstrate clear evidence of error.²³

On appeal counsel contends that the June 27, 2017 report from Dr. Brumblay is sufficiently detailed and rationalized to meet the standard of proof imposed by an untimely request for reconsideration. As explained above, the Board finds that the evidence submitted with the untimely reconsideration request is insufficient to meet appellant's burden of proof.

CONCLUSION

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.

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²² See *A.M.*, *supra* note 18; see also *J.P.*, Docket No. 17-1024 (issued December 27, 2017).

²³ See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).