

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

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S.B., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
HARRY S. TRUMAN MEMORIAL)
VETERANS' HOSPITAL, Columbia, MO,)
Employer)
-----)

Docket No. 24-0665
Issued: December 13, 2024

Appearances:
Appellant, pro se
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 June 5, 2024 appellant filed a timely appeal from an April 29, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 19, 2022, 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 over the merits of this case.

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 20, 2015 appellant, then a 47-year-old health benefits assistant, filed a traumatic injury claim (Form CA-1) alleging that on July 13, 2015 she injured her right shoulder when she

¹ 5 U.S.C. § 8101 *et seq.*

pulled open a door that was off track. OWCP accepted the claim for partial right rotator cuff tear. It subsequently expanded acceptance of the claim to include sprain of the cervical spine and spinal stenosis. OWCP paid appellant wage-loss compensation on the supplemental rolls from September 11, 2015 through November 12, 2016 and on the periodic compensation rolls from November 13, 2016 through May 21, 2022. It also paid appellant wage-loss compensation on the supplemental rolls from May 22 through 30, 2022.

In a March 4, 2022 letter, Dr. Wade Schondelmeyer, Board-certified in internal medicine, related that he had treated appellant for several years. He noted that appellant had developed a significant gastrointestinal illness for which she had been treating with a gastroenterologist. Dr. Schodelmeyer related that appellant had a medical appointment scheduled in Kansas City on March 2, 2022, but based on his examination of appellant on March 4, 2022, travel at that time was not a reasonable undertaking based on her abdominal pain and lower gastrointestinal symptoms.

On April 7, 2022 OWCP scheduled appellant for a May 10, 2022 second opinion examination with Dr. Kala Danushkodi, a Board-certified physiatrist, at 1:00 p.m., in Kansas City, MO. It advised her that an appointment had been scheduled for her in order to assess the status of her accepted conditions, the extent of disability, and appropriate medical treatment. OWCP explained that appellant's entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed an examination.

In a May 6, 2022 memorandum of telephone call (Form CA-110), appellant advised that she could not attend the second opinion appointment as she has carcinoid tumors on her rectum and could not travel. She left a physician's number for OWCP to verify the information. On the form, OWCP noted that this was the second or third time appellant had not attended the scheduled second opinion examination.

On May 12, 2022 QTC Medical Services, OWCP's scheduling contractor, advised OWCP that appellant had not appeared for her scheduled May 10, 2022 examination with Dr. Danushkodi.

On May 16, 2022 OWCP provided notice to appellant that it proposed to suspend her wage-loss compensation and medical benefits, pursuant to 5 U.S.C. § 8123(d), based upon her failure to attend the scheduled May 10, 2022 second opinion examination, noting that she had previously failed to report to earlier examinations which had been scheduled on January 12, February 9, March 3, and April 7, 2022. It found that the evidence of record was insufficient to establish good cause for her failure to attend or her obstruction, with the scheduled examination as no medical evidence had been provided to substantiate that she was homebound and could not travel to the appointment with Dr. Danushkodi on May 10, 2022. OWCP advised her that she had 14 days to provide a written explanation of her reasons, with substantive corroborating evidence, for failing to attend the scheduled examination. It explained that an employee's right to compensation under FECA shall be suspended during the period of a refusal or obstruction of an examination by a physician. Appellant did not respond.

By decision dated May 31, 2022, OWCP finalized its proposed suspension of wage-loss compensation and medical benefits, effective that day. It noted that it had previously directed appellant to report for the examination scheduled on January 12, February 9, March 3, and April 7, 2022 and most recently on May 10, 2022 with Dr. Danushkodi, but that she had not attended the examination or shown good cause for her failure to attend the examination. OWCP indicated that

appellant had failed to establish good cause for her failure to attend the scheduled examination and therefore, pursuant to 5 U.S.C. § 8123(d), her compensation and medical benefits were suspended, effective May 31, 2022. It advised appellant that her benefits would be reinstated only after verification that she attended and fully cooperated with the directed examination.

On June 16, 2022 appellant requested reconsideration. She noted that her medical conditions included diverticulitis, irritable bowel syndrome, chronic obstructive pulmonary disease, chronic pain syndrome, fibromyalgia, and a blood disease. Appellant stated that her medical conditions and medications made her ill at least six days a week which made it hard to travel.

In an April 21, 2022 note, Dr. Michael D. Williams, a Board-certified internist, reported that appellant had been a patient of his since 2015, and that she had a long-standing history of chronic constipation, abdominal pain, gas, and bloating. He summarized her symptoms and ongoing treatment.

In an April 29, 2022 note, Dr. Reggie A. Vaden, a Board-certified colon and rectal surgeon, advised that appellant was undergoing work up for potential cancer. She noted that traveling was not advised until a more definitive diagnosis was obtained.

In a July 6, 2022 note, Dr. Vaden stated that appellant underwent major abdominal surgery on May 17, 2022. She advised against traveling for eight weeks during the recovery period.

By decision dated July 19, 2022, OWCP denied modification of its May 31, 2022 decision. It found that appellant had not provided justification that a nonwork-related condition hindered her from traveling or being able to drive, take a shuttle or public transportation to attend the second opinion evaluation with Dr. Danushkodi.

On August 23, 2022 OWCP received appellant's August 19, 2022 request for reconsideration. In support of her request, appellant submitted a copy of a July 28, 2022 pathology report from Boone Hospital Center. The report indicated that appellant had undergone an ileostomy procedure for a benign small bowel inflammation and edema and a colon resection on July 28, 2022.

By decision dated November 16, 2022, OWCP denied her request for reconsideration, finding that the evidence was irrelevant or immaterial to appellant's failure to attend an OWCP directed second opinion on May 10, 2022.

On April 24, 2024 appellant requested reconsideration.

In an October 17, 2023 report, Dr. John W. Ellis, Board-certified in family medicine and an occupational medicine specialist, requested that appellant's claim be reopened for medical treatment. He summarized OWCP's suspension of benefits. Dr. Ellis opined that a diagnosis of a carcinoid tumor in appellant's gastrointestinal tract was a good cause for failure to attend. He discussed and provided a list of associated symptoms with a carcinoid tumor in the gastrointestinal tract and opined, in all likelihood, that appellant was having to use the restroom at least a dozen times a day. Dr. Ellis also indicated the location of the second opinion appointment with Dr. Danushkodi in Kansas City was about 130 miles away from appellant's home in Columbia, Missouri, about a two-hour drive. An attached copy of directions from appellant's home to the second opinion's office indicated that it was 132 miles away in one direction, a 2-hour and 4-

minute drive. Dr. Ellis opined that it was unreasonable to expect someone suffering from debilitating explosive diarrhea with severe abdominal cramping and bloating to drive two hours in each direction for a second opinion examination. He also noted his review of appellant's file and indicated that appellant had informed OWCP that she had been having gastrointestinal problems and complications since February 2022, but did not know that her gastrointestinal symptoms were the result of a carcinoid tumor. Dr. Ellis indicated that appellant had a very good reason and explanation as to why she was unable to make the two-hour drive in each direction to undergo a second opinion appointment, which were corroborated by her treating providers. Medical publications regarding carcinoid tumors and carcinoid syndrome were received.

Duplicative copies of documentation previously of record were also received.

By decision dated April 29, 2024, OWCP denied her request for reconsideration as it was untimely filed and failed to demonstrate 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.² 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.³ 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).⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a request for reconsideration 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.⁶ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁸ The evidence must be positive, precise, and explicit and

² 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁵ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁷ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *see also id.* at § 10.607(b).

⁸ *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); *Dean D. Beets*, 43 ECAB 1153 (1992).

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 demonstrate 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. This entails a limited review by OWCP of how the evidence submitted with the request for reconsideration bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹² The claimant must present evidence, which on its face shows that OWCP made an error.¹³ 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.¹⁴ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case.¹⁶ The most recent merit decision was OWCP's July 19, 2022 decision which denied modification of the suspension of appellant's compensation benefits effective May 31, 2022. As her request for reconsideration was not received by OWCP until April 24, 2024, more than one year after the July 19, 2022 merit decision, the Board finds that it was untimely filed. Consequently, she must demonstrate clear evidence of error on the part of OWCP in having suspended her compensation benefits effective May 31, 2022.

On reconsideration, appellant stipulated that her request was untimely and submitted an October 17, 2023 report from Dr. Ellis who reviewed appellant's medical record and indicated that she had informed OWCP of her gastrointestinal problems and complications since February 2022. He cited generally the physicians previously of record and opined that appellant's gastrointestinal

⁹ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹⁰ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹² *See supra* note 4 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹³ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

¹⁴ *Id.*

¹⁵ *W.R.*, Docket No. 24-0244 (issued May 22, 2024); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁶ 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

symptoms coupled with a two-hour drive in each direction was good reason to forgo travel for a second opinion evaluation.

In its July 19, 2022 decision, OWCP found that a sufficient justification was not provided for why the evaluation of a nonwork-related condition hindered appellant from traveling or being able to drive, take a shuttle or public transportation to attend the second opinion evaluation with Dr. Danushkodi. It reviewed medical reports from Drs. Schondelmeyer and Vanden that indicated generally that appellant had gastrointestinal issues and that traveling was ill advised until a further diagnosis was obtained.

The Board finds that although Dr. Ellis corroborated his opinion with medical documentation from appellant's physicians previously of record, copies of medical literature pertaining to gastrointestinal symptoms from a carcinoid tumor, it was insufficient to demonstrate clear evidence of error. The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁷ Further, as noted above, even 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 Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁹ It is merely not enough to establish that the evidence could be construed so as to produce a contrary conclusion.²⁰ The evidence appellant submitted with her untimely request for reconsideration does not establish on its face that OWCP's April 29, 2024 decision was issued in error.

Accordingly, the Board finds that the evidence submitted on reconsideration does not demonstrate clear evidence of error on the part of OWCP in its April 29, 2024 decision.

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.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (September 2020); *see also E.R.*, Docket No. 24-0681 (issued July 29, 2024); *K.W.*, Docket No. 19-1808 (issued April 2, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2024
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