

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On August 27, 2014 appellant, then a 60-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging that her hip and back problems were caused by factors of her federal employment, including standing to case, pull, and deliver mail and parcels; and entering and alighting from a mail truck. She stopped work on June 5, 2014.

In a May 12, 2014 report, Dr. Robert M. Peele, Jr., a Board-certified orthopedic surgeon, provided examination findings and diagnosed hip and knee osteoarthritis, medial meniscus derangement, hip and knee pain, and tibialis tendinitis.

A July 15, 2014 magnetic resonance imaging scan of appellant's hips revealed findings of mild left hip osteoarthritis, nondisplaced stress fracture of the posterior superior right ischium near the ilium junction, right hip endstage osteoarthritic changes with evidence of remote avascular necrosis, and degenerative lumbar spine changes.

In an August 11, 2014 report, Dr. Ryan Wetzel, a Board-certified physiatrist, diagnosed sciatica, noting that appellant had been given a right S1 transforaminal epidural steroid injection. On August 22, 2014 he related that appellant was given an intraarticular right hip injection for hip pain.

In an August 18, 2014 report, Dr. Coleman D. Fowble, a Board-certified orthopedic surgeon, diagnosed sciatica, and femur head and neck aseptic necrosis. On August 26, 2014 Dr. Fowble again related appellant's diagnosis of avascular necrosis of the femur head and limited appellant to light-duty work.

On August 21, 2014 Dr. Ivan Lamotta, a Board-certified orthopedic surgeon, diagnosed sciatica and lumbago, and related that appellant could perform light-duty work with no bending, stooping, kneeling, twisting, or lifting over 25 pounds.

By decision dated December 1, 2014, OWCP denied the claim, finding that the medical evidence of record was insufficient to establish a causal relationship between the diagnosed medical conditions and the accepted employment factors.

³ *Order Remanding Case*, Docket No. 19-0236 (issued August 22, 2019).

On January 15, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated February 23, 2015, OWCP denied appellant's untimely request for an oral hearing.

Appellant requested reconsideration on April 14, 2015. In support of her request, she submitted a March 9, 2015 report from Dr. Fowble diagnosing right hip avascular necrosis with some trochanteric bursitis, hip osteoarthritis, and femur head avascular necrosis.

By decision dated April 29, 2015, OWCP denied appellant's request for reconsideration of the merits of her claim.

On July 1, 2015 appellant again requested reconsideration. In support of her request, she submitted an undated and unsigned chiropractic report, which diagnosed severe hip degenerative disc disease, lower back and hip pain, hip joint bursitis, lumbar spine and pelvis disuse musculature atrophy, lumbar degenerative disc disease, lumbar facet arthrosis, lumbar, sacrum and pelvis subluxation, altered gait, antalgic posture, and hip joint fracture and avascular necrosis. The report found that the diagnosed conditions had been aggravated by appellant's employment duties. Appellant also submitted an attending physician's report (Form CA-20) dated June 23, 2015 from Dr. Fowble. Dr. Fowble diagnosed right hip avascular necrosis, right hip osteoarthritis, and right hip bursitis. He also checked a box marked "Yes," indicating that the diagnosed conditions were causally related to appellant's employment. Dr. Fowble concluded that appellant's physical labor/manual labor aggravated her avascular necrosis.

On September 14, 2015 OWCP referred appellant to Dr. Charles S. Hayes, a Board-certified orthopedic surgeon, for a second opinion as to whether appellant's diagnosed right hip, right knee, and back conditions had been caused or aggravated by her employment and the extent of any work-related disability. In a report dated October 8, 2015, Dr. Hayes, based upon a review of the statement of accepted facts (SOAF), medical record, and appellant's physical examination, diagnosed lumbar intervertebral disc degeneration, right femur idiopathic aseptic necrosis, pelvis stress fracture, right knee pain, and left knee unilateral primary osteoarthritis. He concluded that none of the diagnosed conditions had been caused or aggravated by appellant's employment, but rather were due to her morbid obesity, genetic predisposition, and severe deconditioning.

By decision dated December 14, 2015, OWCP denied modification of its December 1, 2014 decision.

On March 8, 2016 appellant again filed a request for reconsideration. In support of her request, she submitted a March 15, 2012 lumbar x-ray interpretation from Dr. Angela M. Larson, a chiropractor, diagnosing a L4-5 subluxation. Appellant also submitted a March 3, 2016 Form CA-20 from Dr. Fowble diagnosing right hip bursitis, morbid obesity, and right hip avascular necrosis. Dr. Fowble again checked a box "Yes." indicating that the diagnosed conditions were causally related to appellant's employment activity. He also related that appellant's conditions were aggravated by job-related repetitive activity, lifting, carrying, pushing, pulling, standing/walking, squatting and bending.

By decision dated April 5, 2016, OWCP denied modification of the December 14, 2015 decision.

Appellant again requested reconsideration on November 1, 2016.

In an undated Form CA-20, Dr. Fowble diagnosed right hip avascular necrosis, right hip pain, and obesity. He checked a box marked “Yes” to the question of whether the diagnosed conditions had been caused or aggravated by appellant’s employment. In support of this conclusion, Dr. Fowble explained that the diagnosed conditions had been aggravated by appellant’s job-related repetitive activity.

Dr. Lamotta, in a September 6, 2016 report, noted appellant’s complaints, detailed examination findings, and reviewed diagnostic tests. He diagnosed morbid obesity, knee and hip osteoarthritis, low back, hip, and knee pain, sciatica, hip bursitis, and femur head avascular necrosis. In a September 19, 2016 Form CA-20, Dr. Lamotta diagnosed back pain, severe right hip osteoarthritis, and morbid obesity. He checked a box marked “Yes” to the question of whether the diagnosed conditions had been caused or aggravated by appellant’s employment. Dr. Lamotta explained that appellant’s repetitive work activities aggravated the diagnosed conditions and referred to the attached September 6, 2016 report.

In a report dated September 14, 2016, Dr. Fowble detailed examination findings, reviewed diagnostic tests, and diagnosed morbid obesity, knee and hip osteoarthritis, low back, hip, and knee pain, sciatica, hip bursitis, and femur head avascular necrosis.

By decision dated January 20, 2017, OWCP denied modification of its April 5, 2016 decision.

On May 9, 2018 OWCP received appellant’s request for reconsideration dated January 20, 2018. No evidence accompanied her request.

By decision dated May 29, 2018, OWCP denied appellant’s request for reconsideration finding that she failed to submit medical evidence with her request or raise a new or relevant legal argument.

Appellant, through counsel, appealed to the Board on November 9, 2018. By order dated August 22, 2019, the Board found that OWCP erroneously applied the standard of review for a timely request for reconsideration as set forth at sections 10.605 through 10.607 of its regulations.⁴ The Board noted that the last merit decision was an OWCP decision dated January 20, 2017. Thus, as more than one year had elapsed since the last merit decision to the filing of appellant’s request for reconsideration on May 9, 2018, OWCP should have applied the clear evidence of error legal standard which is the appropriate standard for cases in which a reconsideration request is untimely filed. The Board set aside the May 29, 2019 decision and remanded the case to OWCP. The Board directed OWCP to apply the appropriate standard for reviewing an untimely request for reconsideration as set forth at 20 C.F.R. § 10.607(a).

OWCP received no further evidence following the Board’s order remanding the case.

⁴ *Id.*

By decision dated October 4, 2019, OWCP denied appellant's May 9, 2018 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error of the January 20, 2017 decision.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application 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 (iFECS).⁶ 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.⁷

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.⁸ 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 establishes clear evidence of error on the part of OWCP.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely 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 reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted 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.¹⁰

OWCP's procedures note and the Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence that 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 that, if submitted before the denial

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

⁸ 20 C.F.R. § 10.607(b); *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

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

¹⁰ *I.A.*, Docket No. 19-1910 (issued September 20, 2020); *M.P.*, Docket No. 19-0674 (issued December 16, 2019).

was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

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.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the timeliness of appellant's May 9, 2018 reconsideration request as the Board found on prior appeal that appellant's reconsideration was untimely filed.

Because appellant's request was untimely filed, she must demonstrate clear evidence of error on the part of OWCP in denying her occupational disease claim.

Appellant's untimely reconsideration request failed to demonstrate that OWCP clearly erred in finding that she had not established causal relationship between her diagnosed medical conditions and the accepted factors of her federal employment. Following the January 20, 2017 merit decision, appellant submitted no medical evidence or argument in support of her untimely request for reconsideration. The Board finds that she has not submitted any argument or evidence that manifests on its face that OWCP committed an error in denying her occupational disease claim. Appellant has, therefore, not raised a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that the request failed to demonstrate clear evidence of error.¹³

On appeal counsel argues that OWCP improperly denied review when appellant submitted evidence of causal relationship. As explained above, the Board does not have jurisdiction over the merits of the claim and OWCP properly determined appellant's untimely reconsideration request failed to demonstrate 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 demonstrate clear evidence of error.

¹¹ Federal (FECA) Procedure Manual, *supra* note 9; *G.L.*, *supra* note 7.

¹² *I.A.*, *supra* note 10; *M.P.*, *supra* note 10.

¹³ *G.B.*, *supra* note 8; *M.P.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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