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A.M., Appellant)	
)	
and)	Docket No. 10-1790
)	Issued: July 20, 2011
U.S. POSTAL SERVICE, MAIN CARRIER)	
ANNEX, Albuquerque, NM, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On June 24, 2010 appellant, through counsel, timely filed an appeal from a June 3, 2010 decision of the Office of Workers' Compensation Programs (OWCP), denying his request for reconsideration of the merits of his claim. Because more than one year has elapsed between the issuance of the last merit decision on February 5, 2002 and the filing of this appeal on August 26, 2010, the Board lacks jurisdiction to review the merits of the case.¹ Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only over the nonmerit issue in this case.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant, through his attorney, contends that the decision is contrary to fact and law.

FACTUAL HISTORY

On July 1, 1999 appellant, then a 47-year-old maintenance mechanic, filed a traumatic injury claim alleging that on that date he fell approximately 10 feet from a ladder to an asphalt surface and fractured his right elbow, left wrist and clavicle. On August 24, 1999 OWCP accepted his claim for fracture of the right humerus; fracture of the left distal radius; fracture of the right olecranon, right reduction with fixation and left reduction with fixation. It later accepted appellant's claim for tear of the bilateral meniscus and right localized primary osteoarthritis and bilateral. Appellant underwent multiple surgeries and OWCP paid appropriate compensation and medical benefits. OWCP referred him to a nurse to monitor his case.

On May 15, 2001 a panel evaluation was completed on appellant by Dr. Paul Legant, a Board-certified orthopedic surgeon; Dr. J. William Wellborn, a physiatrist, and Dr. Theodore J. Scharf, a psychiatrist. The panel made the following diagnoses: (1) status post comminuted fracture of the right distal humerus and olecranon process. Status post open reduction internal fixation with limited range of motion and complaints of chronic pain in the right elbow; (2) status post open reduction internal fixation of a comminuted fracture of the left radius. Complaints of chronic pain in the left radial area of the wrist and in the base of the left thumb, extending onto the radial side of the left wrist; (3) healed fracture of the right clavicle; (4) tear in the posterior horn of the left knee; (5) major depression; and (6) panic disorder, episodic. The panel noted that all these conditions were related to appellant's July 1, 1999 fall. It believed that he could perform work in a sedentary category such as clerical work. However, the panel did not believe that appellant could perform the previous duties as a maintenance mechanic because of the physical demands which his impairments prevented him from performing.

On October 2, 2001 the employing establishment offered appellant a limited-duty assignment as a maintenance operations support section clerk. This position would not require bending, stooping or twisting and would not require that he lift, push or pull more than 5 to 10 pounds intermittently. Appellant declined the position, stating that he was suffering from depression and anxiety which was causing disorders in sleeping, eating and mood swings. By letter dated October 11, 2001, OWCP informed him of the suitability of the position and gave him 30 days to contact OWCP and make a good faith effort to participate in the registered nurse's efforts to return him to gainful employment. It informed appellant that pursuant to 5 U.S.C. § 8113(b) a claimant must undergo vocational development as directed by OWCP and that, pursuant to 20 C.F.R. §§ 10.518 and 10.519, an injured worker must take steps to prepare for reemployment. OWCP further noted that unless he provided evidence to the contrary it will assume that the nurse intervention would have resulted in a return to work with no loss of wage-earning capacity.

By decision dated February 5, 2002, OWCP reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) effective February 23, 2002 because he did not cooperate in vocational rehabilitation efforts and OWCP found that his wage-earning capacity would have increased a great deal as a result of suitable employment that he declined to accept.

On March 26, 2010 appellant, through counsel, filed a request for reconsideration of the February 5, 2002 decision reducing his compensation to zero. Although counsel admitted that the request for reconsideration was untimely, he contended that the February 5, 2002 decision contained clear evidence of error. Specifically, he argued that, before OWCP can invoke the penalty provision of section 8113(b) and reduce a claimant's wage-loss benefits for failure to apply for and undergo vocational rehabilitation without good faith, there must be some evidence that demonstrates specific facts, supporting that a claimant failed to properly undergo vocational rehabilitation. Counsel argued that, as there was no evidence that appellant was referred to the vocational rehabilitation process, the job offer developed by the employing establishment must stand independent of any vocational effort by OWCP. Accordingly, he argued that OWCP's invocation of section 8113(b) or any of the implementing regulations pertaining to the vocational rehabilitation process as a penalty was without authority. Counsel concluded that, as OWCP utilized the penalty provision of section 8113(b) without having a vocational rehabilitation plan in place, such action is reversible and constituted clear evidence of error.

By decision dated June 3, 2010, OWCP denied appellant's request for reconsideration as 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, a claimant must file his application for review within one year of the date of that decision.³ 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.⁴

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.⁵ OWCP's regulations and procedure provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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 decision.¹²

Section 8104(a) of FECA pertains to vocational rehabilitation and provides: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services."¹³ Under this section of FECA, OWCP has developed procedures by which an emphasis is placed on returning partially disabled employees to suitable employment and/or determining their wage-earning capacity.¹⁴ If it is determined that the injured employee is prevented from returning to the date-of-injury job vocational rehabilitation services may be provided to assist returning the employee to suitable employment.¹⁵ Where reemployment at the employing establishment is not possible, OWCP will

⁶ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedure further provides, 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.

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

¹³ 5 U.S.C. § 8104 (a).

¹⁴ Federal (FECA) Procedure Manual, *supra* note 6, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (December 1993).

¹⁵ *Id.*

assist the claimant to find work with a new employer and sponsor necessary vocational training.¹⁶ In this regard, OWCP's implementing regulations provide that where a suitable job has been identified, OWCP will reduce appellant's future monetary compensation based on the amount that would have been his wage-earning capacity if he had undergone vocational rehabilitation. The regulations note that OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process. The regulations note that, when a suitable job has not been identified because the failure or refusal occurred in the early but necessary stages of the vocational rehabilitation effort, OWCP cannot determine what would have been the employee's wage-earning capacity. Under these circumstances, in the absence of evidence to the contrary, OWCP will assume that the vocational effort would have resulted in a return to work with no loss of wage-earning capacity and OWCP will reduced the employee's monetary compensation accordingly until appellant acted in good faith to comply with OWCP's directions.

FECA further provides: "If individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104" OWCP, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, "may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of OWCP."¹⁷ Under this section of FECA, an employee's failure to willingly cooperate with vocational rehabilitation may form the basis termination of the rehabilitation program and reduction of monetary compensation.¹⁸

ANALYSIS

The Board finds that appellant's request for reconsideration was untimely filed. The most recent merit decision is the February 5, 2002 decision reducing his compensation benefits to zero for failure to cooperate with vocational rehabilitation. Appellant's request for reconsideration was received by OWCP on March 30, 2010, more than eight years after the most recent merit decision. Accordingly, his request for reconsideration was not timely filed within the one-year time requirement for filing.

OWCP's February 5, 2002 decision reduced appellant's compensation to zero on the grounds that without good cause he failed to undergo vocational rehabilitation when so directed. Appellant argued on reconsideration that there was no refusal to undergo vocational rehabilitation because referral to a nurse does not constitute vocational rehabilitation. The Board finds that this argument has merit. Appellant was referred to a panel evaluation by Drs. Legant, Wellborn and Scharf. In a report dated May 15, 2001, these physicians opined that he could perform sedentary work. Based on this report, the employing establishing offered appellant a

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 8113(b).

¹⁸ See *Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stages of developing a training program).

limited-duty position which he refused. There is no evidence that the job offer made by the employing establishment was made as part of a rehabilitation plan designed by OWCP. The job offer developed by the employing establishment stands independent of any vocational rehabilitation effort of OWCP.¹⁹

As the Board has previously held, the regulations do not equate the assignment of an OWCP nurse with vocational rehabilitation.²⁰ While the regulations state that the vocational rehabilitation planning process may include meetings with a nurse,²¹ a meeting with a nurse could concern matters unrelated to vocational rehabilitation, such as medical management. When there is no evidence of vocational rehabilitation services, such as referral to a rehabilitation counselor, discussion of a rehabilitation plan, assessment of vocational skills, retraining or assistance in finding work, then it is improper for OWCP to reduce appellant's compensation under 5 U.S.C. § 8113(b).²² Although appellant's failure to accept an offered limited-duty work assignment may result in sanctions under section 8106 of FECA, it does not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of FECA and implementing regulations.²³

The evidence does not establish that appellant's referral to the nurse was part of a vocational rehabilitation plan. The evidence does show clear evidence of error by OWCP. It is well established that OWCP cannot reduce compensation to zero under the circumstances presented in this case. Accordingly, appellant has *prima facie* shifted the weight of the evidence in his favor and raised a substantial question as to the correctness of OWCP decision. Therefore, OWCP abused its discretion in failing to reopen appellant's claim for further merit review.

CONCLUSION

The Board finds that appellant established clear evidence of error in the February 5, 2002 decision and thus OWCP improperly denied his request for reconsideration.

¹⁹ See *Rebecca L. Eckert*, 54 ECAB 183 (2002).

²⁰ *Id.* at 191.

²¹ See 20 C.F.R. § 10.519(b).

²² See *Rebecca L. Eckert*, *supra* note 19.

²³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2010 is reversed.

Issued: July 20, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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