

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

_____)	
H.S., Appellant)	
)	
and)	Docket No. 12-1447
)	Issued: December 21, 2012
U.S. POSTAL SERVICE, POST OFFICE,)	
Oklahoma City, OK, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 26, 2012 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) nonmerit decision dated May 18, 2012, which denied her request for reconsideration as it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the most recent merit decision of August 4, 2003 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 15, 2000 appellant, then a 56-year-old target mail aviation security specialist, filed an occupational disease claim alleging that her modified duties of lifting and bending aggravated her cervical condition. She stopped work on January 24, 2000. OWCP accepted appellant's claim for cervical strain and cervical degenerative disc disease at C4-5 and C5-6. It authorized surgery for an anterior cervical discectomy and fusion at C4 to 7, which appellant underwent on June 7, 2001.

In a September 24, 2001 report, Dr. Frank J. Tomecek, a treating Board-certified neurosurgeon, reviewed appellant's history and findings. He provided restrictions for her return to full-time work. On October 30, 2001 the employing establishment provided appellant with a written job offer for a full-time position as a modified mail handler based on Dr. Tomecek's restrictions. On November 15, 2001 OWCP advised appellant that the offered position was suitable and she was given 30 days in which to accept the position. On November 15, 2001 it received an October 31, 2001 report from Dr. Tomecek, who advised that, while he was "not exactly certain why she is doing so poorly now," she was totally disabled. Dr. Tomecek offered a similar opinion in a January 18, 2002 report. After he was provided with a copy of the October 30, 2001 job offer, he advised on April 29, 2002 that appellant could perform the duties of the offered position, starting at four hours a day for a few weeks and then at full time.

In a May 6, 2002 report, Dr. Stuart C. Smith, a Board-certified neurosurgeon and OWCP referral physician, opined that appellant's prognosis for return to work was poor and recommended a functional capacity evaluation (FCE). In a June 10, 2002 supplemental report, he stated that she could not perform her regular job but could perform sedentary work. On May 9, 2002 the employing establishment provided appellant with a written job offer for a full-time modified mail handler position as originally presented to her in 2001. Appellant would begin at four hours a day for the first few weeks and work up to full time, as recommended. On May 20, 2002 OWCP advised her that the offered position was found suitable and provided her 30 days to accept the job.

In a June 10, 2002 report, Dr. Lawrence A. Reed, a general practitioner, noted that he had been treating appellant since February 1982. He advised that he had reviewed her job descriptions and opined that she was totally disabled for work.

On June 14, 2002 appellant accepted the job offer of May 9, 2002 under protest. She performed the modified-duty position on June 24, 26 and 27, 2002, but stopped work and did not return.

On June 26, 2002 OWCP found that, due to the conflicting opinions of Dr. Tomecek, Dr. Smith and Dr. Reed, the job offer of May 9, 2002 was unsuitable. On September 4, 2002 it referred appellant to Dr. John D. DeWitt, a Board-certified neurologist, for an impartial medical evaluation to address her work capacity and physical restrictions. In a September 24, 2002 report, Dr. DeWitt noted her history and treatment. He examined appellant and reviewed a description of the offered limited-duty position of modified mail handler. Dr. DeWitt determined that appellant was capable of sedentary work requiring minimal standing and

walking and that she should not push, pull or lift up to 10 pounds. He agreed with the restrictions provided by Dr. Tomecek on April 29, 2002.

By letter dated October 8, 2002, OWCP advised appellant that the offered position of modified mail handler was suitable. Appellant was advised that she had 30 days to either accept the position or provide an explanation of her reasons for refusing it. She was further advised that under 5 U.S.C. § 8106(c)(2), an employee who refused suitable work was not entitled to further compensation for wage loss or schedule award.

In a November 7, 2002 letter, appellant stated that she was refusing the offered position due to a lack of information regarding the nature, location and duties of the job.

By letter dated November 14, 2002, OWCP advised appellant that the reasons she had given for refusing the offered position were found to be unacceptable. Appellant was given an additional 15 additional days to accept the position. She did not respond.

By decision dated December 3, 2002, OWCP found that appellant had refused suitable work and was therefore not entitled to further monetary compensation. Appellant was advised that her monetary benefits would terminate as of December 29, 2002.²

In a December 9, 2002 telephone call memorandum, appellant's representative notified OWCP that appellant reported to work on December 7, 2002 but was sent home.

On December 16, 2002 appellant requested a hearing, which was held on May 21, 2003. By decision dated August 4, 2003, the hearing representative affirmed the December 3, 2002 decisions.

By letter dated February 14, 2012, appellant requested reconsideration and submitted additional medical evidence.³ The evidence included: reports dated October 30, 2007 to March 28, 2012, from Dr. Don Barney, an osteopath; reports dating from August 26 to October 24, 2011, from Dr. Darnell Blackmon, a Board-certified orthopedic surgeon; an August 26, 2008 report from Dr. David Crass, a psychiatrist and pain management physician; reports dated August 10, 2005 and October 24, 2011 from Dr. Brian Chalkin, an orthopedic surgeon, reports dated January 18, 2002 to December 22, 2005 from Dr. Tomecek and a May 15, 2003 report from Dr. Reed. The reports did not specifically address appellant's ability to perform the offered position. OWCP also received physical therapy notes, a July 24, 2007 functional capacity evaluation summary and computerized tomography (CT) scan of the chest from August 21, 2008.

² By separate decision, dated December 3, 2002, OWCP denied the claim for a schedule award. It found that the medical evidence did not establish that appellant had reached maximum medical improvement.

³ On November 10, 2003 appellant's representative appealed to the Board. On January 30, 2004 the Board dismissed the appeal as appellant did not submit a signed authorization for her representative. Docket No. 04-256 (issued January 30, 2004). On September 20, 2004 appellant filed an appeal. On January 25, 2005 the Board dismissed the appeal, as it was untimely filed. Docket No. 04-2291 (issued January 25, 2005).

In a September 13, 2004 statement, appellant contended that other cases were given special treatment as compared to her case, which was handled with prejudice. In an October 7, 2004 statement, she questioned OWCP's decision in her claim. Appellant suggested that she was denied because she retired and that she was still pursuing her claim.

In a May 18, 2012 decision, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.⁴

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁵

OWCP's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁶ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁷

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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

⁴ An earlier decision dated May 11, 2012 was superseded.

⁵ 5 U.S.C. § 8128(a).

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.607(b).

question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. 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 reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁰

ANALYSIS

In its May 18, 2012 decision, OWCP properly determined that appellant failed to file a timely reconsideration request. It rendered its most recent merit decision on August 4, 2003. Appellant's February 14, 2012 letter requesting reconsideration was submitted more than one year after the August 4, 2003 merit decision and was therefore untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's reconsideration request showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her request. It reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The underlying issue in this case is whether OWCP properly terminated monetary benefits due to appellant's refusal to accept suitable work under 5 U.S.C. § 8106(c).

In a September 13, 2004 statement, appellant asserted that other cases were given special treatment and that her claim was handled with prejudice. The Board notes that she submitted no evidence supporting her allegation of disparate treatment or otherwise explained how her allegations raise a substantial question as to the correctness of OWCP's decision. Appellant referred to a rating from her physician but did not explain how this related to the issue of refusal of suitable work. In general, she has questioned OWCP's decision, suggesting that her claim was denied because she retired. The Board notes that her monetary benefits were not terminated because she retired, rather, her benefits were terminated because she refused suitable work. The record indicates that appellant did not accept the offered position before OWCP issued its December 3, 2002 decision that terminated her monetary benefits. To the extent that she

⁹ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

¹⁰ *Id.*

contends that she returned to work on December 7, 2002 as noted in a telephone call memorandum, the Board notes that this occurred after her wage-loss benefits had been terminated. These assertions do not raise a substantial question concerning the correctness of OWCP's decision.

On reconsideration, appellant submitted numerous medical records from her treating physicians, but this evidence is insufficient to establish clear evidence of error. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized report which, if submitted prior to OWCP's merit decision, might require additional development of the claim, is insufficient to establish clear evidence of error.¹¹ The Board notes that none of the medical records specifically addressed appellant's ability to perform the offered position and they do not raise a substantial question as to the correctness of OWCP's decision. Consequently, OWCP properly found that appellant's reconsideration request did not establish clear evidence of error.

On appeal, appellant argued that she returned to work and did not refuse the offered position. However, as noted above, she did not accept the offered position before her benefits were terminated. This argument does not show clear evidence of error. Appellant also submitted additional evidence on appeal. The Board has no jurisdiction to review this evidence for the first time on appeal.¹²

CONCLUSION

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

¹¹ See *E.R.*, Docket No. 09-599 (issued June 3, 2009).

¹² 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 21, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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