

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

S.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bedford, IL, Employer**

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**Docket No. 13-91
Issued: May 6, 2013**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 16, 2012 appellant, through his attorney, filed a timely appeal from a September 13, 2012 Office of Workers' Compensation Programs (OWCP) decision which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days has elapsed between the most recent OWCP merit decision, dated February 19, 2010, and the filing of this appeal on October 16, 2012, the Board lacks jurisdiction to review the merits of appellant's 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 determined that appellant's February 8, 2012 request for reconsideration was not timely filed and failed to present clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 7, 2010 appellant, then a 38-year-old city transitional carrier, filed a Form CA-1, notice of traumatic injury, alleging that on December 30, 2009 he was hit by a car and sustained injuries to his head, neck and back. He did not stop work.

Appellant submitted a January 5, 2009 statement and indicated that on December 30, 2009 he was struck by an automobile. He indicated that the next day he began to feel poorly and went to see his physician on January 6, 2010. On January 6, 2010 appellant was treated by Dr. Michael Hartmann, a Board-certified emergency room physician, for a head injury. Dr. Hartmann diagnosed cervical strain and concussion/head injury and noted the computerized tomography (CT) scan and x-rays were negative. Appellant was also treated by Dr. Sonal N. Bhatt, a Board-certified internist, on January 6, 2010 for contusion of the face, scalp and neck, lumbar sprain and concussion. A CT scan of the cervical spine dated January 6, 2010 revealed no fractures. X-rays of the cervical, thoracic and lumbar spine dated January 6, 2010 were normal.

By letter dated January 20, 2010, OWCP advised appellant of the type of factual and medical evidence needed to establish his claim, particularly requesting that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

Appellant submitted a January 7, 2010 note from Dr. Timothy J. Erickson, a chiropractor, who treated appellant on that date and recommended additional treatment. In a January 8, 2010 report, Dr. Bhatt diagnosed contusion of the face, scalp and neck and lumbar sprain and concussion. Also submitted were physical therapy notes from January 25, 2010.

By decision dated February 19, 2010, OWCP denied appellant's claim on the grounds that he failed to establish that the claimed medical condition was causally related to the established work-related events.

Appellant continued to submit evidence. In a November 28, 2011 letter, his counsel noted submitting a medical report and asked that OWCP accept the claim. On January 5, 2012 OWCP responded to counsel's letter and advised that, as OWCP denied the claim on February 19, 2010, all appeal rights had expired.

On February 8, 2012 appellant, through his attorney, requested reconsideration. He asserted that his claim was denied because his chiropractor did not diagnose a subluxation of the spine upon reviewing an x-ray. Appellant's attorney asserted that on December 27, 2011 Dr. Erickson diagnosed a subluxation and that this was positive, precise and explicit evidence of the compensability of appellant's claim. In an attached December 27, 2011 report, Dr. Erickson responded to an inquiry from appellant's counsel and advised that his records should have reflected a subluxation diagnosis. Appellant submitted x-rays of the lumbar, thoracic and cervical spine dated January 6, 2010, a report from Dr. Hartmann dated January 6, 2010, reports from Dr. Bhatt dated January 6 and 8, 2010 and a January 7, 2010 report from Dr. Erickson, all previously of record. He submitted reports from Dr. Bhatt, dated January 14 to 29, 2010, who treated him for a December 30, 2009 injury where he sustained a contusion to the face, scalp and

neck. Dr. Bhatt diagnosed concussion without loss of consciousness and lumbar and cervical strain. Other reports dated February 3 to March 12, 2010 noted appellant's complaints of dizziness, visual disturbances and lumbar and cervical pain. She diagnosed concussion, face and scalp contusion, cervical and lumbar strain and referred appellant to a neurologist. Also submitted were physical therapy reports dated January 12 to February 8, 2010. A February 1, 2010 magnetic resonance imaging scan of the brain revealed no abnormalities. Appellant submitted a January 7, 2010 physical examination report prepared by Dr. Erickson who noted that appellant was hit by a car on December 30, 2009 and experienced dizziness, neck pain and headaches. Dr. Erickson noted pain with cervical and dorso lumbar range of motion studies, numbness and spasm. He noted positive Soto Hall, Rhomberg and Kemps test. In an October 31, 2011 report, Dr. Erickson provided a history of injury indicating that, on December 30, 2009, while on duty as a mail carrier, appellant was struck by a hit and run driver. He noted subjective complaints of neck, midback, low back and shoulder pain, headaches, dizziness, numbness, forgetfulness and visional issues. Dr. Erickson noted findings upon physical examination of decreased cervical, thoracic and lumbar range of motion, positive foraminal compression and tenderness upon palpation of the cervical, thoracic and lumbar spine. He diagnosed contusion of the face, scalp and neck, concussion and neck, lumbar and thoracic sprain. Dr. Erickson opined that the facts of injury were the direct and proximate cause of the diagnoses. On an ICD-9 Diagnosis Codes form, he noted sprain of the neck and lumbago. In a December 27, 2011 e-mail to appellant's attorney, Dr. Erickson noted that after reviewing his notes he diagnosed sprain and strain.

By decision dated September 13, 2012, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

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."²

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the date of that decision.³ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows

² 5 U.S.C. 8128(a).

³ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

clear evidence of error on the part of OWCP in its most recent merit decision. 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 be manifest on its face that OWCP committed an error.⁴

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁰ A right to reconsideration within 180 days also accompanies any subsequent merit decision on the issues. As appellant's February 8, 2012 request for reconsideration was submitted more than 180 days after the most recent merit decision of February 19, 2010 it was untimely.¹¹ Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹²

The Board also finds that appellant has not established clear evidence of error on the part of OWCP. Appellant's February 8, 2012 request indicated that the last merit decision was February 19, 2010 and that OWCP had jurisdiction to reconsider an untimely denial of his claim if it demonstrated clear evidence of error. He asserted that Dr. Erickson's December 27, 2011 report demonstrated clear evidence of error and that the February 19, 2010 merit decision should

⁴ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L. Billingsley*, *supra* note 2.

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ To the extent that counsel's November 28, 2011 letter represented a reconsideration request, this letter was also submitted more than one year after the February 19, 2010 OWCP decision.

¹² 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

be vacated. While appellant addressed his disagreement with OWCP's decision to deny his claim for traumatic injury, his general allegations do not raise a substantial question as to the correctness of OWCP's decision. OWCP properly found that his statement of February 8, 2012 did not establish clear evidence of error.

The Board notes that the underlying issue is medical in nature and that, on reconsideration, appellant submitted x-rays of the lumbar, thoracic and cervical spine dated January 6, 2010, a report from Dr. Hartmann dated January 6, 2010, reports from Dr. Bhatt dated January 6 and 8, 2010 and a January 7, 2010 note from Dr. Erickson. OWCP had previously considered this evidence and appellant, in submitting this document, did not explain how this evidence was positive, precise and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. It is not apparent how resubmission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision.

Following OWCP's February 19, 2010 decision and on reconsideration appellant submitted additional medical evidence. A January 7, 2010 physical examination form from Dr. Erickson noted a history of injury on December 30, 2009 and findings of pain with cervical and dorso lumbar range of motion studies, numbness and spasm. In an October 31, 2011 report, he noted a history of injury and diagnosed contusion of the face, scalp and neck, concussion and neck, lumbar and thoracic sprain. Similarly, on a diagnosis code form, Dr. Erickson noted sprain of the neck and lumbago. In a December 27, 2011 report, he noted that his records should have reflected a subluxation diagnosis. On reconsideration request, appellant relied on Dr. Erickson's December 27, 2011 report as establishing clear evidence of error. Dr. Erickson, however, is not a physician as defined under FECA as he did not diagnose a spinal subluxation based on x-ray. Rather, he noted only that a sprain and strain were diagnosed and did not indicate that he reviewed x-rays.¹³ Appellant did not explain how this considered evidence was positive, precise and explicit in manifesting on its face that OWCP erred by denying his claim for a traumatic injury on December 30, 2009. Even if Dr. Erickson's reports could be considered medical evidence,¹⁴ clear evidence of error is intended to represent a difficult standard. 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, is not clear evidence of error.¹⁵

Appellant submitted reports from Dr. Bhatt dated January 14 to March 12, 2010, who treated him for a December 30, 2009 injury where he sustained a contusion to the face, scalp and

¹³ 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides that the term physician ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. *See also Mary A. Ceglia*, 55 ECAB 626 (2004) (in assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under 5 U.S.C. § 8101(2); a chiropractor is not considered a physician under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist).

¹⁴ *See* 20 C.F.R. § 10.5(bb) (defines spinal subluxation as incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film).

¹⁵ *D.G.*, 59 ECAB 455 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

neck. Dr. Bhatt diagnosed concussion without loss of consciousness, lumbar and cervical strain, dizziness, visual disturbances face and scalp contusion. However, she failed to provide a rationalized opinion regarding the causal relationship between appellant's head, cervical and lumbar injuries and the factors of employment believed to have caused or contributed to such condition.¹⁶ As noted, clear evidence of error is intended to represent a difficult standard. This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. Consequently, the Board finds that Dr. Bhatt's reports submitted on reconsideration are insufficient to raise a substantial question as to the correctness of OWCP's decision. No other medical evidence submitted by appellant raises a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error by OWCP in its September 13, 2012 decision.

Also submitted were physical therapy reports dated January 12 to February 8, 2010. The Board has held that treatment notes signed by a physical therapist are not considered medical evidence as these providers are not a physician under FECA.¹⁷

CONCLUSION

The Board finds that appellant's request for reconsideration dated February 8, 2012 was untimely filed and did not demonstrate clear evidence of error.

¹⁶ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁷ *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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