

L.S., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

Issued: November 10, 2011

Case Submitted on the Record

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

On November 18, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs'(OWCP) nonmerit decision dated October 19, 2010, which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated September 15, 2003 to the filing of this appeal on November 18, 2010, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 15, 2002 appellant, then a 56-year-old custodial laborer, sustained a right shoulder injury at work when he was lifting a heavy box of grass and debris to put into a dumpster. He stopped work on April 11, 2002. OWCP accepted the claim for right rotator cuff tear and later expanded the claim to include rotator cuff syndrome. Appellant underwent authorized operative arthroscopy, right shoulder with subacromial decompression, glenohumeral synovectomy, open repair of rotator cuff avulsion and biceps tendodesis on June 18, 2002. Follow-up surgery for decompression of the ulnar and median nerve was authorized and completed on November 19, 2002.² Appellant received compensation benefits for temporary total disability.³

On August 6, 2003 the employing establishment offered a position as a modified full-time regular (FTR) clerk. The position description included: that appellant monitor individuals on the floor requesting access into particular offices; keep a log of visitors on a daily basis; check visitors in/out of GPO/GPO Annex; issue temporary badges; and other duties as assigned by supervisor within medical limitations.

On August 20, 2003 OWCP advised appellant that the modified FTR clerk position had been found to be suitable to his capabilities and was currently available. Medical reports were received by OWCP.

In a September 3, 2002 report, Dr. William R. Livesay, a Board-certified internist, diagnosed coronary artery disease with exertional angina pectoris, status post coronary angioplasty, mild cardiomegaly of borderline degree and noted that there was no evidence of congestive heart failure. He also indicated that appellant was status “postop” lumbar laminectomy for ruptured disc, steadily improving. Dr. Livesay noted that appellant was also “status postop repair of a torn rotator cuff in the right shoulder with continued limitations and reduced range of motion. He diagnosed additional conditions of diabetes mellitus and hypertensive cardiovascular disease, uncomplicated. Dr. Livesay provided work restrictions which included that appellant had no limitations in sitting or standing but that he was unable to walk more than a half a block to a block before angina was induced and promptly relieved by sublingual nitroglycerine. He advised no lifting on instructions from his orthopedist and no other limitations.

In a separate September 3, 2002 report, Dr. Mehboob Nazarani, a Board-certified psychiatrist and neurologist, advised that appellant was able to perform his activities of daily living, function socially, care for his personal needs and concentrate. He diagnosed dysthymic disorder, provisional post-traumatic stress disorder, chronic with delayed onset, history of high blood pressure, diabetes, coronary artery disease, acid reflux disease, history of back and shoulder injury and serious psychosocial stressors, including medical and financial problems. Dr. Nazarani made no finding regarding appellant’s ability to work.

² Further surgery was authorized on March 4, 2003 for right shoulder arthroscopic synovectomy and retrieval of loose body. Dr. Thompson found that appellant had reached maximum medical improvement on June 11, 2003.

³ Appellant retired on November 28, 2003.

In a July 21, 2003 report, Dr. Steven Thompson, a Board-certified orthopedic surgeon, advised that he had discussed appellant's work restrictions. He noted that he "addressed only [appellant's] shoulder problems." Dr. Thompson indicated that appellant could return to work that did "not require any repetitive or heavy overhead lifting. Based on [appellant's] shoulder, he should be able to perform some type of sedentary occupation." On July 23, 2003 he opined that appellant reached his maximum medical improvement regarding the right shoulder and he reiterated work restrictions.

OWCP indicated that the position was in accordance with his physicians' restrictions. Appellant was advised that he had 30 days to accept the position or provide an explanation for refusing the position. OWCP informed him that if he failed to accept the offered position and failed to demonstrate that, the failure was justified, his compensation would be terminated.

Appellant responded on the same day, August 20, 2003, that he declined the offered job noting: "physical and mental disorders diagnosed/variety of prescription drug[s] that are mood altering." In a letter dated August 29, 2003, OWCP advised him that his reasons for refusing the position were not acceptable and allowed an additional 15 days for him to accept the position. Appellant was advised that no further reason for refusal would be considered.

Appellant submitted to the record on September 11, 2003 additional medical records from Dr. Barry A. Nelms, a Board-certified orthopedic surgeon, reflecting a May 7, 2002 hemilaminectomy, foraminotomy and discectomy at L4-5 on the left side and follow-up reports.⁴ Dr. Nelms allowed that appellant could return to work eight hours per day with no excessive bending effective August 8, 2002.

The record reflects a July 21, 2003 report from Dr. Thompson, received in the record on July 31, 2003, that noted he "addressed only his shoulder problems. He can return to work that does not require any repetitive or heavy overhead lifting. Based on his shoulder, he should be able to perform some type of sedentary occupation."

Appellant was placed in the Nurse Intervention Program and on July 22, 2003 a report from Barbara Berkland, RN, CCM, noted: "I met with Dr. Thompson. He agreed he had no knowledge of any other medical problems for [appellant]. [Dr. Thompson] completed another OWCP-5 form. [Appellant] is in the process of putting information together for retirement."

In a decision dated September 15, 2003, OWCP terminated appellant's entitlement to monetary compensation benefits effective October 5, 2003, due to his refusal to accept suitable work.⁵

⁴ Although appellant claimed this was work related, OWCP had not accepted the back condition at the time of surgery. This claim was later accepted for herniated nucleus pulposus at L4-5 and the surgery was ultimately authorized by OWCP. This matter was handled under claim number xxxxxx338.

⁵ Appellant requested a review of the written record on October 21, 2003 but, on December 3, 2003, OWCP denied the request as being untimely. On May 27, 2004 he requested a schedule award. However, on June 7, 2004, OWCP advised appellant that he was not eligible for an award as he had refused suitable work. It directed him to follow the appeal rights in his September 25, 2003 decision.

On August 28, 2006 OWCP received additional reports from Dr. Barry A. Nelms, a Board-certified orthopedic surgeon. In his October 10, 2003 report, Dr. Nelms noted that he had evaluated appellant for his low back and left-sided buttock pain on April 26, 2002. He noted that while his initial treatment notes indicated that, the pain came without incident, he explained that appellant actually informed him that the pain began a few weeks after a work injury to his shoulder. Dr. Nelms opined that it appeared that appellant “injured his back at the same time, as his shoulder, which has lead to his current problems.”

Appellant requested reconsideration on June 16, 2010 and his representative requested reconsideration on June 17, 2010. The representative argued that appellant had filed a timely request for reconsideration. He also argued that OWCP improperly terminated appellant’s benefits because it had not considered preexisting nonaccepted medical conditions, including his diabetes and post-traumatic stress disorder, as well as heart conditions which had arisen since his surgery, when determining the suitability of the position. The representative noted that OWCP had in the record at the time it made its suitability determination the September 3, 2002 psychiatric report of Dr. Nazarani, which noted appellant’s psychiatric treatment. He indicated that appellant’s subsequently acquired conditions also disabled him from the offered position and, thus, the job was unsuitable. Appellant’s representative alleged that a new report from Dr. Thompson, dated December 17, 2008, clarified that the position was unsuitable. Appellant also submitted nurses’ reports, his refusal to accept the offered position and numerous physical therapy reports, progress notes and a letter to his Congressional representative dated September 16, 2003.

In his December 17, 2008 treatment note, Dr. Thompson advised that, when he saw appellant in 2003, he only considered his shoulder condition, not his neck or back. He explained that appellant also had fairly significant cardiac disease and prostate cancer. Dr. Thompson opined that while appellant “could return to work with restrictions solely based on his shoulder, for the above mentioned reasons he was not able to return to work and in my estimate benefits should not be denied.” He continued to treat appellant and submit reports. OWCP also received copies of previously submitted reports from Dr. Thompson.

In a June 25, 2010 surgical report, Dr. Stephen D. Brown, a Board-certified orthopedic surgeon, performed a right shoulder diagnostic arthroscopy, right shoulder rotator cuff debridement and insertion of a pain pump. He also provided follow up and diagnostic reports.

By decision dated October 19, 2010, OWCP denied appellant’s request for reconsideration on the grounds that the request was not timely and did not establish clear evidence of error by OWCP.⁶

LEGAL PRECEDENT

Section 8128(a) of FECA⁷ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁸ This section vests OWCP with discretionary authority to determine whether

⁶ This decision superseded a July 1, 2010 decision, as appellant’s representative was not sent a copy of that decision.

⁷ 5 U.S.C. § 8128(a).

⁸ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

it will review an award for or against compensation.⁹ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.¹⁰ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).¹¹

OWCP's regulations require that an application for reconsideration must be submitted in writing¹² and define an application for reconsideration as the request for reconsideration "along with the supporting statements and evidence."¹³ The regulations provide:

"[OWCP] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [OWCP] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."¹⁴

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.¹⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁶ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹⁷ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁹ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record

⁹ *Id.* at 768, *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

¹⁰ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹¹ *Id.* at § 10.607(b); *Thankamma Mathews*, *supra* note 8 at 769; *Jesus D. Sanchez*, *supra* note 9 at 967.

¹² *Id.* at § 10.606.

¹³ *Id.* at § 10.605.

¹⁴ *Id.* at § 10.607(b).

¹⁵ *Thankamma Mathews*, *supra* note 8 at 770.

¹⁶ *Id.*

¹⁷ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁸ *Jesus D. Sanchez*, *supra* note 9 at 968.

¹⁹ *Leona N. Travis*, *supra* note 17.

and whether the new evidence demonstrates clear error on the part of OWCP.²⁰ 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's decision.²¹

ANALYSIS

Appellant requested reconsideration on June 16, 2010. Since he filed his reconsideration request more than one year following OWCP's September 15, 2003 merit decision, OWCP properly determined that the request was untimely. Although appellant asserted on reconsideration that he timely requested reconsideration, the record does not support this.

The underlying issue in this case is whether OWCP properly terminated wage-loss benefits due to appellant's refusal to accept suitable work. In the June 17, 2010 request for reconsideration, appellant contended that OWCP failed to consider his nonemployment conditions of post-traumatic stress disorder and diabetes at the time the position was offered.

A determination that an offered position is medically suitable is based on medical evidence at the time the position is offered and includes consideration of nonemployment-related conditions as well as employment-related conditions.²² The Board notes that while appellant asserts that his other conditions were not considered, the record does not reflect this. The record contains Dr. Livesay's 2002 report, which listed the additional diagnoses and his opinion that appellant could work with restrictions on lifting and as long as he did not need to walk more than half a block. The September 3, 2002 report from Dr. Nazarani, upon which appellant's representative relies to show that appellant had post-traumatic stress disorder, does not provide any opinion that he was unable to work as a result of said condition. These reports of record were when OWCP found that appellant refused suitable work. The record does not support his contention that all of his medical conditions were not considered by OWCP. Moreover, the record at the time of termination did not establish the nonemployment-related conditions as disabling. These assertions do not raise a substantial question concerning the correctness of OWCP's decision.

Appellant submitted a December 17, 2008 report from Dr. Thompson, who advised that appellant could not have returned to work in 2003 in view of all of his conditions. However, Dr. Thompson's opinion in 2008, finding that appellant was unable to work in 2003 due to his other medical conditions is less probative than the contemporaneous assessment of his overall ability to work by the physicians who were then treating him for those other conditions. The Board has held that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to OWCP's denial, would have created

²⁰ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

²¹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²² *See Janice S. Hodges*, 52 ECAB 379 (2001).

a conflict in medical opinion requiring further development, is not clear evidence of error.²³ Other medical reports and records submitted on reconsideration do not specifically address appellant's ability to perform the offered position and do not raise a substantial question as to the correctness of OWCP's decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP, which in this case appellant did submit. The evidence, however, must be positive, precise and explicit and must manifest on its face that OWCP committed an error.²⁴ Appellant has not, through the 2008 report of Dr. Thompson and as required by 20 C.F.R. § 10.607(b), demonstrated clear evidence of error on the part of OWCP in finding that he refused to accept suitable work. His request for reconsideration does not establish "on its face" that OWCP's September 15, 2003 merit decision was erroneous. Therefore, the Board finds that appellant has not established clear evidence of error in OWCP's finding that he refused to accept suitable work.

The Board notes that appellant's representative repeated his reconsideration arguments on appeal. As noted above, these arguments are insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

²³ *E.R.*, Docket No. 09-599 (issued June 3, 2009).

²⁴ *D.O.*, Docket No. 08-1057 (issued June 23, 2009).

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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