

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

R.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Metro, GA, Employer**

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**Docket No. 11-1062
Issued: November 2, 2011**

Appearances:

*Thomas P. Deberry, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 18, 2011 appellant filed a timely appeal from a February 25, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as it was untimely and did not establish clear evidence of error. Because more than 180 days elapsed since the most recent merit decision dated July 10, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's February 7, 2011 request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. Appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On May 19, 2009 appellant, then a 45-year-old city letter carrier, filed a traumatic injury claim alleging that on May 14, 2009 he sprained his lumbar and thoracic spine in the performance of duty when his mail truck was struck from the back by another vehicle. He stopped work on May 15, 2009 and returned on May 26, 2009.

Appellant submitted a May 19, 2009 work excuse slip from Stuart Schlein, a chiropractor.

In a May 25, 2009 attending physician's report, an unknown provider noted that appellant was involved in a motor vehicle collision and diagnosed lumbar and thoracic strain.

In a June 10, 2009 report, Dr. Schlein stated that on May 14, 2009 appellant was involved in a vehicular collision when struck in the rear and he hit a utility pole. Appellant's present diagnosis as post-traumatic strain of his thoracic and lumbar spine, brachial neuralgia and cephalgia. Dr. Schlein also provided a May 19, 2009 duty status report and May 26, 2009 work excuse slip.³

In a decision dated July 9, 2009, OWCP denied appellant's claim finding that the evidence failed to establish that his condition resulted from the May 14, 2009 employment incident. It determined that the May 14, 2009 incident occurred but noted that the medical evidence submitted was not from a physician and was insufficient to establish causal relationship.

On August 7, 2009 appellant requested a review of the written record.

In an August 7, 2009 magnetic resonance imaging (MRI) scan examination, Dr. Ralph D'Auria, Board-certified in physical medicine and rehabilitation, noted appellant's complaints of mild thoracic pain and suspected appellant suffered a herniated disc T8-T9.

In a July 31, 2009 report, Dr. D'Auria stated that appellant complained of mid and low back pain beginning on May 14, 2009. Appellant explained that he was in a mail truck when he was rear-ended by a 1995 Buick Century and was jerked forward and back. Dr. D'Auria noted that appellant presented with signs and symptoms that were suspicious of a thoracic herniated disc, which should be ruled out or confirmed through an MRI scan. He also provided progress reports dated August 11 to September 22, 2009.

In a decision dated November 17, 2009, an OWCP hearing representative denied appellant's claim finding the medical evidence did not establish that his thoracic herniated disc resulted from the May 14, 2009 employment incident.

On February 7, 2011 appellant filed a request for reconsideration.

³ On June 29, 2009 appellant submitted a claim for disability compensation for the period June 29 to July 3, 2009. In a decision dated July 10, 2009, OWCP also denied his claim for disability compensation for the claimed period on the grounds of insufficient medical evidence establishing causal relationship.

In an April 5, 2010 report, Dr. Mark W. Feeman, Board-certified in physical medicine and rehabilitation, examined appellant for complaints of pain in his left mid and low back since a motor vehicle accident on May 14, 2009 when he was rear-ended and pushed into a pole. Upon examination, he did not observe any crepitus, defects, masses or effusions. Appellant's range of motion was limited by pain in the left lateral dorsi. Dr. Feeman opined that appellant suffered from post-traumatic back pain and left shoulder bursae/tendon disorder.

In a February 3, 2011 report, Dr. Feeman noted that he thoroughly reviewed appellant's medical history and provided an accurate history of injury regarding the May 14, 2009 motor vehicle accident. He noted that the August 7, 2009 MRI scan of appellant's thoracic spine confirmed a herniated disc at the T7-8 level distorting the ventral surface of the spinal cord. Dr. Feeman observed that appellant had significant restriction of motion of his thoracic spine and the latissimus dorsi region impacting the left shoulder. He opined that the physical stress placed upon appellant's thoracic and left shoulder at the time of the work-related motor vehicle accident on May 14, 2009 is "directly responsible for his thoracic disc displacement and disorder of tendons/bursa of the left shoulder." Dr. Feeman explained that it was in his "firmest medical opinion that these conditions are definitively work related due to the traumatic injury appellant sustained to his back and left shoulder in the performance of his duties on May 14, 2009 when he was struck by another vehicle while delivering mail."

By decision dated February 25, 2011, OWCP denied appellant's request for reconsideration as untimely filed and failing 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.⁴ 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.⁵

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows 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.⁶ The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.⁷ It 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 shift the weight of

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ *Nancy Marciano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁸

Evidence that 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 to merely show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration as more than one year had passed from the date of the last OWCP decision on November 17, 2009 and his request for reconsideration dated February 7, 2011. An application for reconsideration must be sent within one year of the date of OWCP's decision. As appellant's February 7, 2011 request for reconsideration was submitted more than one year after the date of the last merit decision of record on November 17, 2009, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim.¹³

The Board finds that appellant failed to establish clear evidence of error on the part of OWCP. In support of his request for reconsideration, appellant submitted April 5, 2010 and February 3, 2011 reports from Dr. Feeman. On appeal, appellant, through his representative, asserted that OWCP failed to consider these reports in its last decision and that they were sufficient to establish appellant's claim. Dr. Feeman noted appellant's thoracic disc displacement and disorder of tendons/bursa of the left shoulder and opined that they were "definitively work related due to the traumatic injury appellant sustained to his back and left shoulder in the performance of his duties on May 14, 2009 when he was struck by another vehicle while delivering mail." While this report did provide an opinion on causal relationship, it is not sufficient to manifest error in OWCP's previous denials of appellant's claim.¹⁴ This report does not raise a substantial question as to the correctness of OWCP's decisions. Clear evidence of error is intended to represent a difficult standard.¹⁵ Evidence such as a detailed,

⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998); *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*; *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *Thankamma Mathews*, 44 ECAB 765 (1993).

¹² *Cresenciano Martinez*, 51 ECAB 322 (2000); *Pete F. Dorso*, 52 ECAB 424.

¹³ *See Debra McDavid*, 57 ECAB 149 (2005).

¹⁴ *See D.G.*, 59 ECAB 455 (2008); *Y.G.*, Docket No. 10-2190 (issued July 12, 2011).

¹⁵ *R.C.*, 59 ECAB 546 (2008).

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.¹⁶

As appellant did not provide any argument or evidence sufficient to show clear evidence of error on the part of OWCP, it properly denied his request for further review of the merits.

CONCLUSION

The Board finds that appellant's February 7, 2011 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ *James R. Mirra*, 56 ECAB 738 (2005).