

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

E.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington, DC, Employer**

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**Docket No. 12-65
Issued: June 6, 2012**

Appearances:
Appellant, pro se
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 October 5, 2011 appellant filed a timely appeal from the August 19, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. The record also contains a June 2, 2011 nonmerit decision denying his hearing request. Since more than one year elapsed since the most recent merit decision of October 20, 2005 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ 5 U.S.C. §§ 8101-8193.

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a hearing under 5 U.S.C. § 8124; and (2) whether OWCP properly denied his request for reconsideration on the grounds that his request was untimely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On June 5, 1986 appellant, then a 35-year-old city mail carrier, sustained injury to his left hand and back after being attacked by a pit bull during the performance of duty that day. OWCP accepted the claim for chronic lumbosacral strain and right L4 nerve root impingement and paid benefits.

On April 17, 1996 appellant filed a recurrence claim for his lower back pain and spasms. On April 7, 1998 OWCP advised him that he had a continuation of his condition, rather than a recurrence and reopened the claim for the medical condition of chronic strain to the lumbar spine. It noted that appellant's case was not accepted for radiculopathy of the right lower extremity and additional medical evidence was needed from his physician. Appellant was advised of the information needed to file for lost time from work and that any claim for lost wages must be submitted through the employing establishment.

Appellant subsequently requested reimbursement for sick and annual leave used as a result of his job injury and filed a Form CA-8 and time analysis form for the period March 16 to 26, 2005 and June 19, 2005.

By decision dated October 20, 2005, OWCP denied appellant's claim for compensation for the period March 16 to 26 and June 19, 2005 on the grounds that no medical evidence supporting disability during the period claimed was received.

On May 4, 2011 appellant requested an OWCP hearing representative perform a review of the written record of OWCP decisions dated October 20, 2005 and April 19, 2011.³ In a separate letter, he referenced problems with the employing establishment regarding his wage-loss claim for the period dating March 16 to 26 and June 19, 2005. As attachments, appellant enclosed letters to the employing establishment pertaining to leave buyback issues and medical reports, all previously of record, as well as documents from the record.

In a June 2, 2011 decision, OWCP denied appellant's request for review of the written record noting that the request was untimely as it was not made within 30 days of the October 20, 2005 decision. It exercised its discretion with respect to hearing requests by stating that it had considered the matter in relation to the issue involved and had denied his hearing request on the basis that the case could be resolved by requesting reconsideration and submitting additional medical evidence. OWCP indicated that there was no final OWCP decision dated April 19, 2011 and, thus, the case was not in posture for review of that request.

³ The record does not contain an April 19, 2011 decision.

On June 8, 2011 appellant requested reconsideration of OWCP's decisions dated October 20, 2005 and April 19, 2011. He resubmitted several letters to the employing establishment and OWCP pertaining to leave buyback issues and a schedule award; letters wherein OWCP advised him of the information needed for his leave buyback claims; and a copy of the April 7, 1998 letter reopening his claim.⁴ In a November 5, 2005 letter, Cameron Briggs, station manager, indicated that appellant had been on limited duty since June 5, 1986 and that documentation to authenticate his injury were either lost by the employing establishment or not handled properly so that they could be forwarded to the Labor Department.

In a July 11, 2000 report, Dr. Samir N. Azer, a Board-certified orthopedic surgeon, noted that appellant was in physical therapy from April 14 to June 7, 2000 as a result of his June 5, 1986 work injury. In a June 15, 2001 report, he discussed appellant's impairment rating.

By decision dated August 19, 2011, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP representative, provides in pertinent part: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.⁵ Section 10.615 of Title 20 of the Code of Federal Regulations provide: A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.⁶ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁷ The date of filing is fixed by postmark or other carrier's date marking.⁸

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.⁹ Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of

⁴ In a July 13, 2011 letter, OWCP advised appellant of the process for claiming leave buyback, out of pocket medical expenses and travel reimbursement.

⁵ 5 U.S.C. § 8124(b)(1).

⁶ 20 C.F.R. § 10.615.

⁷ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

⁸ *See* 20 C.F.R. § 10.616(a).

⁹ *Henry Moreno*, 39 ECAB 475, 482 (1988).

the 1966 amendments to FECA which provided the right to a hearing,¹⁰ when the request is made after the 30-day period for requesting a hearing,¹¹ and when the request is for a second hearing on the same issue.¹²

ANALYSIS -- ISSUE 1

Appellant's May 4, 2011 hearing request was made more than 30 days after the date of issuance of OWCP's prior decision dated October 20, 2005 and, thus, he was not entitled to a hearing as a matter of right. There is no final decision of record dated April 19, 2011, as he claimed. Accordingly, OWCP was correct in stating in its June 2, 2011 decision that appellant was not entitled to a hearing as a matter of right because his May 4, 2011 hearing request was not made within 30 days of OWCP's October 20, 2005 decision.

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its June 2, 2011 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by requesting reconsideration and submitting additional medical evidence. The Board has held that as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹³ The evidence does not establish that OWCP abused its discretion in denying the hearing request.

LEGAL PRECEDENT -- ISSUE 2

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.¹⁴ 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.¹⁵

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. The evidence must be

¹⁰ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹¹ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹² *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹³ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁴ 20 C.F.R. § 10.607(a).

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

positive, precise and explicit and must be manifested on its face that OWCP committed an error.¹⁶

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁷

Evidence that 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 the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.²⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.²¹

ANALYSIS -- ISSUE 2

In its August 19, 2011 decision, OWCP properly determined that appellant failed to file timely applications for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.²² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including a merit decision of the Board.²³ The most recent merit decision in this claim is OWCP's October 20, 2005 decision. Appellant's request for reconsideration was dated June 8, 2011, more than one year after OWCP's October 20, 2005 decision. There is no final OWCP decision dated April 19, 2011 as claimed.²⁴ Thus, appellant's reconsideration request was not timely filed.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. Several letters from OWCP reflect that appellant has not submitted the necessary information for his leave buyback claims; letters from appellant indicate problems with the employer with regard to leave buyback claims; and a November 5, 2005 letter from Mr. Briggs

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

¹⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

²² 20 C.F.R. § 10.607(a).

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

²⁴ The Board's jurisdiction extends only to the review of final decisions issued by OWCP. 20 C.F.R. § 501.2(c); *E.L.*, 59 ECAB 405 (2008).

indicated that there was a problem of lost or mishandled information by the employing establishment. However this does not establish clear evidence of error or raise a substantial question as to the correctness of OWCP's October 20, 2005 decision, which denied appellant's claim for compensation for the period March 16 to 26 and June 19, 2005 on the grounds that no medical evidence supporting disability during that period was received. Therefore, these letters do not establish clear evidence of error.

The Board notes that appellant's claim for compensation for the above period was denied on the grounds that no medical evidence supporting disability during the period claimed was received. Appellant did not submit any new medical evidence sufficient to shift the weight of the evidence in his favor or establish that OWCP erred in denying his claim. Dr. Azer's July 11, 2000 report is not relevant as it discusses a different period (April 14 to June 7, 2000) than the period adjudicated in OWCP's October 20, 2005 decision. Dr. Azer's June 15, 2001 report is not relevant as it pertains to appellant's impairment rating. These reports were previously of record. Appellant did not address how this evidence was positive, precise and explicit in manifesting on its face that OWCP erred in denying his claim. The resubmission of this evidence does not raise a substantial question as to the correctness of OWCP's decision.²⁵

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision.

On appeal, appellant contended that OWCP had not committed any error; rather the error rested with the employing establishment due to its failure to submit information to OWCP. His claim for compensation for the period dating March 16 to 26 and June 19, 2005 was denied due to lack of medical evidence supporting disability during the period claimed. As this issue is medical in nature, it can only be resolved through the submission of medical evidence and had nothing to do with any error of the employing establishment to submit information to OWCP. As noted, none of the medical evidence appellant submitted relates to the period claimed for compensation. The Board notes that 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.²⁶

CONCLUSION

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

²⁵ Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error. *F.R.*, Docket No. 09-575 (issued January 4, 2010).

²⁶ *D.G.*, 59 ECAB 455 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 19, 2011 is affirmed.

Issued: June 6, 2012
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