

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 14-1272
Issued: October 15, 2014**

Appearances:
Stephen Larkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 12, 2014 appellant, through his attorney, filed a timely appeal from an April 16, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As more than 180 days elapsed since the last merit decision, issued on March 25, 2013 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 30, 2009 appellant, then a 57-year-old electronic technician, filed a traumatic injury claim alleging that on September 29, 2009 he sustained an injury to his lower back when he pulled a stack of tubs. He stopped work on September 30, 2009. OWCP accepted appellant's claim for lumbar radiculopathy and paid disability compensation. On June 23, 2011 it accepted that on March 4, 2011 he sustained a recurrence of the September 29, 2009 employment injury. Appellant again received disability compensation.

OWCP referred appellant, along with a statement of accepted facts and the medical record, to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature and extent of appellant's medical condition and disability. In a September 25, 2012 report, Dr. Sultan reviewed appellant's history, including the statement of accepted facts and noted that he underwent lumbar derangement with documented L4-5 disc herniation and L4-5 lumbar laminectomy. Upon examination, he observed normally aligned spinal column and mildly flat lumbar lordosis. Dr. Sultan found no active paraspinal muscle spasms and no tenderness of the sacroiliac joints with palpation bilaterally. Trendelenburg and straight leg raise testing in the supine position were negative bilaterally. Dr. Sultan opined that appellant no longer required physical therapy treatment for his employment-related condition. He reported that appellant was capable of light or sedentary work with restrictions of lifting or carrying up to 10 pounds.

On October 19, 2012 OWCP referred appellant for vocational rehabilitation counseling.

Appellant submitted various reports by Dr. Michael B. Shapiro, an orthopedic specialist, dated September 10, 2012 to January 10, 2013 who noted that he had treated appellant for back pain for the past three years. Dr. Shapiro related appellant's complaints of dull, aching back pain that radiated into his right and left legs. He reviewed appellant's history and provided findings on examination. Dr. Shapiro reported well-healed incision from surgery and diminished range of motion of the back. Manual muscle testing of the bilateral lower extremity was greater than or equal to 4+/5. Reflexes, sensation and pulses were intact in the bilateral lower extremities. Dr. Shapiro stated that appellant remained totally disabled and opined that the prognosis for recovery was unknown. He diagnosed lumbago.

On January 24, 2013 OWCP offered appellant a position as a modified electronic technician. The duties included issuing and receiving parts, supplies and tools for two hours; performing e-MARS functions for three hours; and keying in crew worksheets for one hour. The physical requirements of the job involved standing and sitting for up to four hours; pushing, pulling and lifting up to 10 pounds for one hour; and fine manipulation functions for four hours. The employing establishment also provided a position description of maintenance support clerk.

In a January 24, 2013 attending physician's report, Dr. Shapiro stated that on September 29, 2009 appellant injured his back while unjamming boxes. He noted that appellant's range of motion was diminished and diagnosed lumbago. Dr. Shapiro checked a box marked "yes" that appellant's condition was caused or aggravated by an employment activity. He reported that appellant was totally disabled beginning September 29, 2010.

In a letter dated January 25, 2013, OWCP advised appellant that the position offered on January 24, 2013 was suitable to his medical limitations as indicated in Dr. Sultan's September 25, 2012 report. It stated that appellant had 30 days to either accept or provide an explanation for not accepting the position. OWCP notified him that he would be paid for any difference in salary between the offered position and his date-of-injury position. It informed appellant that, if he refused suitable work without justification, it would terminate his compensation under section 8106(c)(2).

On February 6, 2013 appellant informed OWCP that he was not willing to accept the position until he had his job offer reviewed by his physician.

In a February 14, 2013 report, Dr. Shapiro noted appellant's persistent problems at the spine, back and left leg. He reviewed appellant's history and provided findings on examination. Dr. Shapiro observed that range of motion of the back was diminished and manual muscle testing of the bilateral lower extremity was greater than or equal to 4+/5. Reflexes, sensation and pulses were intact. Dr. Shapiro diagnosed lumbago. He stated that appellant was totally disabled and could not drive extended distances. In a February 14, 2013 duty status report, Dr. Shapiro noted that appellant worked as an electronics technician. He indicated that on September 29, 2009 appellant injured his back. Dr. Shapiro diagnosed lumbago. He reported that appellant was not advised to resume work.

By letter dated February 20, 2013, appellant advised OWCP that he was instructed by his physician not to return to work as indicated by the recently submitted CA-17 and CA-20 forms. He also stated that he experienced severe pain in his lower back and down his legs after driving between 20 to 25 miles. Appellant submitted various CA-17 and CA-20 forms dated July 12 to December 20, 2012.

By letter dated March 1, 2013, OWCP informed appellant that he had refused to accept or report to the job offered on January 24, 2013. It notified him that his reason for refusing the offered position was not valid. OWCP advised appellant that he had 15 days to accept the position or have his compensation benefits and entitlement to disability compensation terminated.

By decision dated March 25, 2013, OWCP terminated appellant's compensation for wage-loss and schedule award compensation benefits effective March 25, 2013 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). It found that Dr. Sultan's September 25, 2012 report represented the weight of medical evidence and indicated that appellant was capable of performing the duties of the modified position. OWCP confirmed that the position remained available.

Appellant continued to submit medical reports and CA-17 and CA-20 forms by Dr. Shapiro regarding his medical treatment for his back problems.

In a letter dated March 21, 2014 and received on March 27, 2014, appellant's attorney requested reconsideration of the March 25, 2013 decision terminating appellant's benefits. He alleged that a new medical report by Dr. Mehran Golpariani, a Board-certified anesthesiologist who specializes in pain medicine, established appellant's inability to perform the position of

maintenance operations support clerk. Counsel claimed that two reports from January and February 2013 by Dr. Shapiro also established appellant's disability. He further stated that the job position required storing and issuing supplies, parts and tools and pointed out that many tools weighed more than 10 pounds. Counsel noted that appellant did not receive a March 1, 2013 letter advising him to provide an acceptable reason for refusing the offered position. He included copies of the March 25, 2013 termination decision, position descriptions for a tools and parts clerk and maintenance support clerk and Dr. Shapiro's medical reports.

Appellant submitted a November 1, 2013 magnetic resonance imaging (MRI) scan report of the lumbar spine by Dr. Hamid Alam, a Board-certified diagnostic radiologist, who indicated that appellant was status post posterior fusion surgery at the L4-5 level and moderate central canal stenosis at the L3-4 level.

In a March 21, 2014 report, Dr. Golpariani provided an accurate history of the September 29, 2009 injury at work. He reviewed the medical treatment that appellant received and various diagnostic reports. Dr. Golpariani noted that Dr. Sultan opined that appellant could return to work doing mostly sedentary work or light work lifting no more than 10 pounds. He noted that appellant was given a job offer for an installation located 57 miles away from his home. Dr. Golpariani opined that appellant had a permanent disability due to his job-related injury and was unable to travel the 57 miles one-way, which would require an hour or more of continuous sitting. He explained that the condition appellant was experiencing was consistent with back surgery.

In a decision dated April 16, 2014, OWCP denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error. It determined that the most recent merit decision on record was the March 25, 2013 decision terminating his benefits. Because appellant's request for reconsideration was not received until March 27, 2014, more than one year after the March 25, 2013 decision, his claim was untimely filed. OWCP further determined that the evidence submitted after the last merit decision was insufficient to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.² The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.³ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review

² 20 C.F.R. § 10.607.

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

of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board.⁴

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁵ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.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 merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated April 16, 2014 which denied further merit review of appellant's case on the merits because the request for reconsideration was not timely filed and did not show clear evidence of error.

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP issued its most recent merit decision in this case on March 25,

⁴ See also *C.J.*, Docket No. 12-1570 (issued January 16, 2013); *D.G.*, 59 ECAB 455 (2008).

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

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

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

2013 and it received his request for reconsideration on March 27, 2014. Thus, the request was outside the one-year time limit.¹²

On appeal, appellant's counsel alleges that appellant's reconsideration letter was mailed on March 22, 2014, as verified by the certified slip. OWCP regulations, however, are clear that an application for reconsideration must be *received* by OWCP within one year of the date of OWCP decision for which review is sought.¹³ Thus, the fact that the reconsideration letter was mailed on March 22, 2014 does not constitute a timely filing. The regulatory language unequivocally sets a one-year time limitation for reconsideration requests to be received by OWCP.

Along with his request for reconsideration appellant's attorney submitted various diagnostic reports and January 10 and February 14, 2013 reports by Dr. Shapiro previously of record. Also submitted was a March 21, 2014 report by Dr. Golpariani not previously reviewed by OWCP. He opined that appellant had a permanent disability due to his job-related injury and was unable to travel the 57 miles one-way, which would require an hour or more of continuous sitting. While these medical reports are generally supportive of appellant's inability to work the modified job position, they do not establish clear error on the part of OWCP in its suitable work determination. They fail to raise a substantial question concerning the correctness of OWCP's decision, at the time that it was issued.

To establish clear evidence of error, it is not sufficient merely to establish that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in terminating appellant's compensation for refusal of suitable work. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's March 25, 2013 decision. Thus, the evidence is 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.

¹² See Federal (FECA) Procedure Manual, Part 2 -- Reconsiderations, *Time Limitations*, Chapter 2.1602(e)(6) (August 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

¹³ 20 C.F.R. § 10.607 (Emphasis added).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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