

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

P.A., Appellant)
and) Docket No. 11-1120
U.S. POSTAL SERVICE, POST OFFICE,) Issued: December 20, 2011
Nashua, NH, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 5, 2011 appellant, through her attorney, filed a timely appeal from a January 28, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as it was untimely and did not show clear evidence of error. As the most recent merit decision by OWCP was issued on August 8, 2008, the Board lacks jurisdiction to review the merits of this case.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 28, 2011 nonmerit decision.

ISSUE

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

¹ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. See 20 C.F.R. § 501.3(d)(2). An appeal of a final adverse OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision dated September 6, 2000, the Board affirmed February 20 and May 29, 1998 decisions finding that appellant was not entitled to compensation after June 22, 1997 due to her accepted work injuries of cervical strain, right shoulder strain and right hip strain.³ The Board found that OWCP met its burden of proof to terminate her compensation effective June 22, 1997 based on its finding that the opinion of Dr. Gerald M. DeBonis, a Board-certified orthopedic surgeon and OWCP referral physician, constituted the weight of the evidence and established that she had no further disability due to her work injury. On July 21, 2004 the Board affirmed a June 5, 2003 decision finding that appellant had not established that she had employment-related disability after June 22, 1997 and a December 16, 2003 decision denying her request for reconsideration under section 8128.⁴ In a decision dated February 17, 2006, the Board affirmed a June 1, 2005 decision denying her request for a hearing and a September 29, 2005 decision denying merit review under section 8128.⁵ On June 16, 2009 the Board affirmed an August 8, 2008 decision finding that appellant had not established that she was disabled after June 22, 1997 due to her January 19, 1994 work injury.⁶ The facts and the circumstances as set forth in the prior decisions are hereby incorporated by reference.

On December 16, 2010 appellant requested reconsideration based on the November 15, 2010 medical report of Dr. John W. Ellis, Board-certified in family medicine, who discussed her history of a January 19, 1994 injury when she fell on her right hip and shoulder. Dr. Ellis reviewed the medical evidence and listed findings on examination. He diagnosed muscle tendon strain of the neck, cervical disc derangement, cervical nerve root impingement bilaterally, back muscle tendon strain and disc derangement, nerve root impingement at L5 and S1 bilaterally, internal derangement of the right shoulder with impingement syndrome, traumatic arthritis and mid brachial plexus impingement, a contusion of the right hip with bursitis and tendinitis and internal derangement of the left knee with chondromalacia patella and laxity. Dr. Ellis attributed the diagnosed conditions to appellant's employment injury. He explained how the mechanics of the fall caused each condition. Dr. Ellis found that appellant was totally disabled commencing September 1994.⁷

By decision dated January 28, 2011, OWCP denied appellant's request for reconsideration after finding that it was untimely and did not establish clear evidence of error. It

³ Docket No. 98-2432 (issued September 6, 2000). OWCP accepted that on January 19, 1994 appellant sustained cervical strain, right shoulder strain and right hip strain when she slipped and fell on ice.

⁴ Docket No. 04-630 (issued July 21, 2004).

⁵ 57 ECAB 441 (2006). On May 16, 2007 the Board denied appellant's petition for reconsideration. *Order Denying Petition for Recon.*, Docket No. 06-75 (issued May 16, 2007).

⁶ Docket No. 08-2358 (issued June 16, 2009). The Board found that, while OWCP's August 8, 2008 decision purported to be a nonmerit denial of appellant's request for reconsideration, it had conducted a merit review of the claim.

⁷ The record also contains progress reports dated 2009 and 2010 from Dr. M. Dennis Wachs, a Board-certified orthopedic surgeon, discussing his treatment of appellant for multiple conditions, including back and knee pain.

found that Dr. Ellis' report was not sufficiently rationalized to support that her fall caused the diagnosed conditions and thus did not raise a substantial question regarding the correctness of its decision.

On appeal appellant's attorney argued that OWCP, in its February 20, 1998 decision, violated her due process rights when it terminated her compensation without providing pretermination notice. He asserted that the Board improperly affirmed the February 20, 1998 decision after finding that her opportunity to request further review remedied the procedural error. Counsel further maintained that OWCP reviewed the merits of the case in its January 28, 2011 decision as it analyzed Dr. Ellis' report to determine whether it had sufficient rationale. He argued that the Board should review the case on the merits and remand it for further development.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁸ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁹

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 a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.¹⁰ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.¹² A right to

⁸ 5 U.S.C. § 8101 *et seq.*

⁹ 20 C.F.R. § 10.607.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

¹¹ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹² 20 C.F.R. § 10.607(a).

reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ As appellant's December 10, 2010 request for reconsideration was submitted more than one year after June 16, 2009, the date of the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁴

In support of her request for reconsideration, appellant submitted a report dated November 15, 2010 from Dr. Ellis who reviewed her work history and listed findings on examination. Dr. Ellis diagnosed numerous conditions involving the cervical spine, lumbar spine, right shoulder, right hip and left knee. He attributed the diagnosed conditions to appellant's January 19, 1994 employment injury based on the mechanism of injury. Dr. Ellis found that she was totally disabled from September 1994 onward. His report is detailed and contains some rationale supporting his findings. The term "clear evidence of error," however, 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 Dr. Ellis' report is insufficient to establish on its face that OWCP erred in terminating appellant's compensation and thus does not show clear evidence of error.

Before OWCP appellant's attorney argued that OWCP conducted a merit review when it weighed the probative value of Dr. Ellis' report. He thus contended that the Board should review the merits of the case. However, to be entitled to a merit review of an untimely request for reconsideration, appellant must demonstrate clear evidence of error.¹⁶ OWCP did not weigh Dr. Ellis' report against the other evidence previously of record. Instead, it considered the probative value of his report for the limited purpose of determining whether it was sufficient to raise a substantial question as to the correctness of the prior decision. OWCP found that Dr. Ellis' report did not show clear evidence of error and thus properly declined reopening appellant's case for further review of the merits.

Appellant's attorney further argued that OWCP erred in failing to provide pretermination notice before terminating her compensation in its February 20, 1998 decision. In a decision dated September 6, 2000, however, the Board affirmed the February 20, 1998 termination. The Board's decision on this matter became final 30 days from the date of the filing of the decision.¹⁷ The issue is thus *res judicata* and is not subject to further consideration by the Board in this appeal.¹⁸

¹³ Robert F. Stone, *supra* note 11.

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

¹⁵ See Joseph R. Santos, 57 ECAB 554 (2006).

¹⁶ See 20 C.F.R. § 10.607.

¹⁷ See 20 C.F.R. § 501.6(d); see also W.C., Docket No. 09-473 (issued October 9, 2009).

¹⁸ See Hugo A. Mentink, 9 ECAB 628 (1958). In the absence of further review by OWCP on the issue addressed by a Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. See Clinton E. Anthony, Jr., 49 ECAB 476 (1998).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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