

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

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| A.S., Appellant |) | |
| |) | |
| and |) | Docket No. 11-524 |
| |) | Issued: October 14, 2011 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Coppell, TX, Employer |) | |
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| <i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director | <i>Case Submitted on the Record</i> |
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DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 28, 2010 appellant, through his attorney, filed a timely appeal from a September 1, 2010 Office of Workers' Compensation Programs' (OWCP) decision which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year elapsed since the most recent merit decision of July 15, 1987 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's case but has jurisdiction over the nonmerits 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 request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

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 decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

On appeal, appellant's attorney contends that OWCP's September 1, 2010 decision is contrary to fact and law.

FACTUAL HISTORY

On December 28, 2010 appellant, then a 32-year-old automation mail processor, filed a traumatic injury claim (Form CA-1) alleging that he sustained a lower back injury while loading a machine with bundle mail in the performance of duty on October 25, 1985. OWCP accepted the claim for lumbar strain and he was placed on the periodic rolls.

Appellant filed a claim for continuing disability for the period January 11 to February 24, 1986 for wage-loss compensation. His supervisor indicated that he returned to work on January 29 and February 5, 1986 and received compensation from the employing establishment during the period claimed.

On February 18, 1986 the employing establishment reported that appellant did not report to work as scheduled on January 28 and February 1 to 2, 1986. It stated that he was charged as absent without approved leave (AWOL) and warned him that future deficiencies would result in more severe disciplinary action.

By decision dated December 23, 1986, OWCP denied appellant's claim for wage-loss compensation on the grounds that the medical evidence did not establish that he was disabled after February 9, 1986 as a result of his lower back injury of October 25, 1985. It noted that Dr. David R. Webb, Jr., an orthopedic surgeon, released appellant to light duty on January 27, 1986, appellant returned to work on January 29, 1986 and Dr. Webb released appellant to full duty effective February 10, 1986.

On January 22, 1987 appellant requested an oral hearing before OWCP's hearing representative.

By decision dated April 28, 1987, OWCP denied appellant's hearing request on the grounds that it was not timely filed and that he could pursue his claim through the reconsideration process.

In a letter received by OWCP on June 25, 1987, appellant requested reconsideration. He submitted a November 4, 1985 report by Dr. Anthony Polk, a chiropractor, a November 26, 1985 report by Dr. Webb, and a September 12, 1986 and a June 15, 1987 report by Dr. James Elbaor, a Board-certified orthopedic surgeon.

By merit decision dated July 15, 1987, OWCP denied modification of its December 23, 1986 decision. It found that appellant failed to submit sufficient medical evidence to establish disability. In the appeal rights attached to the decision, appellant was notified of the one-year time limitation for requesting reconsideration of his claim.

The case lay dormant until August 18, 1988 when OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and insufficient to

warrant further merit review. It noted that he submitted a June 28, 1988 report by an unidentifiable physician who indicated that appellant had nerve damage in his right arm.³

On May 20, 2010 appellant requested reconsideration and submitted medical reports dated October 31, 1985 to January 3, 1986 with radiological reports dated November 5, 1991 to February 25, 2010. In a January 22, 1986 report, Dr. Webb diagnosed acute lumbosacral strain and lumbar facet syndrome. In a January 24, 1986 report, he indicated that appellant was admitted to the hospital on January 17, 1986 and put on physical therapy and bed rest. Dr. Webb reported that bone scans, chemistries, electromyograms (EMGs) and x-rays were basically normal. A computerized axial tomography (CAT) scan of the lumbosacral spine was essentially within normal limits. Appellant was discharged home that same day with a diagnosis of lumbosacral strain and lumbar facet syndrome. In a January 27, 1986 attending physician's supplemental report, Dr. Webb reiterated his diagnoses and indicated that appellant was not totally disabled for work. He released appellant to light duty that same day.

In a February 10, 1986 report, Dr. Webb indicated that appellant went back to work and apparently was doing well in his job, although he would rather go to his regular job. Appellant had no spasm and good range of motion. Dr. Webb released him to full duty.

In a September 12, 1986 report, Dr. Elbaor diagnosed cervical/thoracic/lumbosacral spine syndrome. He indicated that appellant experienced neck pain while lifting at work. Dr. Elbaor reiterated his diagnosis on September 23, 1986 and opined that appellant was temporarily totally disabled.

In a June 15, 1987 progress report, Dr. Elbaor reported that appellant continued to have mid and low back pain into the anterior thighs and calves.

By decision dated September 1, 2010, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation provides that an application for reconsideration must be submitted within one year of the date of the OWCP decision for which review is sought.⁶ 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).⁷

³ The Board notes that the request for reconsideration and accompanying evidence are not contained in the record.

⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁶ 20 C.F.R. § 10.607(a).

⁷ See *Jesus D. Sanchez*, *supra* note 4; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³

To establish 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 the OWCP decision.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁶ However a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷ The most recent merit decision was the OWCP's July 15, 1987 decision. Appellant was advised that he had one year from the date of this decision to make a timely request for reconsideration. Since he did not file his request until May 20, 2010, it was filed outside the

⁸ 20 C.F.R. § 10.607(b).

⁹ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

¹⁰ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

¹¹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁶ See *Veletta C. Coleman*, *supra* note 14; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (March 2011). See also 20 C.F.R. § 10.607(a); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁷ See *D.G.*, 59 ECAB 734 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

one-year time period. As appellant's May 20, 2010 request for reconsideration was submitted more than one year after the July 15, 1987 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.¹⁸

OWCP denied appellant's claim for wage-loss compensation for the period January 11 to February 24, 1986 because there was insufficient medical evidence to establish that the accepted lower back injury of October 25, 1985 caused him to be disabled for work. The medical reports and diagnostic testing submitted by appellant are insufficient to establish clear error by OWCP in denying his claim.¹⁹

Dr. Webb reported in his progress reports that he hospitalized appellant on January 17, 1986 for bed rest and testing but he was discharged the same day. He reported that at that time appellant was not totally disabled for work and released appellant for light duty. Dr. Webb released appellant to fully duty effective February 10, 1986. In a February 24, 1986 report, he indicated that appellant had been working and still had some intermittent discomfort in the back but had a good range of motion and no spasm with a normal neurological. Dr. Webb's medical reports do not establish clear evidence of error as they do not show that OWCP committed an error in denying appellant's claim due to no employment-related disability, nor do they raise a substantial question as to the correctness of OWCP's decision. In fact, his reports support OWCP's denial of appellant's claim because they establish that he was not disabled for the period claimed.

On September 12, 1986 Dr. Elbaor diagnosed cervical/thoracic/lumbosacral spine syndrome. On September 23, 1986 medical report, he reiterated his diagnosis and opined that appellant was temporarily totally disabled. On June 15, 1987 Dr. Elbaor reported that appellant continued to have mid and low back pain into the anterior thighs and calves. Although he opined that appellant was disabled, he failed to provide a rationalized medical explanation as to how the residuals of the October 25, 1985 employment injury prevented him from continuing in his federal employment. Dr. Elbaor's medical reports do not establish clear evidence of error as they do not show that OWCP committed an error in denying appellant's claim nor do they raise a substantial question as to the correctness of OWCP's decision.

Medical records and reports which predate the employment injury of October 25, 1985 are not relevant to the issue which was decided by OWCP.²⁰ The radiological reports dated November 5, 1991 to February 25, 2010, which do not address how the October 25, 1985 employment injury caused appellant to be disabled for the period claimed, do not establish clear evidence of error as they are not relevant to the issue decided by OWCP.²¹

To establish clear evidence of error, it is not sufficient merely to show 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

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

¹⁹ *See J.R.*, Docket No. 10-2137 (issued July 12, 2011).

²⁰ *See A.M.*, Docket No. 10-526 (issued November 8, 2010).

²¹ *See F.R.*, *supra* note 7 (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal appellant's attorney contends that the September 1, 2010 OWCP decision is contrary to fact and law. For the reasons stated above, the Board finds counsel's argument is not substantiated.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2011
Washington, DC

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

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

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