

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Macon, GA, Employer**

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**Docket No. 11-4
Issued: September 23, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 29, 2010 appellant filed a timely appeal from a September 17, 2010 decision of the Office of Workers' Compensation Programs (OWCP) that denied his request for reconsideration because it was untimely filed and did not establish clear evidence of error. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.¹ Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

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 demonstrate clear evidence of error.

¹ 20 C.F.R. § 501.2(c).

² 5 U.S.C. §§ 8101-8193.

On appeal, appellant asserts that OWCP erred in denying his claim because the employing establishment acknowledged that the offered position on which the termination was based was not a valid offer.

FACTUAL HISTORY

On July 16, 2002 appellant, then a 53-year-old letter carrier, filed an occupational disease claim alleging that the physical requirements of his work duties caused low back pain. He stopped work on June 12, 2002 and on November 1, 2002 OWCP accepted that he sustained herniated discs at L2-3, L3-4 and L4-5. Appellant was placed on the periodic compensation rolls. On April 8, 2003 Dr. David H. McCord, a Board-certified orthopedic surgeon, performed fusion and decompression of the lumbar spine. Appellant retired on August 1, 2003. In a July 3, 2003 report, Dr. McCord advised that appellant could return to limited duty on July 4, 2003.³

On August 1, 2003 the employing establishment offered appellant a modified position that he rejected. The position was amended on August 20, 2003 and he accepted the job offer on September 1, 2003. By letter dated September 11, 2003, the employing establishment notified OWCP that appellant had not reported for work and that he had been approved for regular retirement. It asked that OWCP determine the position's suitability and that he be provided an election form.

By letter dated September 23, 2003, OWCP advised appellant that the position offered was suitable. Appellant was notified that if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. He was given 30 days to respond. In response appellant submitted medical evidence including a July 24, 2003 report, in which Dr. Dwayne L. Clay, Board-certified in physiatry and pain medicine, advised that in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ (A.M.A., *Guides*) appellant had 17 percent impairment of each leg. In an October 23, 2003 letter, OWCP informed him that his reasons for refusing the offered position were not valid and he was given an additional 15 days to accept the offered position. Appellant submitted additional medical evidence including an October 1, 2003 treatment note in which Dr. Clay diagnosed lumbar radiculopathy, lumbar myofascial and facet pain and status post lumbar decompressive surgery with triple level fusion. On December 4, 2003 Dr. Clay stated, "It is my understanding at this point that [appellant] is not employable and he has retired from civil service and therefore he is not able to return to work."

³ Dr. McCord provided restrictions of no continuous bending, lifting or twisting, no work in an outstretched or overhead position. He advised that lifting should be limited to 20 to 25 pounds and that appellant should stretch as needed.

⁴ A.M.A., *Guides* (5th ed. 2001).

On November 4, 2003 the Office of Personnel Management (OPM) advised that appellant's annuity became effective on December 1, 2002 and that he was not in pay status. By letter dated December 31, 2003, OWCP informed OPM that since he had elected to receive OPM retirement benefits, his FECA compensation was terminated effective December 27, 2003.⁵

By decision dated December 31, 2003, OWCP terminated appellant's compensation benefits, effective December 27, 2003, on the grounds that he refused an offer of suitable work. It noted that the employing establishment verified that the position remained available and noted that retirement was not a valid reason for refusal of suitable employment.

On October 14, 2004 appellant filed a schedule award claim. He underwent a second lumbar fusion and removal of hardware on January 28, 2005 and submitted a second schedule award claim on October 11, 2006. By letter dated November 1, 2006, OWCP informed appellant that he was not entitled to a schedule award as he failed to accept suitable employment. On March 2, 2007 it accepted as employment-related corns and calluses to the fifth metatarsal of the right foot.

On November 2, 2007 appellant through his union representative, requested reconsideration of the December 31, 2003 decision, asserting that he had retired prior to the job offer and that his physician had not released him to return to duty. He also argued that he was entitled to a schedule award as Dr. Clay provided an impairment rating on July 24, 2003, prior to the termination of benefits. Appellant submitted evidence previously of record, including Dr. Clay's July 24, 2003 report, the July 3, 2003 report from Dr. McCloud and the October 11, 2006 schedule award claim.

In a November 15, 2007 letter, OWCP again informed appellant that he was not entitled to a schedule award. On July 3, 2008 it denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. In a July 9, 2008 letter, OWCP again informed appellant that he was not entitled to a schedule award. On July 13, 2008 appellant requested reconsideration, asserting that since he had retired on August 1, 2003 the position offered was not available to him as the employing establishment did not inform him that he had been reinstated and could return to work. He submitted evidence previously of record and undated correspondence from the employer regarding his retirement eligibility, stating that his separation date was August 1, 2003. In a November 26, 2007 report, Dr. Steven Lako, a podiatrist, advised that appellant had a partial drop foot deformity due to a lumbar condition and had developed hammer toe contractures. On August 25, 2008 Dr. Joseph M. Brogdon, a Board-certified neurologist, provided examination findings and diagnosed bilateral leg sensory changes secondary to a combination of peripheral polyneuropathy caused by diabetes and polyradiculopathy from arachnoiditis.

On September 2, 2009 appellant filed a third schedule award claim. In an undated letter, received by OWCP on September 7, 2010, he requested reconsideration. Appellant submitted a September 1, 2010 letter in which LaJuana D. Mercer, health and resource management specialist with the employing establishment, advised that he should not have been offered a job

⁵ A copy of the election form is not found in the case record.

on August 20, 2003 as this was after the date of his retirement on August 1, 2003. Ms. Mercer stated:

“Our [a]gency does not require an employee to return to work when retirement election is OPM. Our [a]gency only pursues return-to-work efforts when an employee retires under OPM and later opts to receive FECA benefits. Our [a]gency has not received any notification that [appellant] has opted to switch to FECA benefits.”

By decision dated September 17, 2010, OWCP denied appellant’s reconsideration request on the grounds that it was untimely filed and that he failed to establish clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP’s final merit decision was in error.⁷ Its procedures state that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,⁸ if the claimant’s application for review shows “clear evidence of error” on the part of OWCP. In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

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 OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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 OWCP’s decision.¹⁰

⁶ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁸ 20 C.F.R. § 10.607.

⁹ *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

OWCP's procedures note that 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 that a schedule award was miscalculated). Evidence such as 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.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that as, more than one year had elapsed from the date of issuance of the merit decision in this case on December 31, 2003, appellant's request for reconsideration on July 13, 2008, was untimely filed.¹³ Consequently, as appellant's request was untimely, he must submit evidence or argument that demonstrates clear evidence of error by OWCP.¹⁴ Following his request for reconsideration, he submitted a September 1, 2010 letter in which the employing establishment advised that he should not have been offered a job on August 20, 2003 as this was after the date of his retirement on August 1, 2003. The letter noted that the employing establishment does not require an employee to return to work after electing retirement with OPM and that it only pursues return to work efforts when an employee seeks FECA benefits after retiring.

The facts in this case indicate that on November 1, 2002 OWCP accepted that appellant sustained employment-related herniated discs from L2 to L5. Appellant was placed on the periodic compensation rolls and on August 20, 2003, the employing establishment offered him a modified position that he accepted. He, however, did not return to work, stating that he had been approved for retirement and employing establishment records show that he retired on August 1, 2003.

While the Board has long held that electing to receive retirement is not a justifiable reason to refuse an offer of suitable work,¹⁵ in this case the employing establishment notified appellant by letter dated September 1, 2010 that the August 30, 2003 job offer should never have been proffered since he had retired on August 1, 2003. OWCP's procedures provide that, on the receipt of the job offer, OWCP should proceed with a suitability determination.¹⁶ In this case, the employer has acknowledged that it was error to offer the position. This acknowledgement has a precise and explicit bearing on the merit issue in this case and is sufficient to raise a

¹¹ *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

¹² *Nancy Marcano*, 50 ECAB 110 (1998).

¹³ *Supra* note 6.

¹⁴ 20 C.F.R. § 10.607(b).

¹⁵ *Roy E. Bankston*, 38 ECAB 380 (1987).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 11 *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

substantial question as to the correctness of OWCP's December 31, 2003 decision because, but for the job offer, OWCP would not have made a suitability determination. As the job offer is a condition precedent to proceeding with a suitable work termination under section 8106 of FECA, the Board finds that appellant established clear evidence of error. The Board also notes that the record does not show that appellant was ever provided an election form.

Section 8106(c) of FECA will be narrowly construed as it serves as a penalty provision that may bar an employee's entitlement to compensation, including schedule award compensation.¹⁷ The evidence submitted with appellant's reconsideration request has a precise and explicit bearing on the evidence of record. As such, the Board finds that the September 1, 2010 employing establishment letter raises a substantial question as to the correctness of OWCP's decision and therefore has sufficient probative value to shift the weight in favor of appellant.

CONCLUSION

The Board finds that appellant has established clear evidence of error on the part of OWCP. The case is remanded for consideration of the merits of the claim.

¹⁷ See *S.G.*, Docket No. 08-1992 (issued September 22, 2009).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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