

FACTUAL HISTORY

Appellant, a 51-year-old consumer safety officer injured his neck on March 15, 2007 when the bus on which he was a passenger abruptly applied the brakes, causing him to jolt forward. He filed a claim for benefits on March 22, 2007, which OWCP accepted for a neck sprain, degeneration of a cervical intervertebral disc and cervical spondylosis with myelopathy. OWCP paid compensation for temporary total disability.

Appellant came under the treatment of Dr. Robert Sean Jackson, a Board-certified orthopedic surgeon. He underwent diagnostic testing on February 5, 2009 that showed a moderate level of degenerative disc disease at C6-7, unchanged, with a modest central stenosis at multiple levels. As previously seen a disc protrusion at C6-7 was stated as having resolved and significantly declined in size. On examination, Dr. Jackson noted neck and bilateral arm symptomatology without clinical signs of myelopathy or significant central spinal stenosis. He recommended a course of physical therapy and a functional capacity evaluation. On July 9, 2009 Dr. Jackson noted limited neck range of motion with diminished reflexes, full upper extremity motor strength and diminished sensation in the ulnar distribution on the left and the medial distribution on the right. He commented that appellant's functional capacity evaluation was determined invalid due to inconsistencies during testing. Dr. Jackson found appellant at maximum medical improvement as he was not interested in cervical surgery.

Appellant underwent a subsequent functional capacity evaluation on September 15, 2009 that was reported by the assessment specialist as conditionally valid. He was found capable of meeting medium job demands according to the Dictionary of Occupational Titles. On September 21, 2009 Dr. Jackson recommended restrictions at the medium work category with no bending or stooping, no overhead work, no lifting greater than 10 pounds, frequently no greater than 25 pounds and occasionally up to 50 pounds. On October 6, 2009 he advised that appellant could return to his date-of-injury job as a consumer safety officer.

On February 26, 2010 OWCP issued a notice of proposed termination of wage-loss compensation advising appellant that Dr. Jackson's opinion as to his work capacity supported the termination of compensation benefits. Appellant was notified that if he disagreed with the proposed termination of compensation benefits, he could submit additional evidence within 30 days.

By letter dated March 18, 2010, David Ben Mandelbaum, appellant's attorney, advised OWCP that he was representing appellant. He contended that Dr. Jackson must not have reviewed appellant's entire job description and stated: "Please consider this to be a request that your agency reconsider its determination" and to ask Dr. Jackson to further address appellant's work limitations as a consumer safety officer.

In an April 15, 2010 decision, OWCP terminated appellant's wage-loss compensation benefits. It found that the weight of medical opinion was represented by Dr. Jackson. Further,

OWCP advised appellant that it had not received any authorization for his representation by Mr. Mandelbaum.²

In a letter dated April 20, 2010, received by OWCP on April 22, 2010, appellant provided OWCP with written authorization of his representation by Mr. Mandelbaum. He contended that Dr. Jackson had erred in authorizing his full return to work. Appellant noted his receipt of the termination decision and stated that counsel would provide documents necessary to act on his behalf.

In an April 23, 2010 letter, OWCP notified counsel that he was recognized as appellant's representative of record. It provided him a copy of the April 15, 2010 decision to handle in such capacity.

A memorandum of telephone call dated July 15, 2011 stated that counsel contacted OWCP to check the status of a reconsideration request related to the April 15, 2010 decision. It verified that no request for reconsideration appeared in the file. Counsel stated that he had submitted a request on or about April 26, 2010. OWCP advised him to resubmit the request with verification, such as a certified mail receipt, that it was sent at that time.

In a July 15, 2011 letter to OWCP, counsel submitted a copy of an appeal request form signed by appellant on April 23, 2010 together with a copy of the consumer safety officer job requirements. This letter was received by OWCP on July 18, 2011. On the form, appellant marked an "x" for reconsideration. The copy of the position description was apparently faxed by him to counsel on May 4, 2011 at 10:39 p.m.

By decision dated August 8, 2011, OWCP denied appellant's request for reconsideration without a merit review. It found the request was untimely filed within one year of the April 15, 2010 decision and that the evidence was not sufficient to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle an employee to a review of OWCP's decision as a matter of right.⁴ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

"The Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application. The Secretary, in accordance with the facts found on review may: (1) end or increase the compensation awarded; or (2) award compensation previously refused or discontinued."

² In an April 16, 2010 letter, OWCP advised counsel that it could not communicate with him concerning appellant's file absent written authorization of representation.

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, it has stated that 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 The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ OWCP's procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if his application for review shows "clear evidence of error" on the part of OWCP.⁹

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that it committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ To show 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁵ The Board makes an independent

⁵ Although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. See 20 C.F.R. § 10.606(b).

⁶ 20 C.F.R. § 10.607(b).

⁷ See cases cited *supra* note 4.

⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 4.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 4.

determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued the most recent merit decision in this case on April 15, 2010. OWCP received appellant's request for reconsideration on July 18, 2011. The evidence establishes that the request was untimely as it was outside the one-year time limit.

Counsel wrote to OWCP on March 18, 2010 to advise that he had been retained by appellant; however, he did not provide any written authorization from appellant with his letter.¹⁷ Further, the letter cannot be found to constitute a request for reconsideration as it was submitted prior to issuance of the final adverse decision of April 15, 2010.¹⁸

Appellant wrote to OWCP on April 20, 2010 providing written authorization that counsel could represent him in his claim. He advised that counsel would provide additional documents to resolve his case. While he noted receipt of the termination of benefits letter, appellant did not request reconsideration at that time or submit the notice of appeal form attached to the April 15, 2010 decision.¹⁹

Counsel next contacted OWCP by telephone on July 15, 2011 to inquire regarding the status of a reconsideration request, which he stated he mailed on or about April 26, 2010. He was advised that OWCP had not received any request for reconsideration regarding the April 15, 2010 decision. Counsel was advised to submit a copy of the request for reconsideration, together with any verification or proof of mailing.

On July 18, 2011 OWCP received counsel's July 15, 2011 letter requesting reconsideration of the April 15, 2010 decision. Counsel stated that he was enclosing a copy of an appeal request form of April 23, 2010 previously sent to OWCP. He also enclosed medical evidence and a copy of the physical requirements of the job.

Under the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a letter properly address and mailed in the course of business is presumed to have arrived at the mailing address in due course.²⁰ This is known as the mailbox rule and the Board has held that

¹⁶ *Gregory Griffin, supra* note 4.

¹⁷ The implementing federal regulations and Board case precedent establish that an authorized representative may request reconsideration. See *Joseph Costigan*, 49 ECAB 656 (1998); *David M. Ibarra*, 48 ECAB (1996).

¹⁸ See 20 C.F.R. § 10.605(a). The February 26, 2010 pretermination notice letter was informational in nature and does not constitute a final adverse decision of OWCP.

¹⁹ While no special form is required, a reconsideration request must be made in writing, identify the decision and the specific issues for which reconsideration is being requested, and be accompanied by relevant and pertinent new evidence or argument not considered previously. See *Gladys Mercado*, 52 ECAB 255 (2001).

²⁰ *Kenneth E. Harris*, 54 ECAB 502 (2003).

the presumption of receipt must apply to claimants and OWCP alike, provided the conditions which give rise to the presumption remain the same.²¹ This requires evidence of a properly addressed letter together with evidence of proper mailing.

Although counsel was advised that he could submit evidence of mailing a timely request for reconsideration, no evidence of prior mailing was received. The July 15, 2011 letter enclosed the appeal request form signed by appellant on April 23, 2010, but counsel did not submit any evidence, such as a certified mail receipt or other evidence, to establish proper mailing of this form to OWCP in the ordinary course of business on or about that date. To the contrary, the record on appeal does not document any response by counsel to OWCP's April 23, 2010 letter recognizing him as representative in this case until submission of the July 15, 2011 letter, received on July 18, 2011. For this reason, the Board finds that appellant's request was untimely filed.

The Board also finds that appellant's July 18, 2011 untimely request for reconsideration failed to establish clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. He submitted a copy of the position description for a consumer safety officer, which does not constitute medical evidence relevant to the issue of his capacity to perform such duties.²² Counsel noted that he was enclosing a medical report dated March 5, 2010 from Dr. Christopher C. Meredith, Board-certified in neurosurgery, but the record does not document receipt of this report with the request for reconsideration.²³

The Board finds that appellant did not submit sufficient evidence with his request for reconsideration to substantiate clear error by OWCP in the termination of his wage-loss benefits.

CONCLUSION

The Board finds that appellant's reconsideration request was untimely filed and failed to establish clear evidence of error.

²¹ *Larry L. Hill*, 42 ECAB 596 (1991).

²² Whether a particular employment injury causes disability for employment and the duration of disability are medical questions to be resolved by probative medical opinion. See *Laurie S. Swanson*, 53 ECAB 517 (2002); *Maxine J. Sanders*, 46 ECAB 835 (1995).

²³ The record reflects the report of Dr. Meredith was received by OWCP following issuance of the August 8, 2011 decision. Therefore, it constitutes new evidence which the Board may not review for the first time on appeal. See 20 C.F.R. §501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 28, 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