

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

M.Y., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 11-1453
Issued: February 1, 2012**

Appearances:
Alan Peacock, 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 June 1, 2011 appellant, through his representative, filed a timely appeal from the May 16, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from the issuance of the most recent merit decisions, February 12 and September 30, 1998, to the filing of this appeal on June 1, 2011, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction to review OWCP's May 16, 2001 nonmerit decision.²

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse decisions of OWCP 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 of OWCP issued on and after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly denied appellant's April 26, 2011 request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On September 25, 1996 appellant, a 34-year-old city letter carrier, sustained an injury in the performance of duty when he caught a falling case. OWCP accepted his claim for right shoulder strain, lumbar strain and cervical strain. Appellant underwent two right shoulder arthroscopies and eventually returned to limited duty.

In a decision dated February 12, 1998, OWCP terminated appellant's compensation on the grounds that the weight of the medical opinion evidence established that he no longer had continuing disability or need for further medical treatment as a result of his September 25, 1996 work injury. In a decision dated September 30, 1998, it modified the termination to reinstate medical benefits for the accepted right shoulder condition. Appellant had one year from the date of that decision to request reconsideration or an appeal to the Board.

On April 26, 2011 appellant asked OWCP to expand the acceptance of his claim to include his neck or cervical area and lower back or lumbar area, as those were accepted injuries in his 1996 claim. He provided an updated medical report as evidence of his ongoing symptoms. In an undated report, Dr. Raul F. Nodal, a neurologist, stated that appellant had been symptomatic from his low back condition without interruption since he first presented in 2006. He noted that appellant's low back pain was covered under workers' compensation as the result of cumulative injuries. Dr. Nodal found that appellant currently suffered from L4-5 bilateral facet synovitis, concentric annular bulge and left greater than right facet hypertrophy with mild central stenosis. Appellant had painful limitation of motion and a positive bilateral straight leg raising test without motor or sensory deficits. Dr. Nodal wanted to rule out disc herniation. He supported the reopening of appellant's claim for medical coverage of his current lumbar condition. Appellant also submitted diagnostic testing of his cervical spine from December 2010.

In a decision dated May 16, 2011, OWCP denied appellant's April 26, 2011 request for reconsideration. It found that the request was untimely and failed to present clear evidence of error in the February 12, 1998 decision to terminate compensation for his accepted lumbar and cervical strain.

On appeal, appellant argued that OWCP authorized and paid for lumbar and cervical medical treatment until October 2010, when it sent a notice that it would discontinue. He contends that the medical conditions for which he was treated still exist.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

The term “clear evidence of error” is intended to represent a difficult standard.⁵ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁶

ANALYSIS

To the extent that appellant’s April 26, 2011 request was for reinstatement of benefits for his previously accepted lumbar and cervical injuries, OWCP properly considered this a request for reconsideration of its February 12, 1998 decision to terminate compensation for the accepted injuries. Appellant had one year to request reconsideration. His April 26, 2011 request is therefore untimely. The question is whether appellant’s request shows clear evidence of error in OWCP’s February 12, 1998 decision.

Appellant correctly observed that OWCP previously accepted his low back and neck injury, but he ignores the nature of the accepted injuries and the reason OWCP terminated benefits. OWCP accepted a lumbar and cervical strain, soft-tissue injuries. It terminated compensation for those soft-tissue injuries because the weight of the medical opinion evidence established that they no longer caused continuing disability for work or the need for further medical treatment.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁶ *Id.*, Chapter 2.1602.3.d(1).

Dr. Nodal, appellant's neurologist, supported the reopening of appellant's case for medical coverage of his lumbar condition, which now included L4-5 bilateral facet synovitis, concentric annular bulge and left greater than right facet hypertrophy with mild central stenosis, painful limitation of motion, positive bilateral straight leg raising and possible disc herniation. He did not, however, address the nature of the accepted lumbar injury and the reason OWCP terminated benefits in 1998. Dr. Nodal did not explain how disability or the award for treatment in 2011 related to the accepted strain.

Diagnostic testing showing the current condition of appellant's cervical spine suffers the same defect.

The Board finds that appellant's untimely request for reconsideration, including the medical evidence provided, fails to establish, on its face, that OWCP's 1998 termination of benefits for lumbar and cervical strains was erroneous. The Board will affirm, therefore, OWCP's May 16, 2011 decision denying his April 26, 2011 request for reconsideration.

If OWCP paid for medical treatment of appellant's lumbar and cervical spine until October 2010, it was a gratuitous benefit to which appellant was not entitled by operation of the 1998 termination. The Board has held that the mere authorization of treatment does not constitute an acceptance of causal relationship.⁷ OWCP never accepted appellant's claim for degenerative disc disease, or for any of the medical conditions Dr. Nodal mentioned in his undated report. Appellant's April 26, 2011 request asked for expansion of his 1996 claim to include as compensable his currently diagnosed lumbar and cervical conditions. This issue is not presently before the Board as there is no final decision on this aspect of his claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's April 26, 2011 request for reconsideration.

⁷ *Robert J. Adcock*, 9 ECAB 459 (1957); see *Mae G. Heede*, 5 ECAB 171 (1952) (although the Bureau, OWCP, continued to furnish the claimant medical treatment for her nervous disorder for several years after her accepted tuberculosis had been arrested, apparently in an attempt to lessen the likelihood of a recurrence of the tuberculosis, such treatment did not indicate that the Bureau had accepted the nervous condition as being causally related to the tuberculosis nor did it entitle the claimant to continued benefits when the weight of the medical evidence showed that she no longer suffered from any disability causally related to her employment).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed. The case is remanded for further action consistent with this decision.

Issued: February 1, 2012
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