

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

G.B., Appellant

and

**U.S. POSTAL SERVICE, SURFSIDE STATION,
Surfside, FL, Employer**

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**Docket No. 11-1673
Issued: February 10, 2012**

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 13, 2011 appellant, through his attorney, filed a timely appeal from a January 19, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as untimely and insufficient to show clear evidence of error. As the last merit decision was issued July 8, 2008, more than one year from the filing of the appeal, the Board lacks jurisdiction over 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 19, 2011 nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely and did not establish 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 final adverse OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 27, 2006 appellant, then a 51-year-old manager, filed a traumatic injury claim alleging that he sustained low back strain and a disc and nerve injury on February 11, 2006 in the performance of duty. OWCP accepted the claim for lumbar strain and paid him compensation for total disability beginning August 26, 2006.

By decision dated July 8, 2008, OWCP terminated appellant's compensation and entitlement to medical benefits effective that date. It found that the April 15, 2008 opinion of Dr. Melvyn Drucker, a Board-certified orthopedic surgeon who provided a second opinion examination, established that appellant had no further condition or need for further medical treatment due to his accepted lumbar strain.³

On May 11, 2010 appellant, through his attorney, requested reconsideration. Counsel argued that Dr. Drucker did not consider whether appellant's lumbar strain aggravated a preexisting condition. He also maintained that Dr. Drucker's finding that appellant's continued problems were primarily due to degenerative disc disease and lumbar radiculopathy implied that part of his condition was due to lumbar strain. The attorney asserted that the claim should be expanded to include an aggravation of preexisting degenerative disc disease and radiculopathy. He further maintained that a March 2010 report from Dr. Eddie Sassoon, an attending Board-certified physiatrist, established that appellant's lumbar strain aggravated preexisting degenerative disc disease and radiculitis.

In a January 15, 2010 statement accompanying the request for reconsideration, appellant related that he continued to experience pain due to his February 11, 2006 back injury. He noted that he had back pain 10 years before the 2006 injury that had resolved. Appellant advised that he had been unable to work since August 2006 due to back pain radiating down his legs to his feet.

In a report dated March 8, 2010, Dr. Sassoon related that he had treated appellant since 2006. He reviewed the February 11, 2006 employment injury and discussed appellant's history of preexisting lumbar degenerative disc disease. Dr. Sassoon stated, "This lumbar strain was superimposed upon this preexisting condition and has caused a permanent aggravation of the lumbar degenerative disc disease and created the lumbar radiculitis." He explained that while he had previously found that appellant's lumbar strain had resolved, the "permanent aggravation of lumbar radiculitis had not resolved at that time and continues. This aggravation of the lumbar disc disease and the radiculitis is directly and causally related to the February 11, 2006 incident." Dr. Sassoon asserted that the mechanism of injury and diagnostic studies supported his finding that appellant's lumbar strain aggravated his preexisting condition and listed work restrictions.

By decision dated January 19, 2011, OWCP denied appellant's request for reconsideration after finding that it was untimely filed and did not demonstrate clear evidence of error.

³ In a report dated April 15, 2008, Dr. Drucker found that appellant had no residuals of his lumbar strain but had restrictions due to nonemployment-related degenerative disc disease and lumbar radiculopathy.

On appeal, appellant's attorney argues that Dr. Drucker did not discuss whether the lumbar strain aggravated a preexisting condition. He asserts that, by finding that the primary cause of appellant's restrictions was degenerative disc disease with radiculopathy, Dr. Drucker implied that the lumbar strain was a partial contributing cause. Counsel maintains that Dr. Sassoon's March 18, 2010 report is rationalized and, given the defects in Dr. Drucker's report, sufficient to warrant reversal of OWCP's termination.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁴ 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 OWCP's 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.⁵

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 the 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.⁶ 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.⁷

ANALYSIS

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 OWCP decision.⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ As appellant's May 10, 2010 request for reconsideration was submitted more than one year after the last merit decision of record, issued July 8, 2008, it was untimely.¹⁰

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.607.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

⁷ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Robert F. Stone*, *supra* note 7.

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

In accordance with internal guidelines and the Board precedent, OWCP properly performed a limited review to determine whether appellant's request for reconsideration showed clear evidence of error warranting reopening his case for further merit review under section 8128(a) of FECA (5 U.S.C. § 8128(a)), notwithstanding its untimeliness. It reviewed the evidence he submitted in support of his request but found that it did not clearly show that OWCP's most recent decision was in error.

The Board finds that the evidence submitted by appellant in support of his request for reconsideration does not raise a substantial question as to the correctness of OWCP's most recent decision. The critical issue is whether he has shown clear evidence of error in OWCP's termination of his compensation and medical benefits on the grounds that he had no further disability or residuals of his accepted lumbar strain.

With his request for reconsideration, appellant submitted a March 8, 2010 report from Dr. Sassoon, who described his treatment of appellant since 2006 and discussed his February 11, 2006 work injury. Dr. Sassoon opined that the accepted employment injury of lumbar strain resulted in a permanent aggravation of preexisting lumbar degenerative disc disease and radiculitis. He asserted that diagnostic studies and the means of injury supported his conclusion. Dr. Sassoon provided work restrictions.

Dr. Sassoon's report is supportive of appellant's claim and contains rationale. 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.¹¹ Dr. Sassoon's report does not manifest on its face that OWCP committed an error in terminating appellant's compensation benefits and thus is insufficient to show clear evidence of error.

In his reconsideration request and on appeal, appellant's attorney argued that Dr. Drucker failed to consider whether accepted lumbar strain aggravated a preexisting lumbar condition. He further contended that Dr. Drucker's finding that appellant's problems resulted primarily from degenerative disc disease with radiculopathy implied that he had residuals from his lumbar strain. Dr. Drucker, however, specifically found that the degenerative disc disease and lumbar radiculopathy were not work related and that appellant had no residuals of his lumbar strain.

On appeal, appellant's attorney also argues that Dr. Sassoon's report is sufficient to show error in OWCP's termination of compensation. As discussed, however, his report does not show on its face that OWCP committed an error in its termination decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

¹¹ See *D.D.*, 58 ECAB 206 (2006); *Joseph R. Santos*, 57 ECAB 554 (2006).

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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