

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

A.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 11-1355 &
11-1389
Issued: May 18, 2012**

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 May 13 and 25, 2011 appellant filed timely appeals from Office of Workers' Compensation Programs' (OWCP) decisions dated December 17, 2010 and April 15, 2011 which denied his reconsideration requests on the grounds that they were untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated August 9, 1989 to the filing of these appeals on May 13 and 25, 2011, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant requested oral argument on May 25, 2011. However, as he is merely raising the same contentions which the Board and OWCP have rejected on numerous contentions, the Board in its discretion denies oral argument. The case can equally well be handled with a review of the record and will not unduly delay the issuing of the decision.

ISSUE

The issue is whether OWCP properly determined that appellant's requests for reconsideration were untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. On March 23, 1989 appellant, then a 23-year-old mail clerk, filed a claim for traumatic injury to his low back on March 20, 1989 when a coworker pushed him backward into a mail container. By decisions dated May 19 and August 9, 1989, OWCP denied his traumatic injury claim on the grounds that he did not establish that the March 20, 1989 incident occurred as alleged. By decision dated January 3, 2005, it denied appellant's request for reconsideration as untimely and insufficient to show clear evidence of error. In a May 12, 2006 decision, the Board affirmed OWCP's January 3, 2005 decision.³ By nonmerit decision dated August 10, 2006, OWCP denied appellant's request for reconsideration as untimely and insufficient to show clear evidence of error. In a February 7, 2007 decision, the Board affirmed OWCP's January 3, 2005 nonmerit decision.⁴ By decision dated February 24, 2009, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and that appellant had not established clear evidence of error. In a decision dated February 23, 2010, the Board affirmed OWCP's February 24, 2009 nonmerit decision.⁵ The facts of this case as set forth in the Board's prior decisions are incorporated by reference.

In a December 10, 2010 request for reconsideration, appellant stated that he was submitting new and relevant medical evidence in support of his claim, including a November 19, 2010 report from Dr. Christopher T. Plastaras, a specialist in physical medicine and rehabilitation, a second "corrected" report from Dr. Plastaras, and a report from Dr. Aron Jeffrey, an osteopath. In a February 22, 2011 request for reconsideration, appellant stated that OWCP erred by ignoring several procedural errors by his employer, which failed to fulfill its statutory obligation to assist him in developing the evidence and in obtaining an attending physician's report. He alleged that the employing establishment ignored a March 21, 1989 medical opinion from his treating physician, Dr. Gunnar Ek, and failed to request a medical report in accordance with 20 C.F.R. §§ 10.330 and 10.331; the employing establishment failed to provide him with a Form CA-1 in a timely fashion; the employing establishment failed to ensure that he received CA-16 or CA-20 forms as a follow up to his submission of his completed Form CA-1; the employing establishment's physician issued a report without examining or treating him and failed to order any diagnostic tests regarding his work-related injuries; although his supervisor initially supported appellant's assertion that his injury was work related, she subsequently changed her mind and controverted the claim, which diminished her credibility and that of the witnesses who provided statements in support of the controversion; the employing establishment's witness statements lack credibility because these witnesses were friends of

³ Docket No. 05-967 (issued May 12, 2006).

⁴ Docket No. 06-2139 (issued February 7, 2007).

⁵ Docket No. 09-1556 (issued February 23, 2010).

appellant's alleged assailant and were prejudiced against him for additional reasons; while all of the witnesses indicated an altercation had occurred, they falsely stated that he was not attacked by a coworker on March 20, 1989 due to their personal animus and jealousy toward him; the employing establishment coerced the witnesses into making statements against him and improperly influenced these statements by telling them what to say; and OWCP did not exercise due diligence in trying to contact him while it was developing the claim.

Appellant submitted numerous medical reports from December 2008 through November 2010 in support of his requests. These included: a December 2, 2008 report from Dr. Jeffrey; reports dated April 19, August 30 and November 2010 from Dr. Plastaras; and reports dated June 14 and July 23, 2010 from Dr. Anand Joshi, Board-certified in physical medicine and rehabilitation. These reports related complaints of chronic back pain, presented several diagnoses of appellant's condition and generally attributed appellant's low back condition to the alleged March 20, 1989 work incident.

By decisions dated December 17, 2010 and April 15, 2011, OWCP denied appellant's request for reconsideration without a merit review, finding the requests untimely requested reconsideration and that appellant had not established clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ does not entitle an employee to a review of an OWCP decision as a matter of right.⁷ 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 any time 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.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ 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.⁹ The Board has found that the imposition of

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ *See* 20 C.F.R. § 10.606(b).

⁹ *Id.* at § 10.607(b).

this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).¹⁰

In cases where a request for reconsideration is not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹¹ Its procedures state that it will reopen a case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the application for review shows clear evidence of error on the part of OWCP.¹²

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.¹³ The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷ 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 *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.¹⁸ The Board makes an independent 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.¹⁹

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on August 9, 1989. Appellant requested reconsideration on December 10, 2010 and February 22, 2011; thus, the requests are untimely as they were outside the one-year time limit.

¹⁰ See cases cited *supra* note 7.

¹¹ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹³ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ See *Jesus D. Sanchez*, *supra* note 7.

¹⁶ See *Leona N. Travis*, *supra* note 14.

¹⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁸ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Board finds that appellant's December 10, 2010 and February 22, 2011 requests for reconsideration failed to show clear evidence of error. As the Board noted in its prior decisions, the issue in this case is whether the March 20, 1989 employment incident occurred at the time, place and in the manner alleged. This question is factual in nature. The medical evidence submitted by appellant does not address the pertinent issue of whether he established the occurrence of the March 20, 1989 employment incident. Appellant did not submit any new factual evidence with his request for reconsideration which was relevant to this issue upon which his claim was denied. The evidence submitted therefore does not establish clear evidence of error in the denial of his claim.

The Board also finds that appellant's December 10, 2010 and February 22, 2011 requests for reconsideration merely restate arguments previously rejected by the Board and OWCP. The Board also finds that his contention that prescription drugs prevented him from filing a timely claim is not a valid reason for failing to file a timely request for reconsideration. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in his reconsideration requests dated December 10, 2010 and February 22, 2011. Inasmuch as appellant's reconsideration requests were untimely filed and failed to establish clear evidence of error, OWCP properly denied further review in its December 17, 2010 and April 15, 2011 decisions.

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2011 and December 17, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 18, 2012
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