United States Department of Labor
Employees' Compensation Appeals Board

A.A., Appellant	)	
and	)	**Docket No. 12-928**
	)	**Issued: September 11, 2012**
U.S. POSTAL SERVICE, TRIBORO PERFORMANCE CLUSTER, Flushing, NY, Employer	)	

Appearances:
Anthony C. Darienzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2012 appellant, through counsel, filed a timely appeal from the November 30, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his reconsideration request. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the October 30, 2009 decision of OWCP. Because more than one year has elapsed between the last merit decision and the filing of this appeal on March 19, 2012, the Board lacks jurisdiction to review the merits of this claim.[2]

[1] 5 U.S.C. §§ 8101-8193.

[2] For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

OWCP accepted that on March 1, 2006 appellant, then a 60-year-old driver, sustained a strain/sprain of his right shoulder, strain/sprain of his neck and lumbar strain/sprain (exacerbation of preexisting right lumbar radiculopathy) due to a vehicular accident at work. It later accepted that he sustained lumbosacral root lesions and other acquired deformities of his right ankle and foot due to this injury. Appellant stopped work and received compensation for periods of disability.

In April 17 and July 31, 2008 reports, Dr. Benjamin Bieber, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant was totally disabled from work.

In an August 6, 2008 report, Dr. Frank Hudak, a Board-certified orthopedic surgeon, who served as an OWCP referral physician, indicated that appellant could return to limited-duty work with restrictions of lifting, pushing and pulling no more than 20 pounds and twisting, bending or stooping for no more than two hours per day.

In December 2008, OWCP determined that there was a conflict in the medical opinion evidence between Dr. Bieber and Dr. Hudak regarding appellant's ability to work and it referred appellant to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, for an impartial medical examination on the matter.

In an April 30, 2009 report, Dr. Katz detailed appellant's factual and medical history, including the circumstances of his March 1, 2006 work injury and his medical treatment since that time. He provided the findings of his physical examination and diagnosed resolved cervical strain, resolved right shoulder contusion, resolved status post right foot drop and lumbosacral radiculopathy. Dr. Katz indicated that appellant continued to have limited range of motion and mild spasm in his lumbar spine and noted that he currently only suffered from the lumbosacral radiculopathy which was related to the events of March 1, 2006 *via* an aggravation which appeared to be permanent. He recommended that appellant participate in physical therapy sessions two times per week for three weeks but indicated that only surgical intervention would correct the underlying condition. Dr. Katz noted that appellant had a partial degree of disability and stated:

> "[Appellant] is currently not capable of full[-]duty work as a driver although he would be capable of limited[-]duty seated work with limited standing, limited stooping, limited bending and no lifting of greater than 15 [pounds]. He is capable of working six hours per day. It appears that [appellant] will never be able to return to his previous job but it is possible that his restrictions may be lessened at some point. The restrictions should be in effect for three months."

In an April 30, 2009 form report, Dr. Katz indicated that appellant could work for up to six hours per day and delineated various work restrictions, including sitting for up to five hours, engaging in repetitive wrist or elbow motion for up to six hours per day, operating a motor vehicle at work for one hour per day and operating a motor vehicle to and from work for one hour per day. He stated that the restrictions would apply for three months.

In a May 18, 2009 form report, Dr. Bieber indicated that appellant was totally disabled from May 29, 2007 to the present. In reports dated May 18, July 2 and August 5, 2009, he stated that appellant should continue with physical therapy treatment.

On August 18, 2009 the employing establishment offered appellant a limited-duty position as a modified motor vehicle operator for six hours per day, five days per week. The position involved "answering phones and faxes" for two hours per day, "issuing keys and runs/driving" for two hours per day, "mathematical computations/clients" for one hour per day and "filing paperwork" for one hour per day. The physical requirements of the position included "reaching for phone while sitting/standing" for two hours per day, "issuing keys and runs while sitting/standing" for two hours per day, "mathematical computations while sitting" for one hour per day and "filing forms under 15 pounds" for one hour per day.[3]

In an August 25, 2009 letter, appellant stated, "In response to your offer of a modified assignment dated August 18, 2009, on the advice of my physician I am declining this offer as it is not specific as to the amount of physical exertion I am required to perform."

In a September 11, 2009 letter, OWCP advised appellant of its determination that the modified motor vehicle operator position offered to him was suitable. It advised him that he had 30 days from the date of the letter to accept the position or to provide a valid reason for refusing the position. OWCP noted that, under 5 U.S.C. § 8106(c)(2) of FECA, a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation. Appellant did not respond to OWCP's September 11, 2009 letter within the allotted time.

In an October 30, 2009 decision, OWCP terminated appellant's compensation effective October 21, 2009 on the grounds that he refused an offer of suitable work. It indicated that the weight of the medical evidence regarding appellant's ability to work rested with the April 30, 2009 report of Dr. Katz, the impartial medical specialist. OWCP noted that the modified motor vehicle operator position offered to appellant on August 18, 2009 was formulated based on the physical restrictions imposed by Dr. Katz. It indicated that appellant was advised of the suitability of the position, but she did not accept the position or provide valid reasons for refusing the position within the time allotted and, therefore, it terminated appellant's compensation.

[3] On November 8, 2011 a September 1, 2009 offer for modified work as a motor vehicle operator, which listed appellant's name, was added to the record. The position required various tasks including "issue keys runs/driving" for two hours per day and restricted various physical actions, including an indication of "no truck driving, bending, stooping." There is no indication in the record that this position was actually offered to appellant.

In a November 1, 2011 letter, appellant's counsel requested reconsideration of OWCP's October 30, 2009 decision and argued that the termination of appellant's compensation was improper. Counsel indicated that Dr. Katz noted in his April 30, 2009 report that appellant was not capable of full duty as a driver and that he also described the types of limited work appellant could perform without mentioning any type of driving.[4] He noted that the August 18, 2009 modified job offer required "issuing keys and runs/driving" for two hours per day, but indicated that the term driving was not limited and no vehicle class was mentioned. Moreover, the portion of the job offer listing physical requirements makes no mention as to whether appellant would be required to drive a motor vehicle of any type. Counsel argued that this requirement was inconsistent with Dr. Katz' instruction that appellant could not return to his full-duty job as a driver. He stated that the record now included a September 1, 2009 modified job offer that was not previously forwarded to appellant. The description of the physical requirement of the job ruled out any truck driving, bending or stooping and counsel felt that OWCP made a material mistake in not forwarding this job offer to appellant. Counsel stated that appellant declined the job offered on August 18, 2009 on Dr. Bieber's advice and asserted that Dr. Katz did not mention the fact that truck drivers of certain classes of large vehicles were required to meet Department of Transportation medical requirements on a regular basis. He noted:

> "We maintain that the August 18 offer was not a suitable offer of work since it did not contain restrictions with respect to truck driving; was otherwise vague and not in conformance with the referee specialist's recommendation, and therefore it was reasonable for [appellant] to decline the offer. The September 1, 2009 [job offer], did however, contain restrictions concerning truck driving but this offer was never provided to my client and is not mentioned in [OWCP's] decision of October 30, 2009."

In a November 30, 2011 decision, OWCP denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. It stated that his reconsideration request was made on November 1, 2011, *i.e.*, a period more than one year after the issuance of its last merit decision on October 30, 2009. OWCP discussed appellant's argument regarding the insufficiency of the job offer made on August 18, 2009 and stated, "You did not present clear evidence of error. Therefore your request for reconsideration is denied because it was not dated within the one-year limit."

LEGAL PRECEDENT

To be entitled to a merit review of OWCP decision denying or terminating a benefit, a claimant must file his or his application for review within one year of the date of that decision.[5] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.[6]

[4] Counsel asserted that Dr. Katz' report was only recently provided to him.

[5] 20 C.F.R. § 10.607(a).

[6] 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[7] OWCP regulations and procedure provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of OWCP.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[9] The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13]

ANALYSIS

In its November 30, 2011 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on November 1, 2011, more than one year after OWCP's October 30, 2009 decision, and therefore he must demonstrate clear evidence of error on the part of OWCP in issuing this decision.[14]

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its October 30, 2009 decision. He did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error.

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[7] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[8] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's procedures further provide, "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).

[9] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[10] 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

[11] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[12] *See Leona N. Travis*, *supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[14] In an October 30, 2009 decision, OWCP terminated appellant's compensation effective October 21, 2009 on the grounds that he refused an offer of suitable work. It indicated that the weight of the medical evidence regarding appellant's ability to work rested with the April 30, 2009 report of Dr. Katz, a Board-certified orthopedic surgeon who served as impartial medical specialist. OWCP noted that the modified motor vehicle operator position offered by the employing establishment to appellant on August 18, 2009 was formulated based on the physical restrictions imposed by Dr. Katz.

In a November 1, 2011 letter, appellant, through counsel, requested reconsideration of OWCP's October 30, 2009 decision and argued that the termination of his compensation for refusing suitable work was improper.[15] He indicated that Dr. Katz noted in his April 30, 2009 report that he was not capable of full duty as a driver and that he also described the types of limited work he could perform without mentioning any type of driving. However, this characterization of Dr. Katz' opinion is not proper as Dr. Katz did, in fact, indicate that appellant could engage in driving for a certain period each day.[16] Appellant did not adequately explain why Dr. Katz' opinion on his ability to drive did not comport with the limited driving requirements of the modified motor vehicle operator position.[17] He noted that the August 18, 2009 job offer did not mention any particular type of vehicle class that would be driven. The Board notes, however, that Dr. Katz' opinion did not limit appellant's driving to any particular class of vehicle. Appellant asserted that the portion of the job offer listing physical requirements made no mention as to whether he would be required to drive a motor vehicle, but the Board notes that the driving requirement of the offered position is adequately detailed in other portions of the job offer. He also discussed another job offer dated September 1, 2009, but it does not appear that this job was actually offered to appellant and he did not adequately articulate the relevance of this document to the sufficiency of the job offer made on August 18, 2009.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's October 30, 2009 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

[15] Appellant, through counsel, also made a similar argument on appeal to the Board.

[16] Dr. Katz stated that appellant could engage in driving for up to two hours per day, comprised of operating a motor vehicle at work for one hour per day and operating a motor vehicle to and from work for one hour per day. He also indicated that appellant could sit for five hours per day and could engage in repetitive motion with his wrists or elbows for up to six hours per day.

[17] The duties of the modified job offered on August 18, 2009 included "issuing keys and runs/driving" for up to two hours per day.

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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