

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

M.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Devils Lake, ND, Employer**

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**Docket No. 13-413
Issued: April 3, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 13, 2012 appellant filed a timely appeal from the November 1, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request. Since more than 180 days has elapsed between the last merit decision on July 29, 2011 and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's reconsideration request as it was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On April 20, 2011 appellant, a 52-year-old rural carrier, filed an occupational disease claim alleging that his left arm started going numb and started to ache at the beginning of the

¹ 5 U.S.C. § 8101 *et seq.*

month. A few days later, his left leg started going numb. Appellant stated that his doctor attributed it to the repetition of casing mail, lifting packages and steering his vehicle.

Dr. Paul Fleissner, Board-certified in family medicine, saw appellant on May 10, 2011 for follow-up of pain associated with the left side of his neck and his left arm and for numbness in his hand “associated with repetitive casing and performing his activities as a rural mail carrier for the United States Postal Service.” Dr. Fleissner related appellant’s complaints, described his findings on examination and diagnosed a painful left arm and a history of degenerative disease of the cervical spine.

A magnetic resonance imaging scan showed degenerative changes at C4-5 and more prominently at C5-6. There was some encroachment on the right intervertebral foramen at C5-6 and a relative spinal stenosis at the same level. The spinal cord appeared normal.

Dr. Fleissner saw appellant again on May 24, 2011. He diagnosed cervical degenerative disease and intermittent discomfort in the left upper extremity consistent with a radiculopathy or neuropathy. Appellant had some features of a C6-7 lesion.

In a July 29, 2011 decision, OWCP denied appellant’s claim for workers’ compensation benefits. It found that the medical evidence failed to establish that his diagnosed condition was causally related to specific work factors. Although Dr. Fleissner noted that appellant’s pain and numbness were associated with repetitive work activities, he did not provide a well-reasoned medical opinion to support how exposure to specific work factors aggravated appellant’s preexisting degenerative disease of the cervical spine.

Appellant telephoned OWCP on August 8, 2012 to advise that the Branch of Hearings & Review informed him that it never received his appeal form and that he should resubmit it. On August 24, 2012 OWCP spoke to appellant and informed him that it never received an appeal request. Appellant was adamant that he sent it to OWCP and that his doctor had signed off on it.

On August 31, 2012 appellant faxed to OWCP an undated statement explaining that he applied for workers’ compensation in May 2011 and was denied. He stated that he reapplied in October 2011. Later that year, OWCP advised that appellant’s claim was under review and that a decision takes about 10 months. Appellant talked to many people since, but no one could find his claim. In an August 31, 2012 statement, he explained, “I’m going to have to reapply and I can’t wait another year. I’ve lost my health & life insurance benefits.”

Appellant submitted a September 29, 2011 report from Dr. Fleissner. He stated that he submitted this report when he reapplied for compensation. Dr. Fleissner noted appellant’s cervical degenerative disease and active history of cervical radiculopathy with radiation to the left upper extremity with weakness. He reviewed appellant’s job functions, including sorting and casing mail and driving and delivering mail. Dr. Fleissner noted that appellant used both left and right hands to grab and deliver mail to the mail boxes. Appellant reached using his left upper extremity to grab mail off the seat next to him and pass that to his right hand in order to place the mail in the boxes. Also, he used his left upper extremity to reach upward and repetitively to place mail into mail slots while casing.

Dr. Fleissner opined that the particular motion involving repetitive head motion to the right and left and reaching with the left upper extremity “could cause an aggravation of an underlying degenerative disease of the neck and cause the symptoms that have been presented.”

On September 4, 2012 appellant submitted an incomplete appeal request form indicating that he wanted reconsideration. On October 17, 2012 OWCP received a completed form.

In a November 1, 2012 decision, OWCP denied appellant’s reconsideration request. It found that his request was untimely and did not show clear evidence of error in the July 29, 2011 decision denying his claim for compensation benefits. OWCP noted that it had appropriately assessed the information that was in the file at the time of its July 29, 2011 decision and correctly denied appellant’s claim on the grounds that his physician had not provided an explanation for a causal relationship between the diagnosis and the work activities. It added: “A limited review to determine clear evidence of error does not include consideration of new medical reports received in the file.”

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.”²

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 received by OWCP within one year of the date of the OWCP 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.³

The term “clear evidence of error” is intended to represent a difficult standard.⁴ 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.⁵

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

⁵ *Id.* at Chapter 2.1602.5.b.

ANALYSIS

Appellant had one year from OWCP's July 29, 2011 decision, or until July 29, 2012, to deliver a reconsideration request to OWCP. The Board has thoroughly reviewed the record and can find no reconsideration request received prior to the July 29, 2012 deadline.

Appellant has explained that he "reapplied" in October 2011, but it is unclear what he means by that term. If he means he completed and sent an appeal request form to OWCP indicating that he was requesting reconsideration, no such evidence appears in the record.

OWCP received appellant's completed reconsideration request on October 17, 2012, well after the one-year period of limitation. None of his earlier communications -- the telephone contact he had with OWCP in August 2012, his August 31, 2012 statement, the incomplete appeal request form he sent on September 4, 2012 -- shows receipt by OWCP of a timely request.

Accordingly, the Board finds that appellant's reconsideration request is untimely. The question for determination is whether his request demonstrates clear evidence of error on the part of OWCP in its denial of compensation.

To support his request, appellant submitted a September 29, 2011 report from Dr. Fleissner, the attending physician Board-certified in family medicine. OWCP, however, did not consider this evidence to determine whether it satisfied the clear evidence of error standard. It indicated that a limited review to determine clear evidence of error does not include consideration of new medical reports received in the file.

OWCP cited no rule to support this proposition. To the contrary, regulations require it to consider all evidence submitted appropriately.⁶ Regulations also require OWCP's decisions to contain findings of fact and a statement of reasons.⁷

In the case of *T.M.*,⁸ OWCP denied an untimely reconsideration request with the following assertion: "Since your request is untimely, we are not obligated to review new evidence." The Board found that this was not the proper standard. In order to determine whether the claimant has established clear evidence of error, the Board explained, OWCP will review the evidence submitted and arguments raised in support of the request and determine whether such evidence or argument is sufficient to show error in its prior decision. It shall then issue a decision containing findings of fact and conclusions of law. The Board set aside OWCP's denial of reconsideration and remanded the case for an appropriate decision.

In this case, OWCP denied appellant's claim on the grounds that Dr. Fleissner did not provide a well-reasoned medical opinion to support how exposure to specific work factors aggravated appellant's preexisting degenerative disease of the cervical spine. It is therefore

⁶ 20 C.F.R. § 10.119.

⁷ *Id.* at § 10.126.

⁸ Docket No. 12-1307 (issued December 12, 2012).

incumbent on it to consider Dr. Fleissner's September 29, 2011 response to determine whether appellant is entitled to a reopening of his case and a merit review of his claim.

The Board will set aside OWCP's November 1, 2012 decision and remand the case for a proper exercise of OWCP's discretion under 20 C.F.R. § 10.607 and for an appropriate final decision on appellant's untimely reconsideration request.

CONCLUSION

The Board finds that this case is not in posture for decision. Further action is warranted.

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: April 3, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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