

FACTUAL HISTORY

On the first appeal of this case,³ the Board found that OWCP failed to exercise its discretion to grant appellant's untimely hearing request. The Board remanded the case for a proper exercise of discretion.

The Board noted that on April 24, 2003 appellant, a 67-year-old letter carrier, sustained an injury in the performance of duty when he was involved in an automobile accident. OWCP accepted his claim for cervical and left shoulder strains. It also accepted lumbar sprain, degeneration of lumbar or lumbosacral intervertebral disc and lumbar spinal stenosis. In a decision dated November 6, 2008, OWCP denied appellant's claim that he sustained a recurrence of disability beginning August 27, 2008. The facts of this case as set out in the Board's prior decision and in OWCP's November 6, 2008 decision are hereby incorporated by reference.

OWCP again denied appellant's untimely hearing request on November 3, 2011. The Board, on August 13, 2012 however, again found a failure by OWCP to exercise discretion.⁴ On September 6, 2012 OWCP exercised its discretion by denying appellant's untimely hearing request on the grounds that he could address the issue in his case through an alternative avenue of appeal. Specifically, it advised that he could request reconsideration and submit evidence not previously considered establishing that he was totally disabled for modified work or that the work assignment was changed and no longer met his medically established work restrictions.⁵

On December 12, 2012 appellant requested reconsideration of OWCP's denial of compensation beginning August 27, 2008. He submitted an April 30, 2010 report from Dr. Mahe T. Nadeem, a Board-certified physiatrist:

“[Appellant] was injured on April 23, 2003 while driving a postal vehicle and was rear[-]ended. Since then he complained of low back pain. [Appellant] had another injury on February 5, 2008 when he was lifting a bucket of mail and his left shoulder snapped. He was seen on June 6, 2008 and was released to light duty on June 6, 2008. [Appellant's] low back pain was worsening and eventually he was taken off work on August 27, 2008 and released to work light duty on November 20, 2008.”

Appellant submitted Dr. Nadeem's November 21, 2012 duty status report. He also made reference to a May 14, 2010 report from Dr. Devesh Ramnath, a Board-certified orthopedic surgeon:

“This is a letter regarding a patient of mine, [appellant]. [He] is a patient I have been following for a work[-]related injury to his neck and lower back. I have been seeing [him] since January 2008. [Appellant] has had intermittent, flare-ups

³ Docket No. 11-879 (issued October 14, 2011).

⁴ Docket No. 12-710 (issued August 13, 2012).

⁵ On November 30, 2012 the Board granted appellant's request to withdraw his appeal in order to request reconsideration from OWCP. Docket No. 12-1963 (issued November 30, 2012).

and worsening of his injuries intermittently, which has made it so that he has had to be out of work. He eventually was taken to surgery and was off of work during his recuperative phase. [Appellant] reviewed a letter per Dr. Nadeem, which outlines some specific dates that he was off and I would agree with the dates that she has listed in her letter that he was unable to work.”

In a decision dated March 15, 2013, OWCP denied appellant’s December 12, 2012 reconsideration request. It found the request untimely. Further, OWCP found that the request failed to present clear evidence of error in OWCP’s November 6, 2008 decision denying his recurrence claim. It found a physician’s statement of increased low back pain did not, in and of itself, constitute objective evidence of a recurrence of disability. Further, the physicians did not provide rationale or discuss if a material change occurred such that appellant was no longer able to perform the duties he had been successfully performing. “The evidence is not sufficient to shift the weight of the evidence nor does it raise a substantial question as to the correctness of [OWCP’s] decision.”

On appeal, appellant submitted copies of the above reports from Dr. Nadeem and Dr. Ramnath. He addressed OWCP’s delay in denying his claim and asked that his compensation be restored in full.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to 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.”⁶

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. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.⁷

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a).

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.⁸

The term “clear evidence of error” is intended to represent a difficult standard.⁹ 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.¹⁰

ANALYSIS

On November 6, 2008 OWCP denied appellant’s claim that he sustained a recurrence of disability beginning August 27, 2008. Appellant had one calendar year or until November 6, 2009, to send any reconsideration request. His December 12, 2012 reconsideration request is therefore untimely.

To warrant a reopening of his case, appellant’s untimely request must demonstrate clear evidence of error in OWCP’s November 6, 2008 merit decision. In that decision, OWCP found that the medical evidence did not support a material worsening of his condition that would preclude him from engaging in his modified duties. It noted that appellant’s burden included the furnishing of medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concluded that the disabling condition was causally related to the employment injury and who supported that conclusion with sound medical reasoning. OWCP also noted that a medical opinion consisting solely of a conclusory statement regarding disability, without supporting rationale, was of little probative value.

Dr. Nadeem’s April 30, 2010 report stated that appellant’s low back pain worsened and eventually he was taken off work on August 27, 2008. Although this is relevant to appellant’s recurrence claim, it is not sufficient to establish clear evidence of error. As OWCP noted in its November 6, 2008 decision, Dr. Nadeem’s other reports also stated that he was taken off work due to the worsening of his back pain. The April 30, 2010 report adds nothing new to the record. It does not, on its face, demonstrate that OWCP’s November 6, 2008 decision was clearly erroneous in denying appellant’s claim.

When OWCP denied appellant’s recurrence claim, it indicated that the medical evidence suffered from certain deficiencies as a physician failed to address how his low back condition had worsened. The physician did not provide objective clinical findings or clinical studies to substantiate a material worsening in the accepted employment injury. Appellant’s subjective complaints of pain are not enough to establish his entitlement to compensation beginning August 27, 2008. A claimant may not self-certify his disability for work and entitlement to compensation. There must be objective findings and sound medical reasoning based on a proper

⁸ *Id.* at § 10.607(b).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

¹⁰ *Id.*, at Chapter 2.1602.3.d(1).

factual and medical history. Dr. Nadeem's April 30, 2010 report stated only that appellant was taken off work on August 27, 2008 due to worsening low back pain; he did not address the deficiencies in appellant's claim or establish clear evidence of error in OWCP's November 6, 2008 decision. As the Board noted earlier, clear evidence of error is intended to be a difficult standard. Appellant cannot meet this standard by submitting evidence that is broadly relevant to his claim.

Dr. Nadeem's November 21, 2012 duty status report is not relevant to the issue of recurrence beginning August 27, 2008.

In a May 14, 2010 report, Dr. Ramnath stated that appellant had intermittent flare-ups and intermittent worsening of his injuries, which made it so that he had to be out of work and was eventually (on June 30, 2009) taken to surgery. He deferred to Dr. Nadeem's dates for disability. Dr. Ramnath failed to provide any objective clinical findings or clinical studies to document a material worsening of appellant's accepted work injuries leading up to his work stoppage on August 27, 2008. The report offered no medical rationale to explain why these injuries were flaring up or worsening on an intermittent basis. Dr. Ramnath did not demonstrate his familiarity with the physical demands of appellant's modified-duty assignment in 2008 and did not explain how the flare-ups prevented appellant from working his modified duty. His report does not show that OWCP's November 6, 2008 decision was clearly erroneous.

Because appellant's untimely reconsideration request fails to show clear evidence of error in OWCP's November 6, 2008 decision, the Board will affirm OWCP's March 15, 2013 decision denying that request.

CONCLUSION

The Board finds that OWCP properly denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2013
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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