

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

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**T.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Brooklyn Center, MN, Employer**

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**Docket No. 14-935  
Issued: July 25, 2014**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 18, 2014 appellant filed a timely appeal from a December 12, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying his reconsideration request. Because more than 180 days elapsed from the most recent OWCP merit decision dated February 13, 2012, to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3.

**ISSUE**

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

**FACTUAL HISTORY**

On September 13, 1988 appellant, then a 36-year-old letter carrier, was involved in a rear-end motor vehicle collision and sustained a neck injury. OWCP accepted his claim for cervical strain and herniated disc at C6-7. Appellant stopped work on September 15, 1988 and was eventually placed on the periodic rolls.

On September 15 and 19, 1988 appellant came under the treatment of Dr. Thomas C. Jetzer, a Board-certified physiatrist, for a neck and shoulder injury. Dr. Jetzer diagnosed resolving cervical strain and returned appellant to work full-time light duty. In reports dated July 30, 1990 and April 30, 1991, he treated appellant for neck pain and diagnosed C5-6 and C6-7 disc herniation and cervical degenerative disc disease. On April 30, 1991 Dr. Jetzer noted that appellant had reached maximum medical improvement and recommended a functional capacity evaluation. In a report dated January 8, 2001, he diagnosed preexisting degenerative disc disease without evidence of ongoing, progressive or lasting pathology from the 1988 work injury, other than the natural aging process. Dr. Jetzer opined that appellant was functioning normally and capable of returning to work at regular duty as a letter carrier without restrictions.

Appellant submitted a November 25, 1988 report from Dr. Daniel C. Randa, a Board-certified neurologist, who treated him for cervical pain radiating into the left arm after a work-related motor vehicle accident. Dr. Randa noted that a magnetic resonance imaging (MRI) scan revealed central disc herniation at C6-7 and C5-6. On January 20, 1989 he treated appellant for cervical pain radiating into the left arm after a motor vehicle accident in September 1988. Dr. Randa diagnosed cervical spondylosis with C5-6 and C6-7 disc herniation with cord encroachment. In a February 16, 1989 report, Dr. John Gfrerer, a Board-certified family practitioner, treated appellant for neck pain after the work injury on September 13, 1988. He opined that the neck injury and cord compression occurred as a result of appellant's motor vehicle accident. Appellant submitted a January 16, 1990 report from Dr. Sean P. Flood, a physiatrist, who treated him for neck pain, numbness and weakness. Dr. Flood diagnosed chronic degenerative disc disease in the neck, herniated disc at C5-6 and continued appellant's work restrictions.

OWCP referred appellant for a second opinion evaluation to Dr. E. Harvey O'Phelan, a Board-certified orthopedic surgeon. In a June 11, 2004 report, Dr. O'Phelan found that appellant had severe osteoarthritis of the cervical spine which was not causally related to the work injury of September 13, 1988. Further, appellant had no residuals of the work-related injury.

OWCP found a conflict of opinion between appellant's treating physician and Dr. O'Phelan and referred him to a referee to resolve the conflict. In a September 22, 2010 report, Dr. Gary Wyard, a Board-certified orthopedic surgeon and referee physician, diagnosed longstanding cervical degenerative disc disease and severe osteoarthritis of the cervical spine. He opined that appellant's cervical condition was not causally related to the September 13, 1988 work injury and determined that he did not have work-related residuals.

On October 7, 2010 OWCP issued a notice of proposed termination of compensation benefits based on Dr. Wyard's September 22, 2010 report.

In a statement dated November 4, 2010, appellant disagreed with the proposed termination and submitted reports from Dr. Jetzer dated October 29, 1990 and November 5, 1991, previously of record.

By decision dated December 3, 2010, OWCP terminated appellant's compensation benefits effective that day. It found that the weight of the medical evidence established that residuals of his work-related injury had ceased.

On November 28, 2011 appellant requested reconsideration. He submitted a November 14, 2011 report from Dr. Paul J. Crowe, a Board-certified orthopedic surgeon, who diagnosed advanced degenerative disc disease of the cervical spine worsened by the rear-end automobile injury. Based on appellant's history, the 1988 accident resulted in a significant permanent aggravation of his preexisting problem. In a November 28, 2011 report, Dr. L.L. Lira, a Board-certified orthopedic surgeon, reviewed a history of the 1988 car accident and subsequent medical treatment. He opined that the probability was 51 percent or greater that the aggravation and progression of appellant's preexisting degenerative disc disease was directly connected to the accident of September 13, 1988.

In a decision dated February 13, 2012, OWCP denied modification of the December 3, 2010 decision.

On February 4, 2013 appellant requested reconsideration. He submitted a myelogram dated March 20, 1989; reports from Dr. Jetzer dated October 29, 1990 to February 10, 1992; a functional capacity report dated 1991; a second opinion report from Dr. O'Phelan dated June 11, 2004; a January 16, 2009 report from Dr. Flood; a referee report from Dr. Wyard dated September 22, 2010; a November 14, 2011 report from Dr. Crowe and a report from Dr. Lira dated November 28, 2011, all previously of record. Appellant also submitted a recent MRI scan of the cervical spine dated October 15, 2012.

In a decision dated March 21, 2013, OWCP denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant further merit review.

In an appeal request form dated October 2, 2013, appellant requested reconsideration. He disagreed with OWCP's decision to terminate his compensation and asserted that the opinions of the second opinion physician, Dr. O'Phelan and the referee physician, Dr. Wyard should be dismissed. Appellant asserted that Dr. O'Phelan failed to base his diagnosis on the accepted claim of herniated disc but on degenerative disc disease. As a result, no true conflict of medical opinion arose and he should not have been referred to Dr. Wyard. Appellant contented that Dr. Wyard circumvented the accepted facts and that Dr. Crowe's November 14, 2011 report supported that his accepted motor vehicle accident resulted in a permanent aggravation of his cervical condition. He submitted evidence previously of record. Appellant also submitted duty status reports from Dr. Lira dated February 15 and December 10, 2012 which diagnosed herniated C6-7, C3-4 and cervical strain. Dr. Lira noted that appellant could resume work on February 15, 2012 with permanent restrictions. A February 4, 2013 electromyogram (EMG) revealed changes in the bilateral nerve distributions seen in carpal tunnel syndrome. Also submitted was a list of appellant's treating physicians and a list of OWCP physicians.

By decision dated December 12, 2013, OWCP denied appellant's request for reconsideration finding that it was untimely and did not establish clear evidence of error.

## **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.”<sup>1</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.<sup>2</sup> However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>3</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>4</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.<sup>5</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>6</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>7</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>8</sup>

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.607(a).

<sup>3</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>4</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>5</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

## **ANALYSIS**

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>9</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues. Appellant's October 2, 2013 request for reconsideration was not received within one year after the most recent merit decision of February 13, 2012. Therefore, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.

The Board further finds that appellant has not established clear evidence of error on the part of OWCP in denying his claim. Appellant's October 2, 2013 letter disagreed with OWCP's decision to terminate his compensation and asserted that the opinions of OWCP's referral physicians should be dismissed. He asserted that Dr. O'Phelan failed to base his diagnosis on the accepted claim of herniated disc but based his opinion on his degenerative disc disease and Dr. Wyard circumvented the accepted facts by omission and deception. Appellant asserts that Dr. Crowe's November 14, 2011 report supports a continuing work-related condition. While he addressed his disagreement with OWCP's termination of his medical and compensation benefits, appellant's general allegations do not raise a substantial question as to the correctness of OWCP's decision.

In support of his reconsideration request, appellant also submitted additional evidence, but much of it was previously of record and previously considered by OWCP. He did not explain how this evidence was positive, precise and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. The resubmission of this evidence is not sufficient to raise a substantial question as to the correctness of OWCP's decision or show clear evidence of error.

Appellant submitted duty status reports from Dr. Lira dated February 15 and December 10, 2012 which diagnosed herniated C6-7, C3-4 and cervical strain. Dr. Lira noted that appellant could resume work on February 15, 2012 with permanent restrictions. Also submitted was a February 4, 2013 EMG report. The reports do not explain how appellant's continuing condition or disability is causally related to his employment. The Board notes that clear evidence of error 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 sufficient to establish clear evidence of error.<sup>10</sup> Appellant has not established clear evidence of error by OWCP in its December 12, 2013 decision.

On appeal, appellant asserts that his reconsideration request should be deemed timely because he sought to correct deficiencies in his February 4, 2013 reconsideration request. He cited no authority for his contention that the time period for requesting reconsideration should be

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<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> D.G., 59 ECAB 455 (2008).

extended under such circumstances. Appellant also reiterated assertions that he made before OWCP that the termination of his benefits was improper. As noted, the Board does not have jurisdiction over the merits of the claim.

**CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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