

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

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M.R., Appellant)	
)	
and)	Docket No. 13-2095
)	Issued: March 27, 2014
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Glynco, GA, Employer)	
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Appearances:
Kamau K. Mason, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 19, 2013 appellant, through counsel, filed a timely appeal of an April 17, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed from the most recent merit decision dated July 11, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act¹(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits as his request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 13, 2008 appellant, then a 45-year-old marine interdiction agent, filed a traumatic injury claim alleging that, on June 2, 2008, while in the performance of duty during physical and defensive tactics training, he was injured when two students fell on top of him causing pain on the right side of his neck and back. He did not initially stop work.

In a January 11, 2010 report, Dr. Efrain Salgado, a Board-certified neurologist, noted that appellant was seen to determine whether right neck pain that he is having now is related to an injury he sustained in June 2008 during the course of activities related to his employment. At that time he was practicing defensive tactics. While having his hands tied behind his back, appellant was accidentally hit from behind by a fellow trainee causing him to fall forward and hit his chin on the ground. This caused hyperextension of his neck. Appellant had right neck pain and an isolated shock in his right arm at the time of the impact.” Dr. Salgado noted that appellant reported the incident to the employing establishment and was seen in an outpatient clinic and was prescribed ibuprofen. Appellant continued with neck pain that gradually improved over a couple of months. He also had some neck pain when he overexerted himself or after working long hours. Dr. Salgado indicated that a few months ago appellant experienced more difficulty with weakness of the right arm as he was doing pushups. He advised that appellant noticed when he was riding a boat another sharp pain similar to the one he had at the time of the injury and opined that “since that time the right neck pain has been exacerbated.” Dr. Salgado noted another incident in the last month in which appellant advised that “he had another episode of a shock going into the right arm as he turned his head to the right and yawned.” He diagnosed chronic cervical strain and right C6 radiculopathy. Dr. Salgado opined that it could have been related to a stretch injury from June 2008 or from riding in a boat several months ago. He indicated that a cervical magnetic resonance imaging (MRI) scan revealed multilevel degenerative disc disease and foraminal stenosis.

On February 16, 2010 OWCP accepted the claim for cervical radiculopathy and cervical strain.

In a September 14, 2010 report, Dr. John Gorecki, a Board-certified neurosurgeon, noted:

“[Appellant] was injured in August 2008 on the job. During a training exercise [he] was handcuffed with his hands behind his back wearing a face protective helmet when somebody fell into him knocking him to the ground hyperextending his neck. [Appellant] experienced severe zingers and electrical shocks in all four extremities and transient paralysis. Subsequently [he] was involved in a job that requires him to travel in a boat on moderate waves on the ocean resulting in repeated mild trauma to the cervical spine. [Appellant] noticed that with cervical flexion he developed spontaneous fasciculation of the right biceps and over time he developed progressive wasting of the right bicep. [He] has been able to diminish his severe sharp neck and right arm pain with cervical stretching and

positions that decompress the exiting neural foramina particularly on the right. [Appellant] did not tolerate cervical traction.”

Dr. Gorecki diagnosed cervical spondylosis and headache syndromes. His office later requested approval for anterior cervical discectomy and fusion at C4-5 and C5-6.

On October 14, 2010 appellant requested that his claim be expanded to include cervical herniated discs and headaches.

In an October 21, 2010 letter, OWCP advised appellant that it had received his request for expansion of his claim to include headaches and herniated nucleus pulposus (HNP) of the cervical region. It explained that there were no medical records in the claim prior to January 4, 2010, approximately 1.5 years after the claimed injury of June 2, 2008. OWCP requested that appellant provide current medical records and rationalized medical evidence. It also noted that he had degenerative conditions in the cervical region which were not accepted.

On October 22, 2010 appellant noted that he had a prior work injury to his hand on May 27, 2008 under claim No. xxxxxx879. He indicated that he was unsure of how the claim process worked and was not sure how his injuries were to be treated. Appellant indicated that the hand injury required surgery and he used almost 60 days to recover. He noted that he was reassigned during this time and later changed jobs in 2009.

On December 1, 2010 OWCP requested that an OWCP medical adviser address whether the requested surgery and the additional conditions were due to the work injury. It noted that medical evidence was not received until about one and one half years after the work injury. In a report dated December 1, 2010, OWCP’s medical adviser opined that it was “extremely unlikely that a radiculopathy (pinched nerve in the neck) would be unnoticed, overlooked or unreported for more than one year from the date of injury. This condition does not appear to present a plausible causal relationship to the work injury.”

In a March 24, 2011 report, Dr. Gorecki noted appellant’s history of injury from August 2008. He also explained that, subsequently, appellant was engaged in a job that required him to travel on a motor boat on moderate waves on the ocean resulting in repeated trauma to the cervical spine and with cervical flexion he developed spontaneous fasciculations of the right biceps and over time, progressive wasting of the right bicep. Dr. Gorecki opined that there was a “clear-cut direct causal relationship between [appellant’s] work-related injury, the abnormal findings on the MRI scan and the patient’s symptoms and physical findings.”

In a July 11, 2011 decision, OWCP denied appellant’s request for surgery and to expand his claim to include a degenerative foraminal stenosis at C4-5, C5-6. It found that the medical evidence was insufficiently rationalized to support a causal relationship of the medical conditions to the incident of June 2, 2008. OWCP noted that Dr. Gorecki referenced an incident that was two months after the injury and other factors unrelated to the claim.

On July 13, 2012 OWCP received appellant’s request for reconsideration. Appellant submitted arguments and additional medical evidence. He argued that his claim should be reopened and his claim expanded to include all injuries stemming from his 2008 injury to his neck. Appellant also argued that Dr. Gorecki’s report was taken out of context and noted that the

additional information regarding riding on boats revealed that he was subjected to additional aggravation caused by continuous work after the fact to the original injury. He also indicated that spinal injuries could be caused by aggravation from riding in boats. Additionally, appellant argued that he timely reported his injury, and the two-month time that it took to be seen by a physician should not be negated. He also argued that he was met with resistance when he filed his claim. He requested a new claims examiner.

OWCP received several reports from Dr. Gorecki. They included an August 20, 2010 report in which he noted that in August 2008 appellant sustained a work-related injury during a training exercise. Dr. Gorecki noted that, subsequently, appellant had a job that required him to travel on a boat on moderate waves on the ocean resulting in repeated mild trauma to the cervical spine. He diagnosed cervical spondylosis and noted that appellant had cervical radiculopathy with pain, weakness and sensory loss. Dr. Gorecki recommended anterior cervical discectomy and fusion at C4-5 and C5-6.

Dr. Gorecki further noted in an October 14, 2010 report that appellant had an almost two-year history of severe neck pain and chronic headaches. He related that appellant had headaches and neck pain radiating into the right arm with weakness, especially in the right biceps, deltoid and forearm flexors. Dr. Gorecki diagnosed headache and cervical radiculopathy. In a February 18, 2011 report, he opined that appellant was injured on the job in June or August 2008 and he became symptomatic. Dr. Gorecki noted that appellant did not immediately seek surgery as his job constantly required that he move and he was afraid to lose his status or promotions if he lost time from work. He also noted that appellant was distracted by another work injury involving his hand. Dr. Gorecki stated that the symptoms immediately began after the injury and were associated with progressive abnormal physical findings, and his symptoms were consistent with cervical radiculopathy. He noted that the MRI scan findings revealed a large disc herniation consistent with neurological findings. Dr. Gorecki opined that “[t]here is a clear-cut causal relationship between the injury in question, the cervical radiculopathy and the pathophysiology associated with cervical radiculopathy.” He indicated that the “note from an outside viewer provided by workers’ compensation clearly distorts and misrepresents the facts provided by the patient. There was no delay between the injury and the development of symptoms. There has been a delay between the injury and treatment.”

OWCP also received a May 13, 2010 report from Dr. Frank McDonald, a neurologist, who diagnosed brachial plexitis. In a May 27, 2010 report, Dr. McDonald repeated his diagnosis of brachial plexitis.

By decision dated April 17, 2013, OWCP denied appellant’s request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA² 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.”³

OWCP’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁴ This section does not mandate that it review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, 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.⁵

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP’s decision was, on its face, erroneous.⁶

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 manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

² *Id.* at §§ 8101-8193.

³ *Id.* at § 8128(a).

⁴ *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

a conflict in the 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.⁸

ANALYSIS

In its April 17, 2013 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on July 11, 2011. Appellant's letter requesting reconsideration was received on July 13, 2012. As the request was received by OWCP more than one year after the July 11, 2011 merit decision, it was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application. It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not show that its most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error in OWCP's July 11, 2011 decision that denied appellant's request for surgery and to expand his claim to include a degenerative cervical spine condition that was caused or contributed to by his June 2, 2008 work injury.

In his request for reconsideration, appellant provided several arguments. However, they do not raise a substantial question concerning the correctness of OWCP's July 11, 2011 decision or establish clear evidence of error. Appellant requested that his claim should be reopened and his claim expanded to include all injuries stemming from his 2008 injury to his neck. The Board notes that this was addressed in the July 11, 2011 decision and he has failed to show how the decision was incorrect or in error. Appellant also argued that Dr. Gorecki's report was taken out of context and argued that riding on boats while performing his duties revealed that he was subjected to additional aggravation and injury caused by continuous work after the fact to the original injury. The Board notes that this argument does not establish error in the July 11, 2011 OWCP decision.⁹ Appellant also argued that he timely reported his injury, and the two-month time that it took to be checked out by a physician should not be negated. He also requested a new claims examiner. OWCP's July 11, 2011 decision denied appellant's request for surgery and claim expansion because the medical evidence was insufficient, not because the claim was untimely. The Board notes that these arguments do not raise a substantial question concerning the correctness of OWCP's July 11, 2011 decision or establish clear evidence of error.

⁸ *Id.*

⁹ If appellant is alleging a new occupational injury due to riding in boats, he may file a claim with OWCP.

Appellant also provided medical evidence. In an August 20, 2010 report, Dr. Gorecki noted that in August 2008 appellant sustained a work-related injury during a training exercise. He noted that, subsequently, appellant was involved in a job that required him to travel on a boat on moderate waves on the ocean resulting in repeated mild trauma to the cervical spine. Dr. Gorecki diagnosed cervical spondylosis and noted that appellant had cervical radiculopathy with pain, weakness and sensory loss. His October 14, 2010 report noted appellant's nearly two-year history of symptoms and diagnosed headache and cervical radiculopathy. In his February 18, 2011 report, Dr. Gorecki opined that appellant was injured on the job in June or August 2008 and became symptomatic. He explained that appellant did not immediately seek surgery due to job demands and was distracted by another work injury involving his hand. Dr. Gorecki opined that appellant's symptoms immediately began after the injury and were associated with progressive abnormal physical findings and his symptoms were consistent with cervical radiculopathy. He noted that an MRI scan showed a large disc herniation. Dr. Gorecki opined that there was "clear-cut causal relationship between the injury in question, the cervical radiculopathy and the pathophysiology associated with cervical radiculopathy." He indicated that the "note from an outside viewer provided by workers' comp[ensation] clearly distorts and misrepresents the facts provided by the patient. There was no delay between the injury and the development of symptoms. There has been a delay between the injury and treatment." The Board notes that, while Dr. Gorecki has provided some support for causal relationship, it is not sufficient to establish clear evidence of error. 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹⁰

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in denying appellant's request to expand his claim. Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, appellant's counsel argues that appellant timely reported his claim. The Board notes that the underlying claim has not been denied because of timeliness but because of insufficient medical evidence. Counsel also argued that cervical radiculopathy was noted on the initial injury, and therefore, all subsequent illnesses stemming from that injury would be covered. However, causal relationship is a medical issue that must be addressed by medical evidence.¹¹ Furthermore, the Board does not have jurisdiction over the merits of the claim, only whether appellant's reconsideration request was timely filed and, if not, whether clear evidence of error has been presented. As explained, the reconsideration request was not filed within one year of OWCP's most recent merit decision and appellant's reconsideration request does not establish clear evidence of error for the reasons stated in this decision.

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *See M.D.*, 59 ECAB 211 (2007).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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