

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, CAPITAL VEHICLE
MAINTENANCE FACILITY, Washington, DC,
Employer**

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**Docket No. 14-60
Issued: May 27, 2014**

Appearances:
Brian McLaurin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 17, 2013 appellant, through his representative, filed a timely appeal from a July 12, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his untimely request for reconsideration. Because more than 180 days elapsed from the most recent merit decision dated November 3, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case 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 denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, appellant's representative contends that appellant sustained an injury on August 29, 2011 while in the performance of duty. He further contends that appellant provided

¹ 5 U.S.C. § 8101 *et seq.*

the additional information regarding the August 29, 2011 incident requested by OWCP to his immediate supervisors who failed to forward the information to OWCP.

FACTUAL HISTORY

On September 6, 2011 appellant, then a 48-year-old body and fender mechanic, filed a traumatic injury claim alleging that on August 29, 2011 he developed pain in his neck as a result of a work-related motor vehicle accident. He stated that he was towing a vehicle when the back of the vehicle being towed was hit by a trash truck while he was stopped at a traffic light.

In a September 5, 2011 verification of treatment report, Dr. Glen M. Jacob, a Board-certified internist, stated that appellant was treated on that day for neck pain related to a motor vehicle accident.

By letter dated September 27, 2011, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested factual and medical evidence. Appellant was afforded 30 days to submit the requested evidence.

In a November 3, 2011 decision, OWCP denied appellant's claim. It found that the evidence was insufficient to establish that the incident occurred as alleged and that he failed to submit any medical evidence containing a medical diagnosis in connection with his injury.

By letter dated April 16, 2013, received by OWCP on April 23, 2013, appellant, through his union representative, requested reconsideration and submitted new evidence.

In a March 28, 2012 narrative statement and an undated narrative statement, appellant described the August 29, 2011 incident. He was stopped at a traffic light when a vehicle he was towing was struck in the rear by a dumpster truck. Appellant immediately contacted his current supervisor, Mr. Posey, who arrived at the accident scene within 20 minutes. When he returned to the employing establishment, he reported having pain on the right side of his neck to Mr. Posey. Appellant sought medical treatment on September 5, 2011 and filed a report with a Mr. Bowser on the same day.

In a September 5, 2011 progress note, Abebech Haile, a registered nurse, listed a history of injury that appellant had a motor vehicle accident while driving a tow truck on August 29, 2011. Nurse Haile stated that he had neck pain with spasm due to the accident.

In a September 5, 2011 narrative report, Dr. Jacob advised that appellant had cervicalgia caused by a motor vehicle accident.

In progress notes dated September 8 through October 11, 2011, Dr. Rupa A. Varma, a Board-certified internist, listed a history that he evaluated appellant after having a motor vehicle accident driving a tow truck on August 29, 2011. He provided findings on physical examination and diagnosed, among other things, neck muscle strain and cervicalgia. In verification of treatment reports dated September 27 and October 11 and 26, 2011, Dr. Varma advised that appellant sustained neck strain with radiculopathy due to a work-related motor vehicle accident on August 29, 2011. Appellant was unable to work from September 27 through

October 28, 2011. Dr. Varma released appellant to return to light-duty work with restrictions on October 31, 2011.

In a September 28, 2011 report, Dr. Jan K. Walecki, a Board-certified radiologist, advised that diagnostic imaging revealed straightening of the cervical spine due to muscle spasm. He further advised that the examination was sonographically normal.

Progress notes from appellant's physical therapists and physical therapy assistant addressed the treatment of his cervical pain from September 29 to October 26, 2011.

An unsigned report dated September 22, 2011 from Kaiser Permanente indicated that appellant's blood pressure was checked and found to be at a goal of 139/89 or lower.

In a July 12, 2013 decision, OWCP denied appellant's request for reconsideration, without a merit review. It found that it was not filed within one year of its November 3, 2011 decision and did not establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.² The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.³

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.⁴ OWCP's regulations and procedures provide that OWCP 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.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must

² 20 C.F.R. § 10.607(a).

³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's procedures further provide that 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). Evidence such as 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 clear evidence of error. *Id.* at Chapter 2.1602.3c.

⁶ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

manifest on its face that OWCP committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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.¹¹

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ As appellant's April 16, 2013 request for reconsideration was received on April 23, 2013, more than one year after the last merit decision of record dated November 3, 2011, it was untimely.¹⁴ Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁵

The Board finds that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error. In its November 3, 2011 decision, OWCP denied appellant's claim because he failed to submit sufficient evidence demonstrating that he was involved in a work-related motor vehicle accident on August 29, 2011. Thereafter, the only additional factual evidence submitted was appellant's own narrative statements, describing the August 29, 2011 incident. The record does not show any report or document issued by the employing establishment or police report confirming that the August 29, 2011 motor vehicle accident occurred as alleged. The Board finds, therefore, that OWCP properly found that appellant's narrative statements did not establish clear evidence of error.

⁷ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁸ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ See *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² 20 C.F.R. § 10.607(a).

¹³ See *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁴ See *supra* note 5 at Chapter 2.1602.4 (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision and the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

¹⁵ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

Although the progress notes and reports from Nurse Haile and Drs. Jacob and Varma found that appellant injured his neck as a result of a motor vehicle accident that occurred while he was driving a tow truck on August 29, 2011, none of this evidence indicated whether the tow truck was owned by his employing establishment. The remaining medical evidence did not provide a history of the claimed injury. As none of the evidence raises a substantial question concerning the correctness of OWCP's November 3, 2011 decision, the Board finds that appellant has failed to establish clear evidence of error on the part of OWCP in denying further merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.¹⁶

Issued: May 27, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁶ Richard J. Daschbach, Chief Judge, who participated in the preparation of the decision was no longer a member of the Board after May 16, 2014.