

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

A.B., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
Akron, OH, Employer)

**Docket No. 14-1427
Issued: November 21, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 2, 2014 appellant, through his attorney, filed a timely appeal of a March 17, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision. As more than 180 days have elapsed from August 2, 2012, the date of the most recent OWCP merit decision, the Board lacks jurisdiction to review the merits of the case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 25, 2010 appellant, then a 46-year-old medical technician, filed a traumatic injury claim alleging that on January 11, 2010 he was lifting a patient from the floor and sustained a torn chest muscle and a sprained lower back in the performance of duty. He did not initially stop work but later stopped on April 9, 2010. OWCP accepted the claim for a chest wall strain, neck strain and lumbar strain.²

Appellant requested that the claim be expanded to include a lumbar herniated disc and degenerative disc disease. An April 29, 2010 magnetic resonance imaging (MRI) scan of the lumbar spine read by Dr. Brian Hayes, a Board-certified diagnostic radiologist, revealed a diffuse disc bulge with large super imposed left paracentral extruded disc herniation at the L4-5 level.

In a May 11, 2010 report, Dr. William Ritchey, an osteopath Board-certified in family medicine, noted that appellant was seen on February 1, 2010 with a complaint of pain in the left side of his chest and pain in his neck. He related a history that a “couple of weeks ago” appellant was lifting a patient at work and felt left rib pain. Dr. Ritchey explained that the pain was on the left mid-axillary line in the area of the seventh and eight intercostal spaces with a palpable mass on the anterior chest in the same region. He noted that appellant’s only previous medical problem was that of hypertension, which was controlled with medication. Dr. Ritchey stated that a February 6, 2010 x-ray of appellant’s ribs and chest revealed no acute pathology. On March 2, 2010 appellant was seen with complaints of chest and low back pain. Dr. Ritchey stated that appellant indicated that he developed the symptoms approximately two weeks after lifting a patient at work. He examined appellant and diagnosed diffuse disc bulge with large superimposed left paracentral extruded disc herniation at the L4-5 level, mild degenerative changes of L3-4 and sacralization of L5 lumbar level. Dr. Ritchey advised that he was professionally unable to ascertain the cause of the findings seen on the MRI scan. He noted that appellant had been a patient since July 11, 2000 and never had a complaint of low back pain until after February 1, 2010.

On May 19, 2010 OWCP referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, for a second opinion to determine the extent of any injury-related conditions and disability. In a June 14, 2010 report, Dr. Ghanma reviewed appellant’s history of injury and medical treatment. He found that while there were abnormalities in appellant’s lumbar spine as evidenced by the April 29, 2010 lumbar MRI scan, they were likely preexisting. Dr. Ghanma noted that there was no evidence of abnormal illness behavior, but found evidence of symptom magnification. Dr. Ghanma concluded that there was no current low back, chest or cervical strain. He determined that the lumbar findings on the MRI scan were not related to the accepted injury.

On November 9, 2010 OWCP referred appellant to Dr. Ralph J. Kovac, a Board-certified internist, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Ritchey, appellant’s attending physician, and Dr. Ghanma, the second opinion physician, on the issue of disability related to the January 11, 2010 injury.

² On May 19, 2010 OWCP found that appellant was not entitled to continuation of pay as he did not file his claim within 30 days from the injury date.

In a report dated November 29, 2010, Dr. Kovach reviewed appellant's history of injury and treatment. He explained that appellant had preexisting findings on his lumbar MRI scan study that included degeneration and multiple bulges, as well as the other findings that would not have occurred as a result of the injury that appellant sustained. Dr. Kovach determined that appellant had no evidence of a cervical injury or any evidence of any rib strain. He explained that appellant's only findings were subjective findings that included pain on palpation of the left lower back. Dr. Kovach determined that, objectively, there were no findings to substantiate the subjective complaints. At the time of his evaluation, the injury-related conditions had resolved. Furthermore, there was no evidence of any cervical injury of the neck or chest wall or lower back. Dr. Kovach explained that there were no objective findings to support ongoing injuries caused, accelerated, aggravated or precipitated by the January 11, 2010 job injury.

On July 8, 2011 OWCP issued a notice of proposed termination of compensation. It found that the weight of the medical evidence was represented by the report of Dr. Kovach and established that residuals of the work injury of January 11, 2010 had ceased.³

In a September 15, 2011 decision, OWCP terminated appellant's benefits effective that date. It found that the weight of medical evidence rested with Dr. Kovach, the impartial medical examiner, who found that appellant had no residuals of the accepted conditions.

On September 19, 2011 appellant's representative requested a telephonic hearing, which was held on October 24, 2011.

In an April 12, 2012 decision, the hearing representative affirmed the September 15, 2011 decision. She found that OWCP properly terminated benefits as the weight of the medical evidence established that the work-related medical conditions had ceased.

On April 27, 2012 appellant's attorney requested reconsideration of the April 12, 2012 decision. On August 2, 2012 OWCP denied modification of the September 15, 2011 termination decision.

On February 3, 2014 appellant's attorney again requested reconsideration of the April 12, 2012 decision. He submitted evidence from Dr. Scott Miller, an orthopedic surgeon and osteopath.⁴

In a December 5, 2013 form report, Dr. Miller noted that appellant related that he was injured on January 11, 2010 while lifting a patient. He saw appellant on November 17, 2011 and advised that he complained of severe low back pain and left leg radicular symptoms of a one year duration. Appellant noted that his symptoms persisted without improving or worsening. On examination Dr. Miller noted positive straight leg raise on the left at 30 degrees, right 45 degrees and absent left Achilles reflex with weakness of the left quadriceps. Dr. Miller advised that an

³ In a separate July 8, 2011 decision, OWCP denied appellant's request to expand his claim to include the conditions of herniated disc at L4-5 and/or degenerative disc disease at L3-4. On December 20, 2011 an OWCP hearing representative affirmed the July 8, 2011 decision. She found that the evidence did not establish that appellant had a herniated lumbar disc and lumbar degenerative disc disease casually related to the work injury.

⁴ With his April 27, 2012 reconsideration request, appellant also submitted reports from Dr. Miller.

MRI scan revealed a large extruded disc fragment at L5-S1 causing severe nerve root compression. He diagnosed L5-S1 herniated disc. Dr. Miller signed a preprinted causal relationship statement that advised: “[i]n my medical opinion, the facts of injury are the direct and proximate cause of the diagnosis that I cited above. This is based on reasonable medical probability. There may be other causes for this medical problem, but one of the causes is clearly the activities of work described by the patient and described above.” (Emphasis omitted.)

In a March 17, 2014 decision, OWCP denied appellant’s request for reconsideration finding that it was not timely filed and failed to present 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.”⁵

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).⁶ This section does not mandate that OWCP 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 provides that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.⁷

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.⁸

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

⁵ 5 U.S.C. § 8128(a).

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.607(b).

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.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to 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.¹⁰

ANALYSIS

In its March 17, 2014 decision, OWCP properly determined that appellant failed to file a timely reconsideration request. It issued its most recent merit decision on August 2, 2012. Appellant's February 3, 2014 letter requesting reconsideration was submitted more than one year after the August 2, 2012 merit decision and was, therefore, untimely.

The Board finds that the evidence submitted by appellant in support of his reconsideration request failed to demonstrate clear evidence of error. OWCP's August 2, 2012 decision found that the medical evidence submitted by appellant was not sufficient to support continued disability residuals of his work-related conditions. Appellant's claim was accepted for strains of the chest wall, neck and low back. On reconsideration appellant's attorney submitted a December 15, 2013 form report from Dr. Miller, who indicated that appellant reported an injury at work on January 11, 2010 while lifting a patient. He examined appellant and diagnosed L5-S1 herniated disc. Dr. Miller signed a preprinted statement that "the facts of injury are the direct and proximate cause of the diagnosis that I cited above" and "one of the causes" of appellant's condition was "clearly the activities of work described by the patient and described above." The Board finds that this report is insufficient to establish clear evidence of error. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized report which, if submitted prior to OWCP's merit decision might require additional development of the claim, is insufficient to establish clear evidence of error.¹¹ Dr. Miller's preprinted statement on causal relationship is not sufficient to raise a substantial question as to the correctness of OWCP's decision.

To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹² Appellant did not

⁹ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

¹⁰ *Id.*

¹¹ *See E.R.*, Docket No. 09-599 (issued June 3, 2009).

¹² *Robert F. Stone*, 57 ECAB 292 (2005).

submit such evidence. Consequently, OWCP properly denied appellant's reconsideration request as it does not establish clear evidence of error.

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 March 17, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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