

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

_____)	
E.S., Appellant)	
)	
and)	Docket No. 15-49
)	Issued: March 13, 2015
DEPARTMENT OF ENERGY, BONNEVILLE)	
POWER ADMINISTRATION, Vancouver, WA,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2014 appellant filed a timely appeal from May 2 and July 22, 2014 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). The last OWCP merit decision in this matter was issued on May 7, 2010. Since more than 180 days elapsed since May 7, 2010 and the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a hearing; and (2) whether it properly denied his request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

On appeal appellant asserts that he is entitled to back pay for the periods March 1, 1988 to May 21, 1989 and July 17, 1989 to March 16, 1999, due to his accepted bilateral carpal tunnel syndrome, adjudicated by OWCP under file number xxxxxx757, and back and shoulder conditions, adjudicated under file number xxxxxx355. He also questioned the pay rate used in his schedule award.

FACTUAL HISTORY

This case has previously been before the Board. In a March 9, 1993 decision, the Board remanded appellant's bilateral carpal tunnel claim to OWCP for further development of the medical record.² OWCP subsequently accepted bilateral carpal tunnel syndrome, and on December 15, 1999 appellant was granted a schedule award for a 40 percent impairment of the right upper extremity and a 40 percent impairment on the left upper extremity. The schedule award was amended on March 12, 2007 to show that the award ended on December 28, 2003. Appellant elected FECA compensation effective December 30, 2003 and was placed on the periodic compensation rolls, where he remains. In a May 7, 2010 decision, the Board affirmed May 12 and July 30, 2008 decisions, finding that appellant did not establish that he was entitled to disability compensation for the periods March 1, 1988 to May 21, 1989 and July 17, 1989 to March 16, 1999. The Board also affirmed a nonmerit decision dated November 7, 2008, finding that OWCP properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).³ The law and facts of the previous Board decisions are incorporated herein by reference.

Subsequent to the last OWCP merit decision dated July 30, 2008, in January 5, 2009 reports, Dr. Douglas Bald, a Board-certified orthopedic surgeon, noted appellant's complaints of pain, swelling, and stiffness of both hands, pain and limitations of both shoulders, and severe polyneuropathy of all upper and lower extremities. He provided examination findings and diagnosed bilateral carpal tunnel syndrome and severe polyneuropathy and the upper and lower extremities. Dr. Bald advised that appellant was incapable of any work.

On January 4, 2012 appellant requested reconsideration from the July 30, 2008 decision. In support of the request for reconsideration, he listed a number of physicians and maintained that their opinions established the periods of disability claimed. In letters dated January 24 and

² Docket No. 92-995 (issued March 9, 1993). The instant claim was adjudicated by OWCP under file number xxxxxx757. Appellant has additional claims, including a 1980 injury, accepted for lumbar strain and painful arch syndrome of the left shoulder, and a 1983 claim accepted for low back contusion. The 1980 claim was adjudicated by OWCP under file number xxxxxx355 and the 1983 claim under file number xxxxxx057. An occupational disease claim, filed in 1989 and adjudicated under file number xxxxxx796, was accepted for low back strain. Claim numbers xxxxxx355, xxxxxx057, and xxxxxx796 were combined, with claim number xxxxxx355 the master file. Claim number xxxxxx757 remained a separate file. In an August 4, 2009 decision regarding claim number xxxxxx355, the Board affirmed a July 28, 2008 OWCP decision that denied appellant's reconsideration request because it was untimely filed and did not establish clear evidence of error. Docket No. 09-130 (issued August 4, 2009). As noted in that decision, the last merit decision in claim number xxxxxx355 was issued on June 22, 1990 when OWCP found that appellant did not establish disability causally related to his work injuries as of February 1988 when he was terminated for unacceptable performance.

³ Docket No. 09-1037 (issued May 7, 2010).

April 26, 2012, OWCP asked appellant to indicate in writing the date of the decision for which he was requesting reconsideration. Appellant did not respond.

In a work capacity evaluation dated September 24, 2012, Dr. Bald reiterated that appellant was permanently restricted from work.

In a December 26, 2012 letter mailed to OWCP's Branch of Hearings and Review, appellant referenced claim number xxxxxx757 and the Board's decision dated May 7, 2010. He asserted that the medical evidence of record proved that he was disabled. In a May 2, 2014 decision, OWCP denied appellant's hearing request. It indicated that the most recent decision regarding this matter was the Board's May 7, 2010 decision, and the Branch of Hearings and Review did not have jurisdiction to review Board decisions. The decision advised him that the issue in the case could be addressed by requesting reconsideration with OWCP.

In correspondence received by OWCP on June 2, 2014, appellant requested reconsideration of the May 2010 Board decision. He also referenced medical evidence previously of record and the Board's March 9, 1993 decision and asserted that the medical evidence established disability. Appellant also requested reconsideration of his back and shoulder claims.

By decision dated July 22, 2014, OWCP denied appellant's reconsideration request on the grounds that the request was untimely filed and that he failed to present clear evidence that OWCP's last merit decision was incorrect.

LEGAL PRECEDENT -- ISSUE 1

Before review under section 8128(a) of this title (related to reconsideration), a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary.⁴

FECA provides OWCP with original jurisdiction in the processing of compensation claims and section 8124(a) provides it with the duty and authority to issue an initial decision on an employee's claim for compensation.⁵ Once an initial decision is made in a compensation case, the claimant's rights arise by which the claimant may seek further review of his claim, the right to a hearing or review of the written record before OWCP, the right to reconsideration before OWCP or an appeal to the Board. The Board has clarified that OWCP does not have the discretionary authority to grant a request for a hearing immediately following a Board decision. The Branch of Hearings and Review may not assume jurisdiction in the claims process absent a final adverse decision by the Director.⁶ Following the Board's review of OWCP's decision,

⁴ 5 U.S.C. § 8124(b)(1).

⁵ *Id.*

⁶ *Patricia G. Aiken*, 57 ECAB 441 (2006); *Eileen A. Nelson*, 46 ECAB 377 (1994).

there is no final decision of it left unreviewed over which the Branch of Hearings and Review can assume jurisdiction to exercise its discretionary appellant authority.⁷

ANALYSIS -- ISSUE 1

The instant case was accepted for employment-related bilateral carpal tunnel syndrome. Appellant, who was terminated for unacceptable job performance on February 29, 1988, has been on either schedule award or total disability compensation since March 7, 1999. He also received wage-loss compensation for the period May 22 through July 16, 1989 due to employment-related surgeries.

In denying appellant's hearing request on May 2, 2014, the Branch of Hearings and Review noted that the last decision on the merits of appellant's claim was the Board's May 7, 2010 decision and that the Branch of Hearings and Review did not have jurisdiction to review Board decisions.⁸ The Board has held that, following its review of OWCP's decision, a claimant does not have the right under 5 U.S.C. § 8124(b)(1) to request an oral hearing or review of the written record in the absence of a final OWCP decision.⁹ As there is no final OWCP decision left unreviewed over which the Branch of Hearings and Review could assume jurisdiction,¹⁰ appellant has no right to a hearing following the Board's May 7, 2010 decision. Therefore, the Board finds that OWCP properly denied appellant's request for a hearing.¹¹

LEGAL PRECEDENT -- ISSUE 2

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.¹² When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.¹³ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.¹⁴ In this regard,

⁷ *Robert N. Thomas*, 51 ECAB 180 (1999); *H.C.*, Docket No. 11-1424 (issued December 19, 2011).

⁸ Decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review except by the Board. The decisions and orders of the Board will be final upon the expiration of 30 days from the date of issuance of the Board's decision. 20 C.F.R. § 501.6(d).

⁹ *Supra* note 8.

¹⁰ *Id.*

¹¹ As there was no final OWCP decision left unreviewed over which the Branch of Hearings and Review could assume jurisdiction, it also had no basis to exercise discretionary authority to grant a hearing. *See Robert N. Thomas*, *supra* note 7.

¹² 20 C.F.R. § 10.607(b) (2011); *see Gladys Mercado*, 52 ECAB 255 (2001).

¹³ *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹⁴ 20 C.F.R. § 10.607 (2011).

OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 to merely 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. To show clear evidence of error, the evidence submitted 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.¹⁶

OWCP procedures note 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.¹⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁸

ANALYSIS -- ISSUE 2

On June 2, 2014 appellant requested reconsideration of the May 7, 2010 Board decision. The Board finds that as more than one year has elapsed between the most recent merit decision on this issue, the Board's May 7, 2010 decision, and appellant's request for reconsideration received by OWCP on June 2, 2014, his request for reconsideration was untimely.¹⁹

The Board also finds that appellant failed to establish clear evidence of error. On reconsideration appellant requested that OWCP reconsider whether he was entitled to back pay for the periods March 1, 1988 to May 21, 1989 and July 17, 1989 to March 16, 1999. In merit decisions dated May 12 and July 30, 2008, OWCP denied appellant's claim that he was entitled

¹⁵ See *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 1.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

¹⁹ 20 C.F.R. § 10.607(a) (2011). The Board also notes that appellant's January 4, 2012 request, in which he did not identify a decision and did not thereafter respond to OWCP correspondence, and appellant's December 26, 2012 request, which was mailed to OWCP's Branch of Hearings Review would also be untimely.

to additional wage-loss compensation.²⁰ In its May 7, 2010 decision, the Board affirmed the May 12 and July 30, 2008 decisions.²¹ Absent further merit review of this issue by OWCP, pursuant to section 8128 of FECA, this issue is *res judicata*.²²

On appeal appellant again contends that he is entitled to back pay. As discussed above, this issue was addressed in OWCP's merit decisions dated May 12 and July 30, 2008 and affirmed by the Board on May 7, 2010, the last merit decision on this issue. Without further merit review by OWCP, the Board has no jurisdiction to review this matter.²³

The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.²⁴ With his June 2, 2014 reconsideration request, appellant referenced medical reports previously reviewed by OWCP and the Board. He also submitted medical reports from Dr. Bald dated June 5, 2009 and September 24, 2012 in which he did not discuss the periods of claimed disability. As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the May 12 and July 30, 2008 OWCP decisions, appellant has not established that OWCP committed error by its July 22, 2014 decision.²⁵ The Board therefore finds that, in accordance with its internal guidelines and with Board precedent, OWCP correctly determined that the evidence submitted by appellant with his June 2, 2014 reconsideration request did not demonstrate clear evidence of error and thus properly denied appellant's untimely request for a merit reconsideration on that basis.²⁶

As to appellant's question regarding the schedule award pay rate, on December 15, 1999 he was granted a schedule award for a 40 percent impairment of the right upper extremity and a 40 percent impairment on the left. The schedule award was amended on March 12, 2007. For decisions of OWCP issued prior to November 19, 2008, a claimant had up to one year to file an appeal to the Board.²⁷ Appellant did not file an appeal of either schedule award decision with the Board within that period. The Board, therefore, has no jurisdiction over the schedule award pay rate issue.

²⁰ As noted above, in the July 30, 2008 decision, OWCP found that appellant was entitled to wage-loss compensation from May 22 through July 16, 1989 due to his employment-related surgeries, and he was granted wage-loss compensation for this period.

²¹ *Supra* note 3.

²² *Supra* note 7; see *Robert G. Burns*, *supra* note 16; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

²³ *Id.*

²⁴ *Supra* note 16.

²⁵ *Supra* note 18.

²⁶ 20 C.F.R. § 10.607(b) (2011); see *D.G.*, 59 ECAB 455 (2008).

²⁷ *K.C.*, Docket No. 09-1666 (issued August 25, 2010).

The Board also notes that appellant also requested reconsideration of his back and shoulder claims, adjudicated under file number xxxxxx355. The Board's jurisdiction is limited to reviewing final decisions of OWCP.²⁸ There is no indication in the case record before the Board, file number xxxxxx757, that OWCP has issued a final decision on appellant's back and shoulder claims. Finally, the Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence as its jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision.²⁹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a hearing and that, as his request for reconsideration was untimely filed and he failed to establish clear evidence of error, OWCP properly denied a merit review of his claim.

ORDER

IT IS HEREBY ORDERED THAT the July 22 and May 2, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 13, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

²⁸ 20 C.F.R. § 501.2(c); *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

²⁹ 20 C.F.R. § 501.2(c)(1); *see J.T.*, 59 ECAB 293 (2008).