United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 15-0280**
	)	**Issued: November 18, 2015**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE-REGULAR EMPLOYEE FUNCTIONS, Asheville, NC, Employer	)	

Appearances:
Timothy Welborn, 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 November 19, 2014 appellant, through counsel, filed a timely appeal of an October 6, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from August 6, 2012, the date of the most recent OWCP merit decision on the disputed issue, to the date of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

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 August 17, 2010 appellant, then a 60-year-old engineer equipment operator, was injured when he felt a sharp pain in his left elbow, radiating down to the arm and hand when he struck a machine with a hammer. OWCP accepted the claim for sprain of the left elbow and forearm; lateral epicondylitis; and other specified disorder of bursae and tendons in the left shoulder. Appellant underwent authorized surgery on June 29, 2011 for left extensor carpi radialis brevis release and debridement by the attending physician, Dr. Christopher Bensen, a Board-certified orthopedic surgeon. He did not return to work after the surgery. Appellant received compensation benefits.

In a report dated November 15, 2011, Dr. Bensen treated appellant for complaints of pain and indicated that appellant remained disabled. He also recommended a second opinion examination as he was uncertain of the etiology of appellant's symptoms.

On November 22, 2011 OWCP referred appellant to Dr. Harrison Latimer, a Board-certified orthopedic surgeon, for a second opinion. In a December 19, 2011 report, Dr. Latimer, noted appellant's history and examined him. He determined that appellant had full range of motion of these joints passively, showed no effort whatsoever actively during the examination. Dr. Latimer determined that the work-related conditions had not resolved as appellant had residual left elbow symptoms due to sprain/strain of underlying epicondylitis changes, based upon subjective complaints of pain. However, he opined that appellant had reached maximum medical improvement and was capable of returning to the date-of-injury job. Dr. Latimer further explained that, while it was not uncommon for patients to have some residual symptoms after lateral elbow surgery, appellant's lack of participation in the motion and strength examination of the entire left arm had no medical rationale and showed extreme evidence of symptom exaggeration.

On February 2, 2012 OWCP proposed to terminate wage-loss compensation benefits based on the report of Dr. Latimer which established that appellant could return to his date-of-injury position.[2] Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed termination.

The record reflects that appellant returned to full-duty work on February 27, 2012.

In an April 11, 2012 decision, OWCP terminated appellant's wage-loss compensation, effective that date. It found that the weight of the medical evidence rested with the second opinion physician, Dr. Latimer who found that appellant was no longer disabled as a result of his August 17, 2010 traumatic injury.

[2] OWCP specifically noted that Dr. Latimer opined that: "your work-related conditions have not resolved; that you have residual left elbow symptoms due to sprain/strain of underlying epicondylitis changes, based on your subjective complaints of pain. However, you have reached maximum medical improvement and based on the physical requirements of an Engineer Equipment Operator as enumerated in the statement of accepted facts; you are completely capable of returning to your date-of-injury job as such."

On April 30, 2012 appellant requested an examination of the written record and submitted additional evidence.

In a letter dated June 20, 2012 addressed to the employing establishment, OWCP requested comments from the employing establishment and explained that appellant had requested an examination of the written record.

On July 17, 2012 OWCP received additional submissions from appellant through her United States Senator. This included a June 11, 2012 letter to appellant from Mark Mallette, a maintenance mechanic supervisor with the employing establishment. Mr. Mallette informed appellant that he had determined that the employing establishment was unable to accommodate his restrictions. He noted restrictions provided by appellant's physician, Dr. Bensen, and advised that the employing establishment was unable to restructure or delete the essential functions of an engineering equipment operator without undue hardship and he could not identify any identifiable position to which appellant could be reassigned. Mr. Mallette advised appellant that his request for a reasonable accommodation was denied. He indicated that appellant could use any accrued leave or apply for leave without pay under the Family Medical Leave Act.

In an August 6, 2012 decision, an OWCP hearing representative affirmed the April 11, 2012 decision, which terminated appellant's wage-loss compensation, effective that date.[3] He did not address the July 17, 2012 submissions.

Counsel requested reconsideration on August 8, 2013. He argued that the August 6, 2012 decision terminating appellant's wage loss was made in part because appellant had returned to work on February 27, 2012. However, counsel explained that appellant was unable to fully perform the duties associated with the job. He advised that, by March 22, 2012, appellant was unable to perform the essential functions of his job, and that on June 11, 2012 appellant's request for accommodation was denied. Counsel indicated that the decision to terminate appellant was based upon an incorrect assumption that appellant was able to work. He argued that the treating physician, Dr. Benson, clarified that appellant was unable to perform three of the five essential functions of his job. Additionally, counsel argued that it was error to accord great weight to the second opinion physician, who only examined appellant once, as opposed to his treating physician.

OWCP received additional medical evidence, including several later reports from Dr. Benden. It also received: several CA-7 forms for wage-loss compensation; a June 11, 2012 letter from the employing establishment pertaining to appellant's request for a reasonable accommodation and a description of the duties of an engineering equipment operator; a September 9, 2012 letter to appellant's United States Senator; and an October 7, 2012 response from appellant to OWCP's recurrence questionnaire, in which he indicated that he had to leave his job because the employing establishment could not accommodate his restrictions. It also received a letter dated February 12, 2013, in which counsel requested that Dr. Bensen provide an updated medical report.

[3] On August 29, 2012 OWCP granted appellant a schedule award of five percent permanent impairment to the left arm.

In an October 6, 2014 decision, OWCP denied appellant's request for reconsideration as it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.[4] This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[5] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[6]

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.[7]

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.[8] 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 *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.[9]

[4] *See* 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

[5] 20 C.F.R. § 10.607(a).

[6] *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[7] *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

[8] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

[9] *Id.*

ANALYSIS

In its October 6, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision regarding the termination of wage-loss compensation on August 6, 2012. The reconsideration request of counsel was received on August 8, 2013, more than one year after the August 6, 2012 merit decision and was, therefore, untimely.

The Board finds that the evidence submitted in the untimely request for reconsideration raises a substantial question as to the correctness of OWCP's decision and is sufficient to demonstrate clear evidence of error.

On reconsideration, counsel argued that evidence in the record established that appellant was unable to fully perform the duties associated with the job. The Board has reviewed the record and the August 6, 2012 decision. The Board notes that prior to issuing the August 6, 2012 decision, OWCP had received documentation in which the employing establishment had advised appellant that it could no longer accommodate his restrictions effective June 11, 2012. There is no indication that the hearing representative considered this submission.

Board precedent requires OWCP to review all evidence submitted by a claimant and received by it prior to the issuance of its final decision, including evidence received on the date of the decision.[10] It makes no difference that the claims examiner may not have been directly in possession of the evidence. Indeed, Board precedent envisions evidence received by OWCP but not yet associated with the case record when the final decision is issued. The Board finds that OWCP committed error when it failed to review the documentation from the employing establishment dated June 11, 2012 which advised appellant that they were unable to accommodate his restrictions.[11]

Consequently, the Board finds that appellant has shown clear evidence of error on the part of OWCP such that OWCP erred in denying merit review.

CONCLUSION

The Board finds that appellant has established clear evidence of error in the August 6, 2012 decision and thus OWCP improperly denied his request for reconsideration.

[10] *See Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, 41 ECAB 548 (1990) (OWCP did not consider new evidence received four days prior to the date of its decision); *see Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where OWCP did not consider a medical report received on the date of its decision).

[11] *Thu M. McGill*, Docket No. 98-1867 (issued July 14, 2000); *see also Ruth Hickman*, Docket No. 91-831 (issued July 31, 1991).

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2014 decision of the Office of Workers' Compensation Programs is reversed.[12]

Issued: November 18, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[12] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.