

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

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| H.G., Appellant |) | |
| |) | |
| and |) | Docket No. 15-1217 |
| |) | Issued: October 8, 2015 |
| U.S. POSTAL SERVICE, DOWNTOWN |) | |
| DELIVERY ANNEX, Baltimore, MD, Employer |) | |
| |) | |

Appearances:
Alan J. Shapiro, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2015 appellant, through counsel, filed a timely appeal from an April 9, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last merit decision in this case was a Board decision dated June 16, 2014, which affirmed OWCP's denial of appellant's claim for continuing employment-related residuals or disability. With respect to the findings made in the Board's June 16, 2014 decision, these matters are *res judicata*.¹ The Board may review absent any subsequent decision reviewed thereafter by OWCP under 5 U.S.C. § 8128(a).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

¹ Section 501.6(d) of the Board's *Rules of Procedure* provides in pertinent part regarding finality: "The 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 unless the Board has fixed a different period of time therein." 20 C.F.R. § 501.6(d).

² See *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.⁴ On June 16, 2014 the Board affirmed an October 24, 2013 merit decision by OWCP finding that appellant did not have any continuing employment-related residuals or disability after September 16, 2009 causally related to the May 19, 2006 employment injury. The findings of fact as set forth in the prior decisions by the Board are herein incorporated by reference.⁵

Following the issuance of the Board's June 16, 2014 merit decision, by letter dated and received on March 26, 2015 appellant, through counsel, filed a request for reconsideration. In support of his reconsideration request, appellant submitted a medical report by Dr. Leonid Selya, a Board-certified orthopedic surgeon. Dr. Selya noted that appellant's symptoms started in 2006 and listed his diagnoses as cervical stenosis, degenerative disc disease at C4-5, disc syndrome at C5-6 and C6-7, and radiculopathies within the C5 distribution with impairment of balance consisting of cervical myelopathy and stenosis. He concluded that appellant was totally disabled.

By decision dated April 9, 2015, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error. It explained that he was requesting reconsideration of its October 24, 2013 decision and that the March 25, 2015 request was received beyond the one-year time limitation for timely reconsideration requests.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷ The one-year

⁴ On May 20, 2006 appellant, then a 57-year-old letter carrier, filed a traumatic injury claim alleging that on May 19, 2006 he sustained head and neck pain after a vehicle door hit his head. OWCP accepted his claim for back and lumbar strain sustained on May 19, 2006 during his federal employment. On June 23, 2009 the Board reversed the termination of appellant's compensation benefits, found that an unresolved conflict in medical opinion evidence existed as to whether he established continuing employment-related residuals and disability, and affirmed OWCP's denial of a schedule award claim. *See* Docket No. 09-88 (issued June 23, 2009). By its September 10, 2012 decision, the Board affirmed OWCP's termination of compensation benefits, as well as its denial of appellant's claim for continuing employment-related disability or residuals. *See* Docket No. 12-230 (issued September 10, 2012).

⁵ Docket No. 14-401 (issued June 16, 2014).

⁶ 20 C.F.R. § 10.607(a).

⁷ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁸

ANALYSIS

The Board has reviewed the record on appeal and finds that the case must be remanded to OWCP for application of the appropriate standard of review because appellant's request for reconsideration was timely received.

An application for reconsideration must be received by OWCP within one year of the date of a merit review of the claim, including any merit review by the Board.⁹ The last merit decision of record was the Board's June 16, 2014 merit decision.¹⁰ As appellant's reconsideration request, dated and received on March 26, 2015, was received within one year of the Board's merit decision dated June 16, 2014, the Board concludes that the request was timely.¹¹

OWCP's April 9, 2015 decision erroneously noted that date of the last merit decision as October 24, 2013. It failed to acknowledge that appellant had one year from the date of the last merit decision, *i.e.*, the Board's June 16, 2014 decision, to file a timely request with OWCP.¹² In its April 9, 2015 decision denying appellant's reconsideration request, OWCP applied the clear evidence of error legal standard. This standard is the appropriate standard only for cases in which a reconsideration request is untimely filed.¹³ Since OWCP erroneously reviewed the evidence submitted by appellant in support of his reconsideration request under the clear evidence of error standard, the Board will remand the case to OWCP for application of the standard for reviewing a timely request for reconsideration as set forth at 20 C.F.R. §§ 10.605 through 10.607. Following any necessary further development, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

⁸ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (October 2011).

⁹ *See Mary E. Schipske*, 43 ECAB 318 (1991); *see also C.V.*, Docket No. 14-1293 (issued February 23, 2015).

¹⁰ *Supra* note 3.

¹¹ *J.N.*, Docket No. 12-1543 (issued February 12, 2013).

¹² *See John W. O'Connor*, 42 ECAB 797 (1991).

¹³ *See Donna M. Campbell*, 55 ECAB 241 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 9, 2015 is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: October 8, 2015
Washington, DC

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

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

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