United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 15-1666**
	)	**Issued: October 28, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Merrifield, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 3, 2015 appellant filed a timely appeal from a July 20, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated June 12, 2014, pursuant to the Federal Employees' Compensation Act[1] (FECA), and 20 C.F.R. § 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly determined that appellant's July 6, 2015 request for reconsideration was untimely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On February 3, 2014 appellant, a 63-year-old postal carrier technician, filed a Form CA-2, notice of occupational disease, alleging that he sustained a bilateral carpal tunnel condition

[1] 5 U.S.C. § 8101 *et seq.*

causally related to employment factors. He indicated that he first realized that his condition was causally related to his employment on July 8, 2004.

OWCP received a May 16, 2012 progress note from physician assistant, Michael Early, who noted that appellant had received cortisone injections for left carpal tunnel syndrome.

By letter to appellant dated April 14, 2014, OWCP advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It requested that he submit a comprehensive medical report from his treating physician describing his symptoms and a medical opinion explaining the cause of any diagnosed condition.

On June 2, 2014 OWCP received a February 6, 2014 magnetic resonance imaging (MRI) scan report from Dr. Judith L. Kaplan, a Board-certified diagnostic radiologist, which reported an impression of mild multilevel disc degeneration, and mild central canal stenosis at C3-4.

By decision dated June 12, 2014, OWCP denied the claim, finding that appellant failed to provide medical evidence sufficient to establish that he sustained a bilateral carpal tunnel condition in the performance of duty.

On August 14, 2014 appellant requested an oral hearing before an OWCP hearing representative.

In a decision dated September 18, 2014, OWCP's Branch of Hearings and Review denied appellant's request for a hearing. It exercised its discretion and determined that the issue in the case could be addressed equally well through a reconsideration request and the submission of new evidence. OWCP found that since appellant had already previously requested reconsideration, he was not, as a matter of right, entitled to a hearing with the Branch of Hearings and Review on the same issue.

On July 6, 2015 OWCP received appellant's request for reconsideration and additional medical evidence. In a report dated February 13, 2013, Dr. David R. Miller, Board-certified in orthopedic surgery, advised that appellant was experiencing left hand numbness, tingling and pain for more than 10 years and had been diagnosed with bilateral carpal tunnel syndrome. He noted that appellant had undergone a carpal tunnel release procedure with relief of his symptoms. Dr. Miller asserted, however, that appellant continued to have symptoms of left-sided carpal tunnel syndrome, including numbness and tingling in the radial digits on the left side. He advised that appellant had long-standing symptomatic carpal tunnel syndrome in his left hand. Dr. Miller recommended surgery in the event that his symptoms persisted.

Dr. Willie J. Banks, Board-certified in orthopedic surgery, reported on December 4, 2013 that appellant, a postal carrier, was seen for pain and numbness of the left hand. He related that appellant had similar complaints several years ago, carpal tunnel syndrome was diagnosed, and appellant had undergone surgery to relieve the pressure on the nerve. Dr. Banks noted that appellant's current complaints had been ongoing for several years, and that he had received cortisone injections in the past. He related that appellant had positive Tinel's sign at the right wrist and elbow, with decreased sensation to light touch at the "ulnar" digits.

In a January 17, 2014 report, Dr. Miller noted that appellant had symptoms of pain, numbness, and tingling in both wrists which began four to five years previously. He advised that his current symptoms developed due to an injury at work, and occurred with a work assignment as a mail carrier. Dr. Miller noted that appellant had severe, intermittent pain on the palm side and advised that his symptoms were aggravated by gripping and picking up items. He diagnosed bilateral carpal tunnel syndrome.

In a June 9, 2014 report, Dr. J. Mark Evans, a specialist in orthopedic hand surgery, advised that he had treated appellant for carpal tunnel syndrome since approximately 2003. He noted that appellant had been informed that he might ultimately require carpal tunnel decompression. Dr. Evans opined that, in light of his employment for the employing establishment, his repetitive activities probably exacerbated his carpal tunnel symptomatology. On examination he advised that appellant's findings were consistent with median neuropathy at the left upper extremity, with possible ulnar neuropathy at the left elbow. Dr. Evans noted that appellant recently underwent an electromyelogram/nerve conduction velocity (EMG/NCV) study which documented these findings. He opined that appellant would ultimately require endoscopic carpal tunnel decompression as well as ulnar nerve decompression of his left elbow; in addition, he might also require repeat surgery on his right hand and was having ongoing symptoms of carpal tunnel decompression down the right hand, with ulnar nerve symptoms on the right hand. Dr. Evans opined that he had exacerbation of his carpal tunnel symptoms with gripping, grasping, and lifting activities with both hands. He did not expect these symptoms to resolve without surgical release.

In a report dated June 9, 2014, Dr. Evans noted that appellant previously underwent surgery for carpal tunnel syndrome involving his left hand and had a history of having had a carpal tunnel decompression done by another surgeon on his right hand. He advised that he was having a recurrence of his symptoms in his right hand and had been receiving intermittent cortisone injections for this condition. Dr. Evans noted that appellant recently underwent a repeat EMG/NCV study which showed bilateral carpal tunnel syndrome as well as left ulnar neuropathy at the elbow. He diagnosed left-sided carpal tunnel syndrome and possible recurrent right-sided carpal tunnel syndrome right upper extremity. Dr. Evans noted that he would like to obtain a copy of the recent EMG/NCV study; if this documented carpal tunnel syndrome in the left hand as well as ulnar nerve compression, then he would recommend endoscopic carpal tunnel decompression along with compressions of his ulnar nerve at the elbow. With respect to his right hand, he opined that appellant might require additional surgery if his condition showed no improvement.

By decision dated July 20, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review, finding that the request was untimely and that appellant had not established clear evidence of error. It stated that appellant was required to present evidence which showed that OWCP made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[2] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority. One such limitation is that the application for reconsideration must be received within one year of the date of the decision for which review is sought.[3] When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.[4] OWCP procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.[5]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.[6] The evidence must be positive, precise, and explicit and must 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 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] The Board makes an independent

[2] This section provides in pertinent part: the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of its decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

[4] *Rex L. Weaver*, 44 ECAB 535 (1993).

[5] *See D.E.*, 59 ECAB 438 (2008).

[6] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

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

[9] *See supra* note 7.

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

[11] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.[12]

In the case of *William A. Couch*,[13] the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

ANALYSIS

On July 6, 2015 appellant requested reconsideration of the June 12, 2014 merit decision. Because more than one year had elapsed since the last merit decision, appellant's request for reconsideration was untimely.[14] As such, he must demonstrate clear evidence of error on the part of OWCP in denying his occupational disease claim.

The Board has duly considered the matter and notes that in the case of *William A. Couch*,[15] the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. While OWCP is not required to list every piece of evidence submitted to the record, it only referenced a June 9, 2014 report from Dr. Evans. The record is clear that it received the February 13, 2013 and January 17, 2014 reports from Dr. Miller, the December 4, 2013 report from Dr. Banks, and the June 9, 2014 reports from Dr. Evans. While OWCP noted a June 9, 2014 report from Dr. Evans, it did not indicate that Dr. Evans submitted two reports on June 9, 2014, mentioning only one. OWCP did not indicate that appellant had submitted this medical evidence in its July 20, 2015 decision. Accordingly, it appears that OWCP, in its July 20, 2015 decision, did not adequately or thoroughly review all of the medical evidence.

OWCP's regulations require that a decision contain findings of fact and a statement of reasons.[16] The incomplete adjudication of the medical evidence in the July 20, 2015 decision does not satisfy its obligation to provide a decision with appropriate findings and clear analysis.[17]

For this reason, the case will be remanded to OWCP to enable it to properly consider appellant's request for reconsideration and all the medical evidence submitted prior to the issuance of the July 20, 2015 decision. Following further development as OWCP deems necessary, it shall issue an appropriate decision.

[12] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[13] 41 ECAB 548 (1990).

[14] *Supra* note 3.

[15] *Supra* note 13.

[16] 20 C.F.R. § 10.126.

[17] *See S.B.*, Docket No. 14-1971 (issued July 2, 2015).

CONCLUSION

The Board finds that the case is not in posture for decision. The case is remanded for OWCP to consider the medical evidence appellant submitted with his request for reconsideration pursuant to the standards for clear evidence of error set forth above.

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2015 decision of the Office of Workers' Compensation Programs be set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: October 28, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board