

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

C.C., claiming as personal representative of H.C., Appellant)	
)	
and)	Docket No. 15-1007
)	Issued: April 11, 2016
)	
U.S. POSTAL SERVICE, POST OFFICE, Pensacola, FL, Employer)	
)	

Appearances:
Arlinda J. Clark, 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 H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 30, 2015 appellant, through counsel, filed a timely appeal from an October 15, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision dated September 29, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.³

¹ The employee died on February 23, 2013. Appellant is the employee's widow.

² 5 U.S.C. § 8101 *et seq.*

³ Appellant filed a timely request for oral argument. After exercising its discretion, by order dated December 18, 2015, the Board denied her request as her arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-1007 (issued December 18, 2015).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

The case has previously been before the Board. The facts relevant to the instant appeal will be briefly summarized. In decisions dated September 30, 1992, September 1, 1994, January 26, 1999, and June 1, 2001, the Board affirmed OWCP decisions finding that the employee had no disability after June 30, 1999, causally related to his June 8, 1987 employment injury.⁴ On July 10, 2002 OWCP reopened the case and found that the employee was entitled to disability compensation retroactive to July 1, 1991. In a decision dated November 7, 2003, it terminated the employee's compensation effective that date as he refused an offer of suitable employment. Appellant timely requested reconsideration. On December 18, 2006 OWCP vacated its November 7, 2003 decision based on its finding that it failed to consider all of his medical conditions prior to terminating his compensation benefits.

On April 30, 2009 the employing establishment offered the employee a position as a modified mail handler. The work was sedentary and required lifting and carrying up to 25 pounds.

On April 30, 2009 Dr. Rodger K. Garrett, who specializes in pain management, advised that, based on office visits and his review of surveillance video, the employee could resume full-time work with restrictions of lifting no more than 25 pounds. He also signed the April 30, 2009 job offer. Subsequently, on May 12, 2009 Dr. Garrett indicated that he had reviewed surveillance video showing the employee performing activities inconsistent with the history he provided. He discharged him from care due to credibility issues.

On July 16, 2009 OWCP provided the employee with a copy of the surveillance video. On July 28, 2009 the employee contacted OWCP and requested that it cease harassing him and maintained that the video and photograph were "false."

In decisions dated August 18 and September 29 2009, OWCP terminated the employee's compensation for refusing suitable work. It found that the opinion of Dr. Garrett constituted the weight of the evidence and established that he could perform the position offered by the employing establishment on April 30, 2009. In decisions dated July 26 and November 4 and 30, 2010, OWCP denied the employee's requests for reconsideration.

By decision dated July 5, 2012, the Board affirmed the July 26, 2010 nonmerit decision denying the employee's request for reconsideration and November 4 and 30, 2010 nonmerit decisions denying his requests for reconsideration as untimely and insufficient to establish clear

⁴ Docket No. 92-249 (issued September 30, 1992); Docket No. 93-2409 (issued September 1, 1994); Docket No. 97-2508 (issued January 26, 1999), and Docket No. 01-241 (issued June 1, 2011). OWCP accepted that on June 8, 1987 appellant, then a 31-year-old manual clerk, sustained an aggravation of right inguinal hernia surgery and peripheral ilioinguinal and iliohypogastric nerve entrapment.

evidence of error.⁵ The Board noted that OWCP relied upon the opinion of the employee's attending physician, Dr. Garrett, in terminating his compensation for refusing suitable work. The Board considered his argument on reconsideration that Dr. Garrett was not his attending physician and that the surveillance video was not valid. The Board further considered the employee's contention that Dr. Garrett testified in civil court that he saw the employee moving a piano bench on the surveillance video, but did not mention him moving a piano bench in his medical report. The Board determined that "even if Dr. Garrett did not witness [the employee] move a piano bench, this alone would not constitute clear evidence of error by OWCP...."⁶ Citing *J.M.*,⁷ the majority of the Board indicated that video evidence may be valuable for a physician to provide an opinion regarding a claimant's condition, but could also be misleading if the identity of the individual in the video was in doubt or whether the activities were performed while the individual was on medication. The Board thus noted that OWCP has the responsibility to make a claimant aware that it is providing video footage to a physician and provide him with a copy if requested. The Board determined, however, that in this case the employee failed to challenge the validity of the video evidence at the time he was informed of its existence by Dr. Garrett and also obtained a copy of the surveillance video from OWCP. The Board further found that there was no question that the videotape depicted the employee and noted that Dr. Garrett discharged him from his practice on May 12, 2009 because of credibility issues. The Board concluded that the employee had not raised an argument or submitted evidence sufficient to warrant reopening the case for further merit review and also had not shown clear evidence of error.

In a decision dated July 11, 2013, the Board affirmed August 20 and December 11, 2012 and January 28, 2013 OWCP decisions denying the employee's untimely reconsideration request as it did not demonstrate clear evidence of error.⁸ The Board considered a statement by an official with the state attorney's office that a judge found the surveillance video of poor quality and did not show him moving a piano bench but determined that this was not sufficient to show clear evidence of error. The facts and the circumstances as set forth in the prior decisions are incorporated herein by reference.

In a letter dated July 10, 2014, received by OWCP on October 7, 2014, appellant's counsel requested reconsideration. She contended that OWCP erred in terminating the employee's compensation by relying on evidence obtained in violation of 20 C.F.R. § 10.506. Counsel argued that the employing establishment violated section 10.506 when it sent agents to personally interview Dr. Garrett and obtain an opinion from him regarding the employee's work capacity based on an edited surveillance video and a photograph. She noted that the parties did not discuss the preparation or accuracy of the photograph and video evidence and that the

⁵ Docket No. 11-627 (issued July 5, 2012) (Haynes, James A., dissenting).

⁶ In a dissenting opinion, a Board member opined that the employing establishment violated 20 C.F.R. § 10.506 in personally contacting an attending physician, that OWCP failed to notify the employee of its intended use of surveillance video to obtain a medical opinion, that the interview with Dr. Garrett by the investigators negated the probative value of his report, and that Dr. Garrett's opinion was not detailed and rationalized.

⁷ 58 ECAB 478 (2007).

⁸ Docket No. 13-745 (issued July 11, 2013).

employee did not know that the employing establishment had contacted his physician and thus had no opportunity to make comments on the circumstances surrounding the videotape. Dr. Garrett did not explain how the actions on the videotape showed that the employee could lift up to 25 pounds or address whether the employee was on medication at the time of the actions on the surveillance video. Counsel asserted that Dr. Garrett initialed a letter from the employing establishment and included a notation that the employee could lift up to 25 pounds rather than providing a detailed medical report. She submitted the April 30, 2009 job offer from the employing establishment signed by Dr. Garrett.

By decision dated October 15, 2014, OWCP denied appellant's request for reconsideration as it was untimely and failed to establish clear evidence of error. It noted that 20 C.F.R. § 10.118(a) and (b) provides that the employing establishment could submit evidence obtained through investigation to OWCP and may determine the circumstances of an injury and disability if it appears that the employee may be working or otherwise performing activities showing that he is not totally disabled.⁹

On appeal appellant's counsel maintains that she advanced a legal argument not previously considered by contending that OWCP relied upon evidence obtained in violation of section 10.506 in terminating the employee's compensation benefits. She argues that the employing establishment personally contacted Dr. Garrett, showed him surveillance video and solicited an opinion on whether the employee could perform a position. Counsel notes that OWCP cited section 10.118(a) and (b) to find that the inspectors could contact and interview Dr. Garrett, even though section 10.506 provides that the employer cannot contact a physician by personal visit or telephone. She asserts that Dr. Garrett completed the work restriction evaluation immediately after watching the videotape and without referencing any other evidence upon which he based his determination that the employee could perform the offered position. Counsel notes that in *F.S.*,¹⁰ the Board found that OWCP should reject evidence obtained through a violation of the regulation at section 10.506 and that the employing establishment must notify an employee if it is going to provide a physician with surveillance video and also provide a copy of the video upon request. She relates that the employee learned of the surveillance video during an appointment with Dr. Garrett and received a copy of the video footage on July 16, 2009. Counsel asserts that the employee challenged the validity of the video evidence on July 28, 2009, but OWCP had already determined that the job offer was suitable by that time. She further maintains that Dr. Garrett did not provide any medical reasoning supporting why the employee could perform the offered position.

⁹ OWCP's regulations provides, "The employer may ascertain the events surrounding an injury and the extent of disability where it appears that an employee who alleges total disability may be performing other work, or may be engaging in activities which would indicate less than total disability." 20 C.F.R. § 10.118(b). It also provides that the employer must submit all relevant evidence to OWCP, including that acquired in an investigation. *See* 20 C.F.R. § 10.118(a).

¹⁰ Docket No. 11-863 (issued September 26, 2012).

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹¹ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹² OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹³

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.¹⁴ 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 it committed an error.¹⁵

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP.¹⁶ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷ As OWCP received appellant's request for reconsideration on October 7, 2014, more than one year after the last merit decision of record dated September 29, 2009, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP.¹⁸

¹¹ 5 U.S.C. § 8101 *et seq.*

¹² *Id.* at § 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 OWCP's 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).

¹³ 20 C.F.R. § 10.607(b).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹⁵ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁶ 20 C.F.R. § 10.607(a).

¹⁷ *Robert F. Stone*, *supra* note 15.

¹⁸ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

In support of the request for reconsideration, appellant's counsel asserted that OWCP erred in using evidence obtained by the employing establishment through direct contact with the employee's physician as the basis for its termination of his compensation benefits.¹⁹ She maintained that agents with the employing establishment violated 20 C.F.R. § 10.506 by personally visiting Dr. Garrett and showing him edited surveillance video and a photograph. Counsel asserted that the employee was not aware that the employing establishment contacted Dr. Garrett and thus was unable to explain the circumstances surrounding the events on the surveillance video. She also noted that the parties did not consider the preparation and accuracy of the videotape and photograph. In its July 5, 2012 decision, however, the Board reviewed the argument raised by the dissent that OWCP erred in relying on evidence from a physician who reviewed surveillance video obtained by the employing establishment through direct contact with Dr. Garrett. It found, however, that the employee did not contest the accuracy of the video when he learned of its existence during the May 12, 2009 appointment with Dr. Garrett and that he subsequently received a copy of the video footage. Counsel also noted that Dr. Garrett completed the work restriction evaluation immediately after viewing the surveillance video and without providing supporting rationale. She indicated that he initialed a letter from the employing establishment and included a notation that the employee could lift up to 25 pounds rather than providing a detailed medical report. Counsel resubmitted the April 30, 2009 job offer from the employing establishment signed by Dr. Garrett. The term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.²⁰ Counsel's contentions fail to demonstrate clear evidence of error in OWCP's termination of the employee's compensation for refusing suitable work as it fails to manifest on its face that OWCP committed an error.²¹

On appeal appellant's counsel argues that she raised a new legal argument by contending that OWCP erred in terminating the employee's compensation based on evidence obtained by the employing establishment through personal contact with the employee's physician. Initially, the Board notes that raising a new legal argument is one of the criteria for reopening a case for further merit review after a timely request for reconsideration.²² As appellant's reconsideration request was untimely, the standard for reopening a case is whether she has submitted evidence or argument that shows clear evidence of error in OWCP's last merit decision.²³

¹⁹ Section 10.506 of OWCP's regulations provides, "To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. (However, the employer shall not contact the physician by telephone or through personal visits.) When such contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received."

²⁰ *Joseph R. Santos*, 57 ECAB 554 (2006).

²¹ *See T.K.*, Docket No. 15-1570 (issued November 16, 2015).

²² *See* 20 C.F.R. §§ 10.606(b)(3), 10.607(a).

²³ As noted, 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. 20 C.F.R. § 10.607(b).

Counsel cites to *F.S.*,²⁴ arguing that OWCP must inform an employee if it is going to provide a physician with surveillance video. She also argues that Dr. Garrett did not support his findings with adequate medical reasoning. As discussed, however, the Board does not have jurisdiction over the merits of the case. To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. Counsel's contention does not raise a substantial question as to the correctness of OWCP's decision. Thus, it is insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2016
Washington, DC

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

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

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

²⁴ Docket No. 11-0863 (issued September 26, 2012).