

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

T.E., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
JAMES A. HALEY HOSPITAL, Tampa, FL,
Employer**

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**Docket No. 16-0574
Issued: August 18, 2016**

Appearances:

*Capp A. Taylor, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 1, 2016 appellant, through counsel, filed a timely appeal of September 2 and November 10, 2015 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated April 30, 2013, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly denied appellant's August 10, 2015 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error; and (2) whether OWCP properly denied appellant's October 13, 2015 reconsideration request under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board on appeal. On September 26, 2012 appellant, then a 43-year-old mail clerk filed a traumatic injury claim (Form CA-1) alleging that on September 7, 2012 his mailroom supervisor kicked him unexpectedly in the back of his right leg which caused a low back injury. On the reverse of the form, appellant's supervisor, S.H., stated that the investigation did not reveal witnesses to confirm that the incident actually happened. In a letter dated October 4, 2012, OWCP requested additional factual and medical evidence supporting that the event occurred as alleged and that a medical condition resulted from the alleged employment event.

A report of September 14, 2012, provided by the employing establishment, noted that appellant attempted to file assault and battery charges against mailroom supervisor, F.C., on September 13, 2012 as the result of alleged actions on September 7, 2012. Appellant reported to the police that F.C. "mule kicked" him on Friday, September 7, 2012 at 1:50 p.m. and that he sought treatment at the emergency room after his workday. F.C. denied any incident that would result in injury to appellant. He noted that appellant also alleged that he had struck him with a rolled stack of paper on September 12, 2012 while training him on a piece of equipment. F.C. also denied the paper incident. He stated that the allegations had no validity and that if the events occurred at all there was no intentional or violent harm, but rather playful intent. Five possible witnesses were interviewed and denied witnessing either of the situations alleged by appellant. Appellant stated on September 7, 2012 that F.C. kicked him twice to the knee area making him awkwardly catch himself from falling and resulting in pain in his low back. He stated that he believed that F.C. was "goofing around" and did not intend to cause him harm. S.H. verbally counseled F.C. to refrain from any physical contact with any employee.

Appellant submitted a statement and alleged that there were witnesses to the kicking incident, but that his coworkers refused to come forward. In a separate, undated statement he reported that F.C. kicked him twice on September 7, 2012 landing the second kick to the back of his right knee or thigh. Appellant had to catch himself to prevent a fall and felt pain in his lower back and thigh. He sought medical treatment. On September 12, 2012 F.C. struck appellant with a rolled stack of papers three or four times in front of a trainer. Appellant stated that F.C. was acting playfully and not fighting him, but that he felt that, like sarcasm, these events were underhanded acts of violent intent. On September 27, 2012 appellant repeated his earlier allegations and noted that a repairman was present when F.C. kicked him, but denied witnessing the event.

Appellant submitted a statement from O.W., a coworker, noting that F.C. was initially employed as a work-study student and that he liked to touch people in unexpected ways, such as a pat on the back or shoulder. O.W. reported that F.C. had punched him in the side of his

stomach and patted him on the back. He noted that F.C. meant no harm, but that these actions aggravated a back injury. O.W. stated that when F.C. returned as a supervisor he kicked a mail clerk as a joke.

In a nurse's note dated September 7, 2012, appellant reported right leg pain following a kick. He stated that his supervisor kicked him while playing and joking around. Appellant again sought medical treatment on September 8, 2012. Dr. Samy F. Bishai, an orthopedic surgeon, completed a form report on September 25, 2012 and diagnosed lumbosacral strain. He examined appellant on October 5, 2012 and noted an increase in pain. Dr. Bishai found that appellant was totally disabled pending further testing. He completed a duty status report on October 24, 2012 and diagnosed lumbosacral strain with muscle spasm and reduced range of motion.

F.C. completed a statement on October 25, 2012 and denied doing anything to harm anyone on September 7, 2012. He stated that he treated all employees with dignity and respect.

Appellant submitted an additional statement on October 29, 2012 reviewing the submitted evidence and describing his symptoms. He noted that he had a previous service-related injury to his lower back, knees, and legs.

By decision dated November 8, 2012, OWCP denied appellant's claim as he did not submit the necessary factual evidence to establish that his employment incident occurred as alleged. It noted that there were inconsistencies in the factual record which cast doubt upon whether the employment incident occurred as alleged. Appellant requested an oral hearing before an OWCP hearing representative on November 13, 2012.

In a September 25, 2012 narrative report, Dr. Bishai noted that appellant stated that his supervisor had kicked him in the back of the leg causing a back injury. He diagnosed dorsolumbar strain, herniated lumbar disc, and bilateral radiculopathy in the legs. Dr. Bishai diagnosed herniated lumbar disc with radiculopathy on October 24, 2012. He completed a narrative report on December 4, 2012 and repeated his diagnoses and opined that appellant was totally disabled. Dr. Bishai noted that appellant was experiencing an aggravation of his preexisting back condition which initially developed in the military. He concluded, "[I]t is my opinion that [appellant's] injuries of September 7, 2012 when he was kicked in the leg and back caused an injury and aggravation of a preexisting condition of his back and it is a permanent aggravation of this condition."

Appellant testified at the oral hearing on February 14, 2013. He stated that he was talking with F.C. and saw him kick behind him and then strike him with the second kick. Appellant lost his balance and landed in a chair to keep from falling. He noted that he had problems with balance due to his service-related disability. Appellant stated that he caught himself with his arms leaning into the chair. The incident resulted in back and leg pain. He stopped work and did not return.

During the oral hearing, counsel read a statement from a coworker who reported seeing appellant falling backwards. She stated that appellant tried to grab a chair and table to break his fall. The coworker stated that she did not see F.C. kick appellant, but that he gave her a ride

home and stated that he and appellant played like that. She admonished him not to put his feet on people even playing.

Following the oral hearing appellant submitted additional reports from Dr. Bishai dated February 27 and March 6, 2013. Dr. Bishai noted appellant's complaints of neck pain and pain in his lower back. He continued to support appellant's disability for work.

S.H. reviewed the hearing transcript on March 18, 2013 and stated that he interviewed the coworker during that initial investigation and she did not state that she had witnessed anything related to appellant's traumatic event. He disputed her allegation that she had reported appellant's stumble to him.

By decision dated April 30, 2013, the hearing representative found that the case record did not contain any witness statements supporting appellant's version of events. She noted that the claim form was filed two weeks after the alleged incident and that she did not find his testimony to be credible. The hearing representative stated that F.C. denied that the incident occurred and that the medical records failed to provide a reasoned opinion supporting that the diagnosed conditions were causally related to appellant's alleged work incident. She found that, due to the late reporting and lack of contemporaneous medical evidence, the incident did not occur as alleged.

Appellant submitted additional reports from Dr. Bishai dated April 11 and May 16, 2013. These reports repeated the findings and conclusions in the February 27 and March 6, 2013 reports. Appellant also resubmitted the September 25 and October 24, 2012 as well as the March 6, 2013 reports from Dr. Bishai. He submitted a series of reports dated July 1, August 13, and October 3 and 29, 2013 as well as December 11, 2013, January 4, 2014 from Dr. Claude Barosy, a family practitioner. These medical reports provided a September 7, 2012 date of injury, findings, and diagnoses of lumbar sprain, lumbar disc syndrome, and bilateral radiculopathy. Dr. Barosy found herniated discs at L3-4 and L5-S1. He recommended physical therapy.

Appellant requested reconsideration on February 7, 2014 and stated that he was submitting new medical evidence from Dr. Bishai. He also asked that OWCP review O.W.'s statement, the statement dated February 7, 2013 from the other coworker and a March 29, 2013 statement from the union president. Counsel argued that the coworker saw appellant fall, although she did not see the actual horseplay that appellant alleged led to the fall, and that her statement was therefore significant. On March 29, 2013 D.P., a union president, discussed appellant's claim with another employee who stated that F.C. had kicked appellant and that O.W. witnessed this event.

In a January 9, 2014 report, Dr. Bishai noted that appellant had preexisting back problems due to military service, but this did not include radicular symptoms. He reported appellant's statements that on September 7, 2012 he was kicked in the leg by a coworker during horseplay, which caused him to lose his balance and break his fall by catching himself on a chair. Appellant reported that he immediately felt pain in his low back. Dr. Bishai stated, "[I]t is my opinion that [appellant] suffered lumbar disc herniation with bilateral lower extremity radiculopathy as a result of the incident at work on September 7, 2012."

In a decision dated February 21, 2014, OWCP declined to reopen appellant's claim for consideration of the merits. It found that he had failed to submit relevant or pertinent new evidence or argument in support of his request for reconsideration. Counsel appealed this decision to the Board. In a decision dated October 9, 2014,³ the Board found that OWCP properly declined to reopen appellant's claim for review of the merits on February 21, 2014.

Following OWCP's February 21, 2014 decision, appellant submitted additional medical evidence. In a note dated February 25, 2014, Dr. Eduardo L. Gonzalez, a Board-certified family practitioner, diagnosed dorsolumbar strain, herniated disc at L3-4 and L5-S1, as well as bilateral lower extremity radiculopathy. He treated appellant on March 25, 2014 for upper extremity radiculopathy, cervicalgia, dorsolumbar strain, and as well as the previously diagnosed lumbar conditions. On June 4, 2014 Dr. Gonzalez repeated his diagnoses and opined that appellant was totally disabled. He performed an epidural injection on August 26, 2014.

Dr. Rosana Rodriguez, a podiatrist, examined appellant on April 11, 2014 and noted his history of a kick by his supervisor on September 7, 2012. She diagnosed abnormal gait, Morton's neuroma, and posterior tibial dysfunction bilaterally, as well as severe pes planus.

Dr. Robert R. Reppy, an osteopath, examined appellant on October 23, 2014 and diagnosed bulging disc at L3-4, and L4-5, lumbar stenosis and wedge compression of the C5 vertebra.

Counsel requested reconsideration of OWCP's prior decisions through a letter dated August 4, 2015 and received by OWCP on August 10, 2015. He argued that he was submitting the coworker's statement that she saw appellant fall and that this statement established fact of injury as the employment incident actually occurred. Counsel further argued that Dr. Bishai's January 9, 2014 report was sufficient to establish that appellant sustained a medical condition as a result of this fall.

By decision dated September 2, 2015, OWCP declined to reopen appellant's claim for consideration of the merits finding that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. It reviewed the new evidence and noted that the record did not contain a written statement from the coworker as alleged by counsel.

Counsel again requested reconsideration through a letter dated October 9, 2015 and received by OWCP on October 13, 2015. He again alleged that he was submitting a statement from appellant's coworker dated February 7, 2013, which had not been considered by OWCP and which required merit review of appellant's claim. In a handwritten narrative dated February 7, 2013, the coworker indicated that she witnessed appellant falling backward on September 7, 2012. She related that he stated, "ouch," and tried to grab a chair which moved and then tried to grab the table and almost missed the chair completely.

By decision dated November 10, 2015, OWCP declined to reopen appellant's claim for consideration of the merits of his claim. It found that he had not submitted sufficient new evidence or argument to require merit review of his claim.

³ Docket No 14-1047 (issued October 9, 2014).

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA⁴ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁵ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁶ OWCP, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request (the "received date" in the Integrated Federal Employee's Compensation System (iFECS)).⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁸

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁹ OWCP's procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by OWCP of how the

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁶ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁷ 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011). *G.F.*, Docket No. 15-1053 (issued September 11, 2015).

⁸ *Supra* note 5 at 769; *Jesus D. Sanchez*, *supra* note 6 at 967.

⁹ *Supra* note 5 at 770.

¹⁰ *See* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5 (October 2011).

¹¹ *Supra* note 5.

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 6 at 968.

¹⁴ *Supra* note 12.

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.¹⁵

To demonstrate 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 *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.¹⁶ The Board must make 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.¹⁷

ANALYSIS -- ISSUE 1

Counsel requested reconsideration of the April 30, 2013 merit decision through a letter dated August 4, 2015 and received by OWCP on August 10, 2015. As this request was received by OWCP more than one year after the most recent merit decision, the request for reconsideration was untimely filed.

OWCP proceeded to evaluate in the new evidence in appellant's case record under the clear evidence of error standard and found that he had not met this standard. In support of his request for reconsideration, appellant submitted additional medical evidence from Drs. Gonzalez, Reppy, and Rodriquez. These physicians did not address the central issue in this claim, whether his employment incident occurred as alleged. As these reports are irrelevant, the Board finds that they are insufficient to demonstrate clear evidence of error on the part of OWCP.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹⁸

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁹

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on

¹⁵ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁷ *Nancy Marciano*, 50 ECAB 110 (1998).

¹⁸ 5 U.S.C. § 8128(a).

¹⁹ 20 C.F.R. § 10.607(a).

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 a reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.²⁰ Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.²¹

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.²²

The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been present, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.²³

ANALYSIS -- ISSUE 2

The most recent adverse decision reviewing the merits of appellant's case was OWCP's April 30, 2013 decision. As the appeal rights attached to that decision explained, appellant had one calendar year from the date of that decision, April 30, 2014, to ensure receipt by OWCP of any reconsideration request.

OWCP received appellant's request for reconsideration on October 13, 2015. As the received date was more than one year beyond April 30, 2013, his request must be considered untimely. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.

In denying appellant's reconsideration request, OWCP did not determine whether his reconsideration request was untimely filed and did not review the request under the clear evidence of error standard. Rather, it applied the standard of review for timely requests for reconsideration. As OWCP applied the wrong standard of review to the untimely request for reconsideration, the Board will set aside OWCP's November 10, 2015 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.²⁴

²⁰ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4b (October 2011).

²¹ *Id.*

²² 20 C.F.R. § 10.607.

²³ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5a (October 2011).

²⁴ *See* 20 C.F.R. § 10.607(b). *See W.L.*, Docket No. 15-1842 (issued January 14, 2016); *L.D.*, Docket No. 15-0865 (issued October 6, 2015).

CONCLUSION

The Board finds that OWCP properly denied appellant's August 10, 2015 request for reconsideration on the basis that it was not timely filed and did not establish clear evidence of error. The Board further finds that OWCP improperly denied his October 13, 2015 reconsideration request under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed. It is further ordered that the November 10, 2015 decision of the Office of Workers' Compensation Programs be set aside and the case is remanded for further review under the clear evidence of error standard.

Issued: August 18, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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