United States Department of Labor
Employees' Compensation Appeals Board

W.C., Appellant	)	
and	)	**Docket No. 16-0991**
	)	**Issued: December 1, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
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 April 4, 2016 appellant filed a timely appeal of an October 8, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] As more than 180 days elapsed from the last merit decision, dated April 30, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.[3]

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's October 8, 2015 decision was April 5, 2016. Since using April 8, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 4, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence after OWCP rendered its October 8, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence on appeal. 20 C.F.R. § 501.2(c)(1).

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

On March 15, 2012 appellant, then a 60-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 14, 2012 he slipped on a mat while delivering mail injuring his lower back and left hip. On May 16, 2012 he underwent a lumbar spine magnetic resonance imaging (MRI) scan, which demonstrated a disc herniation and extruded disc at L5-S1. OWCP accepted appellant's claim for lumbar sprain and neck sprain on June 21, 2012.

Dr. Louis Train, a Board-certified family practitioner, found that appellant was totally disabled from March 19 through October 3, 2012.

OWCP referred appellant for a second opinion evaluation on November 30, 2012. In a report dated December 20, 2012, Dr. James E. Butler, a Board-certified orthopedic surgeon and OWCP second opinion physician, provided results on examination and diagnosed resolving cervical sprain/strain, improving lumbar sprain/strain, and S1 radiculopathy on the right with absent Achilles reflex. He advised that a positive MRI scan on the left may be related to a 2007 low back injury. Dr. Butler noted that appellant's examination was normal except for the absent reflex. He opined that appellant could return to his date-of-injury position with no restrictions.

OWCP found a conflict of medical opinion between Dr. Train and Dr. Butler regarding the extent of appellant's disability and restrictions. On March 8, 2013 it referred appellant to Dr. Larry Likover, a Board-certified orthopedic surgeon, for an impartial medical examination. On April 4, 2013 Dr. Likover noted appellant's history of injury and reviewed his medical history. He noted that appellant's MRI scan demonstrated a disc herniation on the left. On physical examination Dr. Likover found that appellant demonstrated exaggerated pain response on general bent knee raising, while sitting straight leg raising was normal. He opined, "[Appellant's] appearance is that of an individual who is substantially enhancing his examination. He had numerous positive Waddell's signs and examination inconsistent with the objective findings of the MRI [scan]." Dr. Likover concluded that appellant's subjective complaints of disabling back pain and right leg pain were not verified by examination or diagnostic testing. He found that appellant could return to work as a letter carrier without activity restriction.

Appellant returned to work on June 7, 2013 but he did not complete his shift. In a note dated June 12, 2013, appellant's physician Dr. Jay Chavda, a Board-certified orthopedic surgeon, opined that appellant could not complete a full eight-hour shift without restrictions. Appellant filed a claim for compensation (Form CA-7) on June 21, 2013 and requested leave without pay for the period June 7 to 21, 2013.

On July 29, 2013 appellant underwent a lumbar electromyogram (EMG), which demonstrated degenerative spondylosis and degenerative disc disease greatest at L4-5. A July 5, 2013 cervical MRI scan demonstrated disc protrusions at C3-4, C4-5, and C5-6.

By decision dated September 6, 2013, OWCP denied appellant's claim for wage-loss compensation benefits finding that Dr. Likover's report was entitled to the weight of the medical opinion evidence. It further noted that Dr. Chavda did not explain how appellant's current disability was related to his accepted employment injury.

Appellant requested reconsideration on October 22, 2013. He submitted a report dated September 6, 2013 from Dr. Arnold Ravdel, an orthopedic surgeon. Dr. Ravdel opined that OWCP should accept the additional conditions of canal stenosis at C3-4, C4-5, and C6-7 as due to appellant's employment injury as demonstrated by electrodiagnostic testing. On December 31, 2013 he diagnosed cervical disc lesion, disc lesion at L4-5, and bilateral carpal tunnel syndrome.

Dr. Steven B. Inbody, a Board-certified neurologist, examined appellant on December 5, 2013 and conducted an EMG and nerve conduction velocity (NCV) study. In the upper extremities, he found delayed latencies at the median nerves bilaterally as well as irritation in the distal right median and ulnar nerves.

By decision dated January 7, 2014, OWCP denied modification of the September 6, 2013 decision denying wage-loss compensation benefits.

Appellant again requested reconsideration on January 30, 3014 and submitted additional medical evidence. In a report of January 21, 2014, Dr. Ravdel continued to support the additional conditions of cervical disc displacement, lumbar disc displacement, and bilateral carpal tunnel syndrome as due to the accepted employment and opined that appellant was totally disabled. He repeated his findings and conclusions on February 4, March 4, and April 3, 2014.

Appellant underwent an additional lumbar MRI scan on February 28, 2014, which demonstrated a disc herniation at L5-S1 impinging on the left S1 nerve roots, and L3-4 and L4-5 disc herniations indenting the thecal sacs. He also underwent a cervical MRI scan which demonstrated a C3-4 disc herniation with retrolisthesis, severe canal stenosis, and severe bilateral neural foraminal stenosis, a C4-5 disc herniation indenting the cervical cord with severe bilateral neural foraminal stenosis, C5-6 disc herniation, C6-7 disc herniation, and C7-T1 disc herniation, as well as severe foraminal stenosis with contact on bilateral C4, C5, and C7 nerve roots in the foraminal spaces.

In a merit decision dated April 30, 2014, OWCP denied modification of its January 7, 2014 decision finding that appellant had not met his burden of proof to establish work-related disability due to the accepted opinion for a period entitling him to wage-loss benefits.

On May 7, 2014 appellant elected to receive retirement benefits effective May 2, 2014.

Dr. Inbody next examined appellant on May 12, 2014 diagnosing cervical disc herniation with bilateral cervical radiculopathy, right thoracic outlet syndrome, bilateral carpal tunnel syndrome, and L5-S1 disc herniation with bilateral L5-S1 radiculopathy. He reviewed appellant's cervical and lumbar MRI scans as well as EMG/NCV studies. Dr. Inbody found probable C7-T1 right radiculopathy or thoracic outlet syndrome and right L5-S1 radiculopathy or sciatic nerve entrapment by the piriformis muscle at the right hip with an underlying mild

diabetic neuropathy. He opined that appellant's objective test supported his symptoms and that he was unable to return to work.

Dr. Clark D. McKeever, a Board-certified orthopedic surgeon, examined appellant on June 24, 2014. He reviewed appellant's history of injury and medical treatment. Dr. McKeever examined appellant and his diagnostic studies. He diagnosed cervical disc disorder with disc protrusions and nerve impingement, cervical neuropathy, lumbar disc disorder, and lumbar neuropathy. In an addendum dated July 15, 2014, Dr. McKeever noted that, based on MRI scan reports, appellant had additional diagnosed conditions of cervical and lumbar herniated discs. He asked that OWCP add these conditions to the compensable diagnoses.

Dr. Reginald Newsome, a Board-certified anesthesiologist, examined appellant on August 15, 2014. He noted that appellant slipped and fell at work on March 14, 2012. Dr. Newsome reviewed appellant's diagnostic studies and found lumbar and cervical disc protrusions. He recommended a right transforaminal epidural steroid injection.

In an August 26, 2014 report, Dr. Inbody diagnosed lumbar herniated disc, cervical disc herniation, and bilateral internal shoulder derangement. He referred appellant for a functional capacity evaluation (FCE) on November 19, 2014 to determine his work capacities. On December 30, 2014 Dr. Inbody listed appellant's compensable diagnoses as sprain of the lumbar region and sprain of the neck. He reported appellant's symptoms as persistent neck, left shoulder, low back, and lower extremity pain. Dr. Inbody recommended a surgical consultation and noted that appellant wished to postpone epidural injections. In notes dated January 30, February 27, and March 27, 2015, he listed appellant's compensable diagnoses as lumbar and cervical sprains. Dr. Inbody noted that appellant's current conditions included lumbar herniated disc, cervical herniated disc, and bilateral internal shoulder derangement. He requested that appellant's cervical diagnoses be expanded to allow for cervical epidural steroid injections. On February 27, 2015 Dr. Inbody again recommended an FCE. Appellant completed the suggested FCE on March 18, 2015.

Dr. Inbody completed a report on February 27, 2015 and requested that OWCP accept appellant's claim for cervical disc herniations with cervical radiculopathy and concurrent neurovascular compression at the thoracic outlet. He noted that appellant's symptoms had included not only his low back and L5-S1 radiculopathy, but also right cervical paraspinal pain, tightness in the right shoulder, and numbness with tingling down into the right hand. Dr. Inbody found that appellant's February 2014 cervical MRI scan demonstrated multilevel retrolisthesis with broad-based central disc protrusions indenting the ventral cord, severe canal stenosis, and severe bilateral neuroforaminal stenosis. In a note dated April 24, 2015, he repeated his previous diagnoses and noted that the abnormalities in appellant's cervical spine as demonstrated by MRI scan were "far more dramatic than just a neck sprain." Dr. Inbody recommended injections.

Appellant requested reconsideration of OWCP's April 30, 2014 merit decision through a form dated June 10, 2015 and received by OWCP on July 10, 2015. He submitted an April 24, 2015 report from Dr. Inbody requesting that OWCP accept the additional conditions of cervical disc herniation, bilateral internal shoulder derangement. Appellant based his diagnoses on MRI scans and reported that medications were no longer helping appellant.

Appellant underwent a cervical MRI scan on May 5, 2015, which demonstrated C3-4 retrolisthesis, disc herniation, and canal stenosis with severe bilateral neural foraminal stenosis. This test also found similar herniations and additional conditions at C4-5, C5-6, and C6-7. A lumbar MRI scan of the same date demonstrated disc herniations at L4-5 and L5-S1 with canal stenosis and bilateral neural foraminal stenosis.

Dr. Inbody also completed a note dated June 10, 2015 and alleged that appellant's initial March 14, 2012 injury was misdiagnosed as a sprain/strain. He reviewed a May 16, 2012 cervical MRI scan as well as May 22, 2012 EMG/NCV studies. Dr. Inbody opined that appellant was a potential surgical candidate. He noted that appellant's accepted conditions were not fully consistent with his current findings. Dr. Inbody opined that over the tenure of appellant's service at the employing establishment, the wear and tear of his condition became chronic and severe.

By decision dated October 8, 2015, OWCP declined to reopen appellant's claim for consideration of the merits as his July 10, 2015 request for reconsideration was untimely filed and he failed to demonstrate clear evidence of error by OWCP. It noted that the most recent merit decision was dated April 30, 2014 and denied his claim for continuing disability compensation since July 7, 2013 as he had not submitted sufficient medical evidence in support of disability for the period claimed.

LEGAL PRECEDENT

Section 8128(a) of FECA[4] 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 filed. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP 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 a request for reconsideration is 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 on the part of OWCP in the last merit decision.[9] OWCP's procedures

[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 (September 11, 2015).

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

[9] *Id.* at 770.

provide 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 demonstrate 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 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 show clear evidence of error, the evidence 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.[16] The Board must make an independent determination of whether a claimant has demonstrated 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

The Board finds that OWCP properly declined to reopen appellant's claim for reconsideration of the merits as the request for reconsideration was untimely filed and did not demonstrate clear evidence of error. The only decision over which the Board has jurisdiction is the October 8, 2015 nonmerit decision where OWCP denied reconsideration.

Appellant's request for reconsideration was received by OWCP on July 10, 2015 more than one year after the April 30, 2014 merit decision. Therefore, his reconsideration request was untimely filed.

The Board further finds that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error. OWCP determined that appellant could return to full-duty work following the April 4, 2013 report of Dr. Likover, an impartial medical examiner. Appellant returned to work on June 7, 2013, but failed to complete his initial day of full-duty work. The last merit decision denied his claim as he failed to establish disability beginning

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[10] *See 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.

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

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

[17] *Nancy Marcano,* 50 ECAB 110 (1998).

June 7, 2013 for wage-loss compensation due to his accepted employment-related conditions of lumbar strain and neck strain. Appellant has not submitted evidence demonstrating clear evidence that this decision was in error.

Appellant has submitted medical reports from several physicians including Drs. Ravdel, McKeever, and Newsome, addressing additional conditions including herniated cervical and lumbar discs, bilateral carpal tunnel syndrome, and bilateral internal shoulder derangement. Dr. Newsome reviewed appellant's diagnostic studies and found lumbar and cervical disc protrusions. Dr. Ravdel opined that appellant's additional conditions were due to his employment injury and that appellant was totally disabled. Dr. McKeever found that appellant had additional diagnosed conditions of cervical and lumbar herniated discs and asked that OWCP add these conditions to the compensable diagnoses. While these physicians supported that appellant was disabled due to these additional diagnosed conditions, the Board notes that clear evidence of error was intended to represent a difficult standard. Even the submission of a detailed well-reasoned medical report which, if submitted before the denial as issued, would have created a conflict in medical opinion requiring further development, is insufficient to demonstrate clear evidence of error.[18] The Board finds that these reports do not rise to the level of clear evidence of error.

Appellant also submitted a series of reports from Dr. Inbody, supporting his claim for additional conditions arising from his accepted employment injury and additional periods of disability. Beginning with reports dated May 12, 2014 through June 10, 2015, Dr. Inbody diagnosed cervical disc herniation with bilateral cervical radiculopathy, right thoracic outlet syndrome, and L5-S1 disc herniation with bilateral L5-S1 radiculopathy. He found that appellant was unable to return to work. In his June 10, 2015 report, Dr. Inbody alleged that appellant's initial March 14, 2012 injury was misdiagnosed as a sprain/strain and again suggested that OWCP should accept additional conditions resulting from appellant's accepted employment injuries. He then opined that, over the tenure of appellant's service at the employing establishment, the wear and tear of his condition became chronic and severe. While this opinion offers an opinion on the connection between appellant's current conditions and his employment, Dr. Inbody fails to recognize that appellant's current claim is a traumatic injury which occurred on March 14, 2012. The Board finds that Dr. Inbody's reports are insufficient to demonstrate clear evidence of error on the part of OWCP.

CONCLUSION

OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

[18] *R.K.,* Docket No. 16-0355 (issued June 27, 2016); *V.C.,* Docket No. 16-0642 (issued April 19, 2016).

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 1, 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