United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 16-0008**
	)	**Issued: February 19, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Stratford, CT, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 1, 2015 appellant, through counsel, filed a timely appeal from a July 29, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between December 19, 2014, the most recent merit decision, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.[2]

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant is also appealing an OWCP document dated June 10, 2015, but the Board notes that this represents an informational letter rather than a final decision of OWCP with appeal rights and, therefore, it is not appealable to the Board. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

OWCP accepted that on December 8, 2003 appellant, then a 33-year-old letter carrier, sustained a left olecranon fracture, lumbosacral sprain, and impingement syndrome of the left shoulder when she fell on slippery steps. She stopped work on the date of injury. OWCP authorized a left shoulder arthroplasty performed on March 18, 2005 by Dr. Patrick J. Carolan, an attending Board-certified orthopedic surgeon. On September 19, 2005 appellant returned to limited-duty work, four hours a day.

On April 24, 2006 Dr. Carolan advised that appellant's ability to return to work eight hours a day would be determined based on her ability to increase her work schedule.

By letter dated May 5, 2006, OWCP referred appellant, together with a statement of accepted facts, a list of questions, and the medical record, to Dr. Eric M. Garver, a Board-certified orthopedic surgeon, for a second opinion to determine whether she could work more than four hours a day. In a May 24, 2006 medical report, Dr. Garver obtained a history of the accepted December 8, 2003 employment injuries, provided examination findings, and diagnosed employment-related fracture of the left olecranon, left shoulder impingement syndrome, and cervical trapezius strain. He advised that appellant probably would not do well as a letter carrier, but she could work 40 hours a week performing other activities that involved primarily her right upper extremity. Dr. Garver concluded that she did not require any further medical treatment and that she had reached maximum medical improvement as of February 2006 as determined by Dr. Carolan. In a supplemental report dated June 13, 2006, he clarified that appellant was unable to use her left upper extremity for any degree of lifting, pulling, or pushing. Appellant could push, pull, or lift five pounds using her right upper extremity. Dr. Garver concluded that there was no limit on the number of hours that she could work using her right upper extremity.

On July 26, 2006 the employing establishment offered appellant a full-time modified letter carrier position within the restrictions provided by Dr. Garver. In a July 28, 2006 letter, OWCP advised her that the position of modified letter carrier was suitable and available to her. It informed appellant that, upon performance of the position in its entirety, she would be paid compensation based on the difference, if any, between the pay of the offered position, and the pay of her date-of-injury position. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2) with respect to refusal of suitable work and afforded 30 days to either accept and perform the position or provide an explanation for refusal.

On August 10, 2006 OWCP determined that there was a conflict in medical opinion between Dr. Carolan and Dr. Garver regarding appellant's work capacity and need for further medical treatment. By letter dated August 22, 2006, it referred her, together with a statement of accepted facts, a list of questions, and the medical record, to Dr. David B. Brown, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a September 5, 2006 report, Dr. Brown reviewed a history of the December 8, 2003 employment injuries and appellant's medical record. He provided findings on examination and assessed a healed left olecranon fracture, status post subacromial decompression for supraspinatus tendinitis, and subjective complaints of cervical radiculitis without objective evidence of any nerve root compression. Dr. Brown determined that appellant had reached maximum medical improvement and she had five percent permanent impairment of the left shoulder and five percent permanent impairment of the left elbow under the American Medical

Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He advised that she could not perform her letter carrier duties, but could work eight hours a day with restrictions, that included lifting no more than 10 pounds with her left arm and no repetitive overhead use of her left arm. Dr. Brown concluded that appellant did not require any further medical treatment.

On October 3, 2006 the employing establishment offered appellant a full-time modified letter carrier position based on Dr. Brown's restrictions. On October 10, 2006 appellant rejected the job offer, stating that its expectations were above the limitations provided by Dr. Carolan, Dr. Garver, and Dr. Brown. She related that she wanted to work within these limitations and gradually return to work eight hours a day.

By letter dated October 11, 2006, OWCP notified appellant about the suitability of the offered position and penalty provisions of section 8106 of FECA. Appellant was afforded 30 days to respond.

On October 18, 2006 appellant again rejected the offered position, stating that she disagreed with the job offer. In an October 23, 2006 treatment note, Dr. Carolan reported that appellant related to him that she was unable to perform the offered position because she was restricted from overhead activity and carrying weight due to left arm pain.

In a November 15, 2006 letter, OWCP notified appellant that she had not provided valid reasons for refusing the job offer. Appellant was again advised that refusal of suitable work would result in termination of her compensation. She had 15 days to accept the position.

Appellant submitted several medical reports dated May 6, 2004 to January 3, 2007 from her physical therapists and Dr. Carolan which addressed her continuing neck and left upper extremity symptoms, treatment, and work restrictions.

In a February 2, 2007 decision, OWCP terminated appellant's wage-loss and schedule award compensation effective February 17, 2007 because she refused an offer of suitable work. It found that the weight of the medical evidence rested with Dr. Brown's impartial medical opinion.

On February 6, 2007 appellant filed a claim for recurrence of disability (Form CA-2a) as of December 19, 2006. A development letter was sent to her on February 2, 2007, but no further action was taken on this claim due to the sanction imposed by the February 2, 2007 decision.

On February 16, 2007 appellant requested an oral hearing before an OWCP hearing representative which was held on October 16, 2007. In a January 24, 2008 decision, the hearing representative affirmed the February 2, 2007 termination decision. He found that the weight of the evidence rested with the opinion of Dr. Brown, the impartial specialist, and found that OWCP met its burden of proof to terminate appellant's monetary benefits as she refused an offer of suitable work.

On June 4, 2009 the employing establishment offered appellant a full-time modified city carrier technician position which she accepted on the same day.

On April 9, 2010 appellant filed a Form CA-2a alleging a recurrence of total disability that caused her to stop work on April 5, 2010.

In a decision dated July 14, 2010, OWCP denied appellant's recurrence claim as she had not submitted sufficient medical evidence to establish a recurrence of total disability commencing April 5, 2010 due to her accepted December 8, 2003 work injuries.

On August 5, 2010 appellant requested a telephone hearing with an OWCP hearing representative which took place on November 4, 2010. In a January 12, 2011 decision, an OWCP hearing representative affirmed the July 14, 2010 decision, finding that there could be no wage-loss compensation as she had previously refused suitable work.

On December 3, 2014 appellant filed a claim for a schedule award (Form CA-7). By decision dated December 19, 2014, OWCP denied her claim for schedule award, finding that her eligibility for wage loss or a schedule award had been terminated on February 2, 2007 when she refused an offer of suitable work.

By letter dated January 6, 2015, appellant, through counsel, requested an oral hearing regarding the December 19, 2014 decision. In a May 27, 2015 decision, an OWCP hearing representative set aside the December 19, 2014 decision and remanded the case to OWCP for further consideration. He found that OWCP had not complied with its procedural requirements as it had afforded appellant new appeal rights for her schedule award claim rather than refer her to the appeal rights for the termination decision. The hearing representative instructed OWCP to issue a *de novo* decision on her entitlement to a schedule award.

On remand, OWCP sent appellant a June 10, 2015 informational letter advising that the hearing representative had set aside the December 19, 2014 schedule award decision because she was not eligible to receive any wage loss or schedule award compensation after the February 2, 2007 termination decision. It further advised that she had failed to exercise her appeal rights provided with the January 24, 2008 decision which affirmed the February 2, 2007 termination decision. OWCP indicated that appellant's appeal rights for that decision had expired, and, thus, no new appeal rights could be granted under FECA.

By letter dated and received on June 17, 2015, appellant, through counsel, requested reconsideration of the January 24, 2008 and June 10, 2015 "decisions." He contended that OWCP, in its October 11, 2006 notice of the suitability of the position, clearly erred when it misstated the law. Counsel asserted that a Form CA-2a was the appropriate form to claim appellant's consequential neck and right shoulder injuries. He noted that she had complained about pain on the right side of her neck and right shoulder as a result of overuse from her left arm injury. Counsel further contended that OWCP erred in finding that appellant was not entitled to a schedule award in its June 10, 2015 decision. He noted that, at that time, she was receiving minimal workers' compensation payments for partial disability. Counsel indicated that Dr. Garver's reports found that appellant reached maximum medical improvement as of February 2006, she could not use her left arm for any significant weight or work as a letter carrier, and she had seven percent impairment of the left shoulder and five percent impairment of the left elbow. Dr. Brown's report found that she reached maximum medical improvement as of September 2006 and had five percent impairment of the left shoulder and five percent impairment of the left elbow.

The record contains numerous medical reports submitted subsequent to OWCP's last merit decision. These include a January 31, 2007 disability slip and work-duty status report

(Form CA-17) from Dr. Carolan who recommended that appellant refrain from work until further notice.

In reports dated February 13, 2008 to October 10, 2010, Dr. Michael J. Brennan, a Board-certified physiatrist, noted appellant's continuing pain, provided an assessment of myofascial pain syndrome, thoracic outlet syndrome, status post elbow fracture, status post rotator cuff surgery, and migraines. He opined that her migraines were work related. Dr. Brennan addressed appellant's work capacity, restrictions, and treatment.

Diagnostic test results dated February 1, 2008 to March 22, 2012, found that appellant had cervical strain and radiculopathy, chronic cervical spasm related to her December 8, 2003 work injury, left arm and left leg radiculopathy, and lumbar herniated nucleus pulposus.

Hospital records addressed appellant's provocative lumbar discography and discogram performed on March 26, 2008 by Dr. Rahul S. Anand, a Board-certified anesthesiologist, and Dr. Abraham Mintz, a Board-certified neurosurgeon, respectively.

In reports dated July 22, 2009 to May 21, 2010, Dr. Robert Pesale, a chiropractor, diagnosed displacement of lumbar intervertebral disc, muscle spasm, lumbar segmental dysfunction, sprain/strain of the sacroiliac region, shoulder impingement syndrome, elbow bursitis/inflammation, and pain in the shoulder joint region and elbow/forearm. He addressed appellant's treatment plan which included the goal to keep her working.

In a March 22, 2012 report, Dr. John N. Awad, a Board-certified orthopedic surgeon, advised that a cervical magnetic resonance imaging (MRI) scan revealed left arm radiculopathy. A lumbar MRI scan demonstrated left leg radiculopathy and lumbar herniated nucleus pulposus.

Dr. Lawrence P. Kirschenbaum, a Board-certified anesthesiologist, also reported on March 22, 2012 examination findings and diagnoses of cervical musculoligamentous strain, history of lumbar annular tears, left arm and leg radiculopathy, and thoracolumbar spasm. He restricted appellant from all work activities.

Laboratory reports dated August 12 and December 5, 2012, and May 8, 2013 provided drug test results.

In an August 6, 2014 report, Dr. Nicholas Diamond, an osteopath, found that appellant had 13 percent impairment of the left arm and 1 percent impairment of the left leg under the sixth edition of the A.M.A., *Guides*. He concluded that she reached maximum medical improvement on the date of his examination.

In a July 29, 2015 decision, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a

benefit unless the application for review is received within one year of the date of that decision.[3] Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.[4] In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[5]

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 OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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.[6]

OWCP procedures note that 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 that a schedule award was miscalculated). Evidence such as 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.[7] The Board makes an independent determination of whether a claimant has submitted, clear evidence of error on the part of OWCP.[8]

ANALYSIS

The Board finds that OWCP properly denied appellant's request for a merit review of her claim. OWCP regulations[9] and procedures[10] establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues,[11]

[3] 20 C.F.R. § 10.607(a) (2011).

[4] *Id.* at § 10.607(b) (2011); *Cresenciano Martinez*, 51 ECAB 322 (2000).

[5] *See Alberta Dukes*, 56 ECAB 247 (2005).

[6] *Robert G. Burns*, 57 ECAB 657 (2006).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

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

[9] 20 C.F.R. § 10.607(a); *see supra* note 5.

[10] Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4 (October 2011); *see Veletta C. Coleman*, 48 ECAB 367 (1997).

[11] *See Robert F. Stone*, 57 ECAB 292 (2005).

including any merit decision by the Board and any merit decision following action by the Board.[12] Appellant has requested reconsideration of an OWCP hearing representative's January 24, 2008 merit decision which affirmed the termination of her wage-loss and schedule award compensation on February 2, 2007 because she refused an offer of suitable work. She had one year from the date of the January 24, 2008 decision to make a timely request for reconsideration. Appellant's request for reconsideration was received by OWCP on June 17, 2015. As her request for reconsideration was received more than one year after the January 24, 2008 merit decision, the Board finds that it was untimely filed.

The Board further finds that the arguments and evidence submitted by appellant in support of her request for reconsideration do not raise a substantial question as to the correctness of OWCP's decision denying modification of the termination decision. The issue is whether she has shown clear evidence of error in OWCP's termination of her wage-loss and schedule award compensation for refusing an offer of suitable employment.

In her request for reconsideration and on appeal, appellant, through counsel, contends that OWCP erred in its October 11, 2006 letter by misstating that a Form CA-2a was not the appropriate form for claiming her consequential neck and right shoulder injuries. He asserts that she complained about pain on the right side of her neck and right shoulder as a result of overuse from her left arm injury. The Board notes that OWCP's October 11, 2006 letter did not address the issue of whether appellant sustained neck and right shoulder injuries as a consequence of her accepted December 8, 2003 employment injuries. Rather, OWCP addressed its determination that the modified letter carrier position offered to her by the employing establishment on October 3, 2006 was suitable. It also addressed the penalty provision of 5 U.S.C. § 8106(c) if appellant did not accept the offered position.

The Board notes that appellant had filed a recurrence claim on February 6, 2007, but it was filed after the suitable work termination decision on February 2, 2007.

Counsel further contends on reconsideration and on appeal that OWCP erred in finding, in its June 10, 2015 document, that appellant was not entitled to a schedule award for her left shoulder and left elbow as both Dr. Garver and Dr. Brown found that she had reached maximum medical improvement as of February 2006 and September 5, 2006, respectively, prior to the termination of her compensation on February 2, 2007. As previously stated, the June 10, 2015 document is an informational letter rather than a final decision. In this informational letter, OWCP noted the hearing representative's May 27, 2015 decision set aside the December 19, 2014 schedule award decision because OWCP had afforded appellant new appeal rights for the schedule award decision: when it should have referred appellant to the appeal rights she had received with the termination decision. It noted that since she had failed to exercise her appeal rights associated with the January 24, 2008 decision, her appeal rights for that decision had expired. As such, OWCP related that no new appeal rights could be granted under FECA.[13]

[12] *See E.C.*, Docket No. 13-1937 (issued February 6, 2014); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4(a) (October 2011).

[13] An OWCP final decision is accompanied by information about the claimant's appeal rights. 20 C.F.R. § 10.126.

A review of the medical evidence regarding appellant's work capacity indicates that on January 31, 2007 Dr. Carolan advised that appellant could not work until further notice. In a March 22, 2012 report, Dr. Kirschenbaum diagnosed cervical musculoligamentous strain, history of lumbar annular tears, left arm and leg radiculopathy, and thoracolumbar spasm. He restricted appellant from all work activities. While the reports of Dr. Carolan and Dr. Kirschenbaum support appellant's disability for work, they do not establish clear evidence of error as the physicians' opinions generally finding that she could not work did not specifically address whether she could perform the duties of the offered position as of February 2, 2007.[14] As noted, 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 merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[15] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.[16]

The remaining medical evidence submitted on reconsideration addressed appellant's various medical conditions and indicated that she worked, but does not specifically address her ability to perform the offered position as of February 7, 2007.[17] The Board finds, therefore, that this evidence does not raise a substantial question as to the correctness of OWCP's January 24, 2008 termination decision.

Appellant's remaining contention on appeal pertains to the merits of the claim. However, as noted, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

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

[14] *See F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

[15] *Supra* note 7.

[16] *Supra* note 8.

[17] *Supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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