

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

N.B., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
GENERAL MITCHELL AIR RESERVE)
STATION, WI, Employer)

**Docket No. 16-0020
Issued: January 12, 2016**

Appearances:
Debra Hauser, Esq., for the appellant
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 October 7, 2015 appellant, through counsel, filed a timely appeal of an August 24, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Since more than one year elapsed since the last merit decision of February 28, 2003 and the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² For decisions prior to November 19, 2008, a claimant had one year to file an appeal. *See R.W.*, Docket No. 10-1626 (issued March 1, 2011); 20 C.F.R. § 501.3(d)(2) (2007).

FACTUAL HISTORY

On July 21, 1999 appellant, then a 43-year-old boiler plant operator, filed a traumatic injury claim (Form CA-1) alleging a back injury while lifting a manhole cover in the performance of duty on June 25, 1999. He provided his mailing address in Sturtevant, Wisconsin. Appellant submitted medical evidence from Dr. Sharon Hill, a chiropractor. There is no indication that any action was taken on appellant's claim at that time.

Appellant submitted a notice of recurrence of disability (Form CA-2a) on October 29, 2002. On the form he provided a new home address in Racine, Wisconsin. Appellant submitted a form report dated October 9, 2002 from a Dr. Stephen Pagano, a Board-certified internist.

By letter dated January 8, 2003, OWCP advised appellant that chiropractors were considered physicians under FECA only to the extent that they diagnosed a subluxation of the spine as demonstrated by x-ray. It asked him to respond to questions regarding his condition and to submit additional medical evidence. The letter was addressed to appellant's original Sturtevant, Wisconsin address provided on the July 21, 1999 CA-1 form.

On February 3, 2003 appellant submitted a January 6, 2003 report from Dr. Yogendra Bharat, a Board-certified anesthesiologist. Dr. Bharat indicated that appellant had been treated for low back pain and recommended a lumbar epidural injection.

By decision dated February 28, 2003, addressed to the Racine, Wisconsin address provided on the Form CA-2a, OWCP denied the claim for compensation. It found the medical evidence of record was insufficient to establish a traumatic injury in 1999,³ noting that chiropractors are physicians under FECA only to the extent they diagnose a subluxation of the spine as demonstrated by x-ray. OWCP found the chiropractors' reports did not diagnose a subluxation based on x-rays. As to the report from Dr. Bharat, it found the report did not provide an opinion on causal relationship between the condition and his employment. In addition, OWCP explained that there could be no recurrence of disability as the initial claim had not been established. Appellant was provided with full appeal rights.

On April 5, 2007 OWCP received a letter of that date from a congressional representative asserting that appellant felt OWCP had not acknowledged the significant injuries appellant had allegedly sustained in 1999, and that this was affecting his claim for compensation.⁴ In an undated letter received on April 5, 2007, appellant reported continuing difficulties since an injury

³ OWCP referred to May 25, 1999 incident. Appellant himself referred to a May 25, 1999 injury in a letter received by OWCP on April 5, 2007. As noted, however, the claim form clearly alleged the date of injury was June 25, 1999.

⁴ Appellant had also filed a Form CA-1 for an injury on November 13, 2002 when he was climbing out of a pit and fell to the ground. The claim was accepted for lumbar strain, aggravation of lumbar stenosis, and aggravation of neurogenic claudication. The Board affirmed termination of compensation effective July 28, 2007 for that claim. Docket No. 09-35 (issued April 6, 2009). Appellant also filed an occupational disease claim dated May 15, 2008 for a back condition. The Board affirmed a February 28, 2011 OWCP decision which denied that claim. Docket No. 11-1968 (issued June 21, 2012).

on May 25, 1999. He reported that his treating physician was a Dr. Debbie Miller but OWCP had not bothered to look at her records. In response to the congressional representative, by letter dated April 16, 2007, OWCP noted that appellant had not appealed the February 28, 2003 decision and there were no reports in the record from a Dr. Miller.

On June 19, 2009 OWCP received a letter from appellant, which had been sent to a congressional representative asserting that his November 2002 injury was a direct result of his 1999 injury. In an undated letter received on October 9, 2009, appellant reported that he had requested medical reports from OWCP after the February 28, 2003 decision, but was told there were no medical reports and therefore it was impossible to appeal the decision.

On August 20, 2015 appellant, through counsel, requested reconsideration of the February 28, 2003 OWCP decision. He argued that the January 8, 2003 development letter was improperly addressed, that appellant had no opportunity to respond to the development letter, that appellant was denied due process, and that the February 28, 2003 decision was issued in error.

By decision dated August 24, 2015, OWCP found the reconsideration request was untimely. It further found there was no clear evidence of error established. OWCP indicated that the January 8, 2003 letter was not returned as undeliverable.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁵ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”⁶

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁷ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁸ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁹ For decisions between June 1, 1987 and August 28, 2011, an application for reconsideration needed to be mailed within one year of the date of OWCP’s decision for which review was sought.¹⁰ 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

⁵ *Supra* note 1.

⁶ 20 C.F.R. § 10.605 (2012).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

⁹ *Supra* note 1.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(e) (October 2011).

evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.¹² Evidence that 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 A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁵

ANALYSIS

In the present case, the merit decision with respect to appellant's claim for compensation was dated February 28, 2003. The application for reconsideration was dated August 20, 2015. Since this is more than one year after the merit decision, it is untimely filed.

As the reconsideration request was untimely, appellant must demonstrate clear evidence of error to be entitled to a merit review. In this regard he argues that the January 8, 2003 development letter was improperly addressed. There is no question that the development letter of record did not contain appellant's last known address, which was provided in the October 29, 2002 Form CA-2a. The Board has held that in the absence of evidence to the contrary, it is presumed that a notice mailed to an addressee in the ordinary course of business was received by the addressee.¹⁶ Since the January 8, 2003 development letter was improperly addressed, it rebuts the presumption of receipt created by the mailbox rule.¹⁷

Having established a procedural error in the issuance of the January 8, 2003 development letter does not itself meet the standard of "clear evidence of error" in OWCP's decision. As noted above, the evidence must be of such 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. In this case the February 28, 2003 OWCP decision was properly sent to appellant's last known address. It explained the deficiencies in the evidence and provided full appeal rights. This included one year to request reconsideration or appeal to the Board.

¹¹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

¹⁵ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

¹⁶ *See Larry L. Hill*, 42 ECAB 596, 600 (1991).

¹⁷ *See R.L.*, Docket No. 13-123 (issued April 12, 2013).

Appellant did not, however, timely exercise any appeal right. He had the opportunity to submit additional relevant evidence or argument with a request for reconsideration or a hearing, and to raise arguments on appeal with the Board. There is some indication in the record that appellant felt his appeal rights were compromised because he could not obtain medical reports from OWCP. No evidence was submitted to verify this allegation or explain how he was precluded from exercising his appeal rights. Appellant bears the burden of proof to submit relevant evidence in support of his claim for compensation.¹⁸ He could have submitted to OWCP new and relevant medical evidence regarding the alleged June 25, 1999 injury at any time up to one year from the February 28, 2003 decision. The Board has held that when appellant has an opportunity to exercise appeal rights and has an opportunity for reconsideration, for a hearing or review by the Board, there is meaningful post deprivation processes whereby the procedural error may be addressed after it occurs.¹⁹ Since appellant had an opportunity to cure any procedural defect with respect to a January 8, 2003 development letter, the Board finds no clear evidence of error is established in this case.

On appeal, appellant's counsel cites to *L.R.*²⁰ and argues that this decision establishes clear evidence of error in the February 28, 2003 decision, but *L.R.* was not a case involving the clear evidence of error standard. In that case, the claimant had timely exercised his appeal rights and filed an appeal with the Board of a merit decision. The Board noted that the development letter had been sent to the wrong address, and after the claimant again notified OWCP of the proper address, it had not resent the development letter but issued a decision denying the claim. The Board found that the case was not in posture for decision and remanded the case to properly issue the development letter. The *L.R.* case underscores the Board's finding above that appellant had the opportunity to cure any procedural defect by exercising his appeal rights. Appellant could have, for example, timely requested an appeal of the February 28, 2003 decision and the procedural issue would have been addressed by the Board. Accordingly, the Board finds he has not established clear evidence of error in this case.

CONCLUSION

The Board finds that appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error by OWCP.

¹⁸ *Abe E. Scott*, 45 ECAB 164 (1993).

¹⁹ *See Lan Thi Do*, 46 ECAB 366 (1994) (although appellant did not receive a pretermination notice prior to termination of compensation, the opportunity for reconsideration, a hearing, and review by the Board provided meaningful post deprivation remedies for the procedural error).

²⁰ Docket No. 14-0361 (issued June 5, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 24, 2015 is affirmed.

Issued: January 12, 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