

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

V.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 16-0132
Issued: July 13, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 28, 2015 appellant filed a timely appeal of June 10 and October 9, 2015 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than one year elapsed from the last merit decision, dated March 12, 1996,¹ to 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.

ISSUES

The issues are: (1) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing; and (2) whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹ For final adverse decisions issued by OWCP prior to November 19, 2008, a claimant had up to one year to file an appeal with the Board. *See* 20 C.F.R. § 501.3(d)(2) (2008).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal.³ The facts and the circumstances surrounding the prior appeals are incorporated by reference. The relevant facts are as follows.

On August 29, 1989 appellant, then a 49-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her back, elbows, and left side when she fell in the performance of duty. OWCP accepted her claim on October 28, 1989 for cervical and lumbar strain as well as post-traumatic headaches. Appellant filed claims for recurrence of disability on October 25, 1989 and September 4, 1990. OWCP authorized compensation benefits and entered her on the periodic rolls September 1, 1990.

In a decision dated March 9, 1992, OWCP terminated appellant's wage-loss compensation and medical benefits effective April 5, 1992 as she had no disability due to the August 29, 1989 employment injury. By decisions dated July 8, November 16, 1992 and February 4, 1993, it denied modification of its March 9, 1992 decision.

By decision dated August 21, 1995, OWCP denied appellant's claim for a schedule award, finding no impairment to warrant a schedule award. It denied modification of its August 21, 1995 decision on March 12, 1996.

In a letter dated May 8, 1996, appellant's attorney alleged error on the part of OWCP in its reliance on the second opinion physician and the impartial medical examiner as the weight of the evidence in terminating appellant's compensation benefits and requested reconsideration on May 21, 1996. By decision dated July 22, 1996, OWCP found that counsel's arguments were not sufficient to require it to reopen appellant's claim for consideration of the merits under section 8128(a) of FECA.

Appellant again requested reconsideration on April 22, 1997 and submitted additional evidence and argument in support of her claim. By decision dated September 23, 1997, OWCP found her request was untimely filed and had failed to demonstrate clear evidence of error. Appellant appealed this decision to the Board.

In its December 15, 1999 decision,⁴ the Board found that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.

Following the Board's December 15, 1999 decision, appellant again requested a schedule award on March 6, 2003. By letter dated May 28, 2003, she again objected to the examination and findings of the impartial medical examiner. In response to OWCP's inquiry regarding which appeal right she wished to pursue, appellant indicated on August 26, 2003 that she wanted an oral hearing. By decision dated July 8, 2004, the Branch of Hearings and Review denied her

³ Docket No. 98-751 (issued December 15, 1999) and Docket No. 07-736 (issued July 3, 2007).

⁴ Docket No. 98-751 (issued December 15, 1999).

request for an oral hearing as untimely and as she had previously request reconsideration of the issues in her claims.⁵

Appellant requested reconsideration on August 9, 2006.

By decision dated November 20, 2006, OWCP referenced the August 9, 2006 letter from appellant.⁶ It noted that during a telephone conversation on October 20, 2006 appellant raised a separate issue of whether the selected impartial medical examiner had previously examined appellant for the employing establishment. OWCP found that the second opinion examiner had performed a fitness-for-duty examination for the employing establishment and that OWCP had selected the impartial medical examiner to resolve a conflict of medical evidence. It noted, “It was appropriate to send you to an impartial medical examination based on [the second opinion examiner’s] report, but not to create a conflict in medical opinion evidence.” OWCP noted that it was error to refer to the physician selected to perform the impartial medical examination as an impartial medical examiner, but found that the weight of the medical evidence rested with his report as he was an appropriate Board-certified specialist. It found that appellant had not timely filed her reconsideration request and that she failed to demonstrate clear evidence of error. Accordingly, OWCP denied appellant’s request for reconsideration. Appellant appealed to the Board.

In its July 3, 2007 decision, the Board reviewed OWCP’s November 20, 2006 decision and found that appellant’s request for reconsideration was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.⁷ The Board found that although appellant had established a procedural error in OWCP’s designation of the impartial medical examiner, his report was sufficient to meet OWCP’s burden of proof to terminate her compensation benefits and to deny her additional claims for compensation and medical benefits after April 5, 1992.

On October 29, 2009 appellant filed a Form CA-2a alleging a recurrence of disability of her August 29, 1989 employment injury. In a letter dated May 14, 2010, OWCP noted that benefits under the August 29, 1989 employment injury had been terminated and suggested that appellant follow the appeal rights of the 1992 decision.

Appellant requested reconsideration in an August 10, 2010 letter and continued to argue that the report relied upon to terminate her compensation benefits was insufficient to meet OWCP’s burden of proof. She alleged that the procedural errors noted by the Board were sufficient to warrant reopening of her claim for merit review.

⁵ As this decision dated July 8, 2004 was issued more than one year prior to the date of appellant’s appeal to the Board on January 16, 2007, the Board is precluded from addressing this issue on appeal. 20 C.F.R. § 501.3(d)(2) (2008).

⁶ OWCP did not address any of the statements or arguments raised by appellant in her August 9, 2006 request for reconsideration, limiting itself to the issues raised by her October 20, 2006 telephone call. As OWCP did not address these issues, the Board may not consider them for the first time on appeal. 20 C.F.R. § 501.2(c).

⁷ Docket No. 07-0736 (issued July 3, 2007).

Appellant submitted a report dated September 21, 2010 from Dr. Sasan Yadegar, a Board-certified neurosurgeon, opining that appellant's neck, shoulder, and arm pain had worsened. Dr. Yadegar noted that appellant had fallen and hit her neck. He asserted this fall resulted in difficulty with walking and spasms in both arms.

In a letter dated May 14, 2012, appellant requested a schedule award and alleged that the Social Security Administration asserted her conditions were employment related and required refund of monies paid.

By decision dated October 17, 2012, OWCP declined to reopen appellant's claim for consideration of the merits on the basis that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

Appellant requested both an oral hearing and review of the written record from OWCP's Branch of Hearings and Review on May 4, 2015.

By decision dated June 10, 2015, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing as she had previously requested reconsideration and was not, as a matter of right, entitled to a hearing before the Branch of Hearings and Review on the same issue. The Branch of Hearings and Review exercised its discretion and further denied appellant's request as the issues could be addressed through the reconsideration process.

Appellant requested reconsideration on September 3, 2015 of decisions issued between August 29, 1989 and October 17, 2012. By decision dated October 9, 2015, OWCP declined to reopen her claim for consideration of the merits as her request for reconsideration was untimely filed from any merit decision. It further found that appellant had not submitted any evidence in support of her reconsideration request and had not demonstrated clear evidence of error on the part of OWCP in its prior decisions.⁸

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b) of FECA⁹ concerning a claimant's entitlement to a hearing before an OWCP representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁰ Section 10.615 of OWCP's regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.¹¹ OWCP regulations provide that the request must be sent within 30 days of the date of

⁸ On appeal appellant submitted additional evidence. The Board's jurisdiction is limited to reviewing evidence before OWCP at the time it issued its final decision. As OWCP did not consider this evidence in reaching a final decision, the Board is precluded from reviewing it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

⁹ See *supra* note 2.

¹⁰ *Id.* at § 8124(b)(1).

¹¹ 20 C.F.R. § 10.615.

the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹²

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings and reviews of the written record in certain circumstances where no legal provision was made for such reviews and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing or review of the written record.¹³ OWCP procedures, which require OWCP to exercise its discretion to grant or deny a hearing or review of the written record when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.¹⁴

ANALYSIS -- ISSUE 1

In the instant case, OWCP properly determined that appellant's May 4, 2015 request for an oral hearing and a review of the written record was not timely filed as it was made more than 30 days after the issuance of OWCP's most recent merit decision dated March 12, 1996. It further found that appellant had previously requested reconsideration of both the March 9, 1992 OWCP termination decision and the August 21, 1995 decision denying a schedule award. OWCP therefore, properly denied appellant's hearing and review of the written record as a matter of right.

OWCP then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing or review of the written record in this case. It determined that a hearing or a review of the written record was not necessary as the issue in the case was medical in nature and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, OWCP properly denied appellant's request for a hearing and a review of the written record as untimely and that she had previously requested reconsideration. Further, it properly exercised its discretion in denying appellant's request for a hearing and a review of the written record as she could further pursue her claim through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA¹⁵ does not entitle a claimant to a review of an OWCP decision as a matter of right.¹⁶ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁷ 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

¹² *Id.* at § 10.616(a).

¹³ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁵ 5 U.S.C. § 8128(a).

¹⁶ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

¹⁷ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

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).¹⁸ 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).¹⁹

In those cases where requests for reconsideration are not timely 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.²⁰ 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 shows "clear evidence of error" on the part of OWCP.²¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²² The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.²³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.²⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁵ 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.²⁶ To show 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.²⁷ 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.²⁸

¹⁸ 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).

¹⁹ *Supra* note 16 at 769; *Jesus D. Sanchez*, *supra* note 17 at 967.

²⁰ *Supra* note 16 at 770.

²¹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

²² *Supra* note 16.

²³ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

²⁴ *Jesus D. Sanchez*, *supra* note 17 at 968.

²⁵ *Supra* note 23.

²⁶ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

²⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²⁸ *Nancy Marciano*, 50 ECAB 110 (1998).

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on September 3, 2015 of decisions of OWCP dated from August 29, 1989 through October 17, 2012. The Board notes that the most recent merit decision in the case is dated March 12, 1996 and that this decision denied appellant's request for a schedule award. The Board finds that appellant's September 3, 2015 request for reconsideration is untimely.

The Board further finds that appellant submitted no evidence or argument in support of her request for reconsideration and that her request, therefore, cannot demonstrate clear evidence of error on the part of OWCP. As appellant failed to demonstrate clear evidence of error, OWCP properly declined to reopen her claim for consideration of the merits.

CONCLUSION

The Board finds that OWCP's Branch of Hearings and Review properly denied appellant's request for an oral hearing because the request was untimely, that she had previously requested reconsideration, and that the issues could be addressed through the reconsideration process. The Board further finds that OWCP properly declined to reopen appellant's claim for consideration of the merits as her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error on the part of OWCP.

ORDER

IT IS HEREBY ORDERED THAT the October 9 and June 10, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 13, 2016
Washington, DC

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

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

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