

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

E.M., Appellant)
and) Docket No. 16-0471
DEPARTMENT OF THE ARMY,) Issued: May 16, 2016
FORT McCOY, Sparta, WI, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 6, 2016 appellant filed a timely appeal from a December 3, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was the November 3, 2014 decision of the Board, which became final after 30 days of issuance and is not subject to further review.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ 20 C.F.R. § 501.6(d).

² 5 U.S.C. § 8101 *et seq.*

³ Appellant submitted new evidence on appeal. However, the Board cannot consider this evidence as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1); *see Steven S. Saleh*, 55 ECAB 169 (2003).

ISSUE

The issue is whether OWCP properly denied appellant's request to reopen his case for further merit review under 5 U.S.C. § 8128(a).

On appeal appellant contends that some of the decisions in his case have been based on information supplied by the employing establishment which consisted of forgery, rumors, and false documents, and that he wished to have his case based on medical evidence and documents that are a matter of record.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference.⁴ The relevant facts are set forth below.

Appellant, then a 46-year-old boiler fireman, sustained an injury at work on February 9, 1979 when he bumped his head against a pipe. OWCP accepted his claim for acute muscle spasm with C5-6 radiculopathy, for which he underwent a cervical discectomy and fusion. In a June 20, 1994 decision, it terminated appellant's wage-loss compensation benefits under section 8106(c)(2) due to his refusal of an offer of suitable work. The termination was effective June 18, 1994. The last merit review of the suitable work termination decision was issued by OWCP on July 24, 1996.

On November 21, 2012 and January 25 and February 1, 2013, appellant submitted claims for a schedule award (Forms CA-7). OWCP initially denied these claims. In an August 28, 2013 decision, however, it found that appellant had established 23 percent permanent impairment of the right upper extremity and five percent permanent impairment of the left upper extremity. The date of maximum medical improvement was January 2, 1990 and the schedule award would have run from January 2, 1990 through September 5, 1991. During that same period of time, however, appellant received wage-loss compensation for temporary total disability, and he was, therefore, not eligible for a schedule award as it would have constituted a prohibited dual payment. He requested a hearing, which was held before an OWCP hearing representative on January 27, 2014. On March 13, 2014 the hearing representative affirmed the August 28, 2013 decision. Appellant subsequently appealed to the Board and, on November 3, 2014, the Board affirmed OWCP's March 13, 2014 decision.⁵

⁴ In Docket No. 84-725 (issued June 13, 1984), *petition for recon. denied*, Docket No. 84-725 (issued August 21, 1984), the Board affirmed OWCP's finding that appellant failed to establish disability causally related to his employment after March 12, 1979, the date he returned to his regular duties. In Docket No. 97-2794 (issued April 24, 1988), the Board dismissed appellant's appeal at his request. In Docket No. 06-1946 (issued July 13, 2007) and Docket No. 09-511 (issued September 4, 2009), the Board affirmed OWCP's denials of reconsideration regarding the suitable work termination, as appellant's requests were untimely filed and failed to demonstrate clear evidence of error. In Docket No. 14-1075 (issued November 3, 2014), the Board affirmed OWCP's denial of appellant's claim for a schedule award, and noted that appellant was precluded from the receipt of schedule award compensation for the period he received wage-loss compensation for disability.

⁵ Docket No. 14-1075 (issued November 3, 2014).

By letter dated September 23, 2015, and received by OWCP on October 2, 2015, appellant requested reconsideration of both the July 24, 1996 termination decision and the November 3, 2014 decision affirming the denial of his schedule award claim. He argued that long ago his claim had been accepted for disability benefits, but his wage-loss compensation was terminated effective June 1994 for refusing a job that he felt was “impossible” for him to perform. Appellant argued that he had nerve damage in both hands and was unable to type. He argued that the employing establishment filed forged documents and false statements and should be held accountable for their actions. In support of his claim, appellant submitted a portion of a job description and a December 21, 2010 note from his psychiatrist, which was previously in the record.

By decision dated December 3, 2015, OWCP denied appellant’s request for reconsideration without conducting a merit review. It found that the underlying issue was whether the medical evidence of record supported that appellant was entitled to a schedule award from January 2, 1990 through September 5, 1991. OWCP concluded that the evidence appellant submitted with his request for reconsideration was insufficient to warrant further merit review.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant’s application for review must be received within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷ The one-year period begins on the date of the original decision. 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 reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁸

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP’s regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: “(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹⁰ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.¹¹

⁶ 20 C.F.R. § 10.607(a).

⁷ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁹ *Supra* note 2.

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.608(b); *see Norman W. Hanson*, 45 ECAB 430 (1994).

OWCP may not deny an application for review solely because the application for reconsideration was untimely filed. When an application for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.¹² OWCP regulations and procedures provide that OWCP will reopen a case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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.¹⁹

ANALYSIS

OWCP terminated appellant's wage-loss compensation, effective June 18, 1994, as appellant had refused an offer of suitable work. The last merit review of this suitable work termination was issued by OWCP on July 24, 1996. Subsequently, OWCP denied multiple requests for reconsideration of this decision, finding that appellant's requests were untimely filed and failed to demonstrate clear evidence of error. The Board affirmed OWCP's decisions denying reconsideration in decisions dated April 24, 1998, July 13, 2007, and

¹² See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide 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. *Id.* at Chapter 2.1602.3c.

¹⁴ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁵ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁶ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁷ See *supra* note 12.

¹⁸ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ *Leon D. Faidley, Jr.*, *supra* note 7.

September 4, 2009.²⁰ OWCP also denied appellant's claims for a schedule award. The award would have run from January 2, 1990 through September 5, 1991, and as appellant received wage-loss compensation for temporary total disability during that same period, he was not entitled to dual benefits. The most recent merit review of the denial of the schedule award decision was the Board's decision of November 3, 2014.²¹

By letter dated September 23, 2015, received on October 2, 2015, appellant requested reconsideration of both the 1996 suitable work termination and the 2014 denial of his schedule award claim. He noted that his compensation was stopped in June 1994 for not accepting a job that was impossible for him to do. Appellant further argued that he had nerve damage in both hands and cannot type. In support of his claim, he submitted a portion of a job description and a December 21, 2010 note from his psychiatrist, which was previously in the record.

As the last merit decision on the schedule award claim was the Board's November 3, 2014 decision, OWCP properly applied the standard for a timely reconsideration request, as his request for reconsideration was received within one year of the November 3, 2014 decision. Appellant, however, presented no relevant and pertinent new evidence not previously considered by OWCP to demonstrate that he did not reach MMI on January 2, 1990. He also has not shown that OWCP erroneously applied or interpreted a point of law, or made a relevant legal argument not previously considered by OWCP. The Board, therefore, finds that OWCP properly denied further merit review of the denial of appellant's schedule award claim.²²

With regard to appellant's request for reconsideration of the suitable work termination, as the request was made more than one year after the July 24, 1996 merit decision, the Board finds that it was untimely filed. 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 that appellant's reconsideration request was untimely filed with regard to the July 24, 1996 suitable work termination decision, nor did it review the request under the clear evidence of error standard. Rather, it merely applied the standard of review for timely requests for reconsideration. As OWCP applied the wrong standard of review to the untimely request for reconsideration of the suitable work termination decision, the Board will set aside OWCP's December 3, 2015 decision in part and remand the case for it to conduct a proper review under the clear evidence of error standard as required by regulations²³ and the issuance of an appropriate decision.

²⁰ See *supra* note 2.

²¹ Docket No. 14-1075 (issued November 3, 2014).

²² 20 C.F.R. § 10.606(b)(3).

²³ See 20 C.F.R. § 10.607(b). See L.D., Docket No. 15-0865 (issued October 6, 2015).

CONCLUSION

The Board finds that this case is affirmed with regard to appellant's request for reconsideration of the denial of a schedule award. The Board further finds that the case is not in posture for decision with regard to appellant's request for reconsideration of the suitable work termination of his wage-loss compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2015 is affirmed in part and set aside in part and the case is remanded for further consideration consistent with this decision.

Issued: May 16, 2016
Washington, DC

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

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

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