

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

M.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hopewell Junction, NY, Employer**

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**Docket No. 16-1108
Issued: September 21, 2016**

Appearances:
Paul Kalker, Esq., for the appellant¹
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 May 4, 2016 appellant, through counsel, filed a timely appeal from November 12 2015 and April 7, 2016 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated November 17, 2014, 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 over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly denied appellant's October 23, 2015 request for reconsideration without merit review of the claim pursuant to 5 U.S.C. § 8128(a); and (2) whether OWCP properly found appellant's request for reconsideration received on March 31, 2016 was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

The case has previously been before the Board.³ The facts and the circumstances as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On October 17, 2012 appellant, then a 28-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained a hernia as a result of lifting and stacking pallets at work on September 26, 2012. By decision dated December 13, 2012, OWCP found the evidence was insufficient to establish the claim for compensation.

On January 4, 2013 appellant requested a hearing before an OWCP hearing representative. In a May 16, 2013 decision, an OWCP hearing representative affirmed the December 13, 2012 decision.

Appellant, through counsel, requested reconsideration on November 13, 2013 and submitted a September 9, 2013 report from Dr. Lyda Rojas Carroll, a Board-certified surgeon. Dr. Carroll indicated that appellant has undergone hernia surgery on June 28, 2013. She opined that the September 26, 2012 lifting incident had caused the once reducible hernia to become incarcerated and require surgery.

By decision dated January 28, 2014, OWCP denied modification of the prior decision. It found that Dr. Carroll's report was not based on a complete background as the factual evidence showed the surgery was required for a preexisting, no employment-related condition.

Appellant appealed to the Board. The Board remanded the case to OWCP by decision dated July 22, 2014. The Board found that the primary issue was medical in nature, and Dr. Carroll had explained how a preexisting hernia can be aggravated and accelerate the time for surgery. The Board remanded the case to OWCP to further develop the medical evidence with respect to whether the umbilical hernia was caused or aggravated by the September 26, 2012 employment incident, and if so, whether the June 28, 2013 surgery was employment related.

On return of the case record, OWCP sent Dr. Carroll an August 12, 2014 letter requesting that she submit a report clarifying how the September 26, 2012 employment incident aggravated the umbilical hernia. There is no indication that Dr. Carroll responded.

By decision dated November 17, 2014, OWCP denied the claim for compensation. It found the medical evidence was insufficient to establish the claim.

³ Docket No. 14-0762 (issued July 22, 2014).

On October 23, 2015 appellant, through counsel, submitted an October 17, 2015 letter requesting reconsideration. Counsel indicated that an August 26, 2015 report from Dr. Carroll was attached. The evidence of record, however, indicated only that a copy of the September 9, 2013 report from Dr. Carroll was submitted.

By decision dated November 12, 2015, OWCP denied the reconsideration request without merit review of the claim as the submitted evidence was previously of record and reviewed by OWCP. The decision was addressed to appellant's address of record and to the address of appellant's counsel.

On November 20, 2015 OWCP received a return to sender notice from the employing establishment regarding appellant's address. The employing establishment indicated that the time to forward the mail had expired. On December 7, 2015 OWCP attempted to contact appellant by telephone, but received a message that the number was disconnected.

By letter received on March 31, 2016, counsel wrote that a reconsideration request had been submitted on October 22, 2015 and requested that OWCP issue a decision. He also submitted a second letter dated March 27, 2016 advising OWCP of an address change for appellant.

By decision dated April 7, 2016, OWCP found that the letter received on March 31, 2016 was an untimely request for reconsideration of the November 17, 2014 merit decision. It denied merit review of the claim, finding that appellant had not demonstrated clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provides 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: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP."⁵ 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.⁶

ANALYSIS -- ISSUE 1

In the present case, OWCP issued a decision dated November 17, 2014 denying the claim for compensation. Appellant timely requested reconsideration on October 23, 2015, and by decision dated November 12, 2015, OWCP denied merit review.

⁴ 5 U.S.C. § 8128(a) (providing that "[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").

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

Counsel has alleged that the November 12, 2015 decision was not received by either appellant or counsel. In this regard the Board notes that there is a presumption, under the mailbox rule, that a mailing in the due course of business is received by the addressee.⁷ The presumption does not apply in this case with respect to the mailing to appellant, as OWCP received evidence that appellant did not receive the decision.⁸

The presumption, however, does apply to the mailing to counsel. The decision was properly addressed and no contrary evidence was submitted. OWCP's regulations state that a copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative, a copy of the decision will also be mailed to the representative.⁹

The Board also notes that the record indicates that the reason the November 12, 2015 decision was not received by appellant was that he had failed to properly notify OWCP of a change in address. Notification of change of address was not provided to OWCP until March 31, 2016. Pursuant to regulations appellant's copy of the decision was mailed to the last known address. The Board finds the November 12, 2015 decision was properly issued as it was mailed to the last known address of appellant and counsel.¹⁰

With respect to the findings in the November 12, 2015 decision, the Board finds that OWCP properly denied merit review. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Counsel indicated that he was submitting an additional medical report, but the record does not contain a new medical report submitted with the reconsideration request. The only medical report was the September 9, 2013 report from Dr. Carroll, which was previously of record and previously reviewed by OWCP. Evidence or argument which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening the case.¹¹ Appellant therefore failed to submit pertinent new and relevant evidence.

The Board therefore finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) and that OWCP properly declined to review the merits of the claim.

On appeal, counsel asserts that the November 12, 2015 decision was not received, and argues that the decision improperly denied merit review. As discussed above, the November 12, 2015 OWCP decision was properly issued. In addition, there was no pertinent new and relevant evidence submitted and OWCP properly found the reconsideration request was insufficient to warrant merit review of the claim.

⁷ See *Larry L. Hill*, 42 ECAB 596 (1991).

⁸ When there is probative evidence of nondelivery, the presumption of receipt does not apply. *J.L.*, Docket No. 15-0828 (issued August 3, 2015).

⁹ 20 C.F.R. § 10.127.

¹⁰ *Id.*

¹¹ See *Eugene F. Butler*, 36 ECAB 393 (1984); see also *V.R.*, Docket No. 16-0969 (issued August 8, 2016).

LEGAL PRECEDENT -- ISSUE 2

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.¹² 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.”¹³

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.¹⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA. As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.¹⁶ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁷

To demonstrate 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.¹⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.²¹

¹² 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.605 (2012).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ 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.”

¹⁶ 20 C.F.R. § 10.607 (2012).

¹⁷ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

²⁰ *Id.*

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

ANALYSIS -- ISSUE 2

In the present case, counsel submitted a letter dated March 27, 2016 and received by OWCP on March 31, 2016, indicating that he was making a second request for reconsideration. The last decision on the merits of the claim was dated November 17, 2014. The March 27, 2016 letter was received more than one year after November 17, 2014, and therefore is an untimely reconsideration request.

As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP. In the March 27, 2016 letter, counsel indicates only that he had previously requested reconsideration. This indication of a prior reconsideration request does not demonstrate clear evidence of error. OWCP issued a November 12, 2015 decision, as discussed above, with respect to an October 23, 2015 reconsideration request. In the absence of clear evidence of error, it properly declined to review the merits of the claim for compensation.

CONCLUSION

The Board finds that OWCP properly denied appellant's timely request for reconsideration without merit review of the claim. The Board further finds that OWCP properly found appellant's letter received on March 31, 2016 was an untimely reconsideration request that failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 7, 2016 and November 12, 2015 are affirmed.

Issued: September 21, 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