

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 27, 2014 appellant, then a 42-year-old mail handler, submitted an October 1, 2014 traumatic injury claim (Form CA-1) alleging that he sustained a back injury on November 9, 2010. On the claim form he reported that he was loading and unloading trucks. Appellant later reported that, after unloading and loading containers on November 8, 2010, he had felt muscle spasms and he "called off from work" on November 9, 2010. On the reverse side of the claim form appellant's supervisor asserted that appellant had never reported an injury and he had not seen a physician. The employing establishment submitted an October 27, 2014 letter from a human resources specialist, which indicated that he had worked on November 9, 2010 and had never reported an injury to his supervisor. The specialist wrote that appellant had also filed CA-2 forms claiming back injuries due to unloading and loading trucks, with dates of injury as May 24 and July 12, 2010. According to the human resources specialist, appellant's employment was terminated as of July 13, 2012 due to violation of a "last chance" agreement.³

By decision dated December 18, 2014, OWCP denied appellant's claim finding that it was untimely filed under 5 U.S.C. § 8122. It indicated that the date of injury was November 9, 2010, but the claim was not filed until October 1, 2014.

On December 31, 2014 OWCP received a request for a review of the written record by an OWCP hearing representative. By decision dated May 8, 2015, the hearing representative affirmed the December 18, 2014 OWCP decision. She found that the evidence of record did not establish the claim was timely filed. The hearing representative noted that appellant had claimed the employing establishment had timely notice of injury, but the use of sick leave did not establish notification of an employment injury.⁴

Appellant requested reconsideration on May 21, 2015, indicating that he was submitting additional evidence. OWCP however never received additional evidence. By decision dated August 11, 2015, it reviewed the merits of the claim and denied modification. OWCP again found that the claim was untimely filed under 5 U.S.C. § 8122.

On August 21, 2015 appellant again requested reconsideration. He argued that the evidence submitted was sufficient to modify the denial of the claim. Appellant discussed other claims that he had filed and then indicated that the current claim should be considered an occupational claim, as it involved activity on November 9, 19, and 30, 2010. He also argued that

² Docket No. 16-0601 (issued June 21, 2016).

³ A notice of removal dated June 4, 2012 indicated that appellant had signed a "last chance agreement" on October 18, 2010, which was intended to provide him a last opportunity to show that he could be a productive and dependable employee.

⁴ Appellant had also alleged that notice was given to the employing establishment in investigative interviews on June 7 and 30, 2011. The hearing representative indicated that these interviews were more than 30 days after the date of injury, and in any case only provided notification that sick leave was used on November 9, 2010.

OWCP had not properly considered evidence and he should not have been removed from employment.

In a decision dated November 17, 2015, OWCP reviewed the case on its merits and denied modification. It reviewed appellant's arguments and again found that the claim for compensation was untimely filed.

Appellant again requested reconsideration on November 23, 2015. By decision dated January 27, 2016, OWCP determined the reconsideration request was insufficient to warrant a merit review of the claim. It found that appellant had failed to submit relevant evidence or argument with respect to the issue presented. Appellant appealed to the Board.

By decision dated June 21, 2016, the Board affirmed the November 17, 2015 and January 27, 2016 OWCP decisions.⁵ The Board found that there was no probative evidence of record to establish that appellant had timely filed a claim for injury on November 8, 2010.

On June 29, 2016 appellant again requested reconsideration. He alleged that his claim should have been converted to an occupational disease claim and that he had given notice within 30 days of injury. Appellant referred to the last chance agreement and alleged that this provided notice. On July 22, 2016 he submitted a copy of the Board's June 21, 2016 decision with handwritten notes. Appellant claimed that he had not "officially" received a copy of the decision and disputed that he had filed a Form CA-1 alleging an injury on November 9, 2010.

By decision dated October 20, 2016, OWCP denied reconsideration of the merits of the claim. It found that appellant had not met any of the requirements to warrant a merit review of the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ 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: "(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 evidence not previously considered by OWCP."⁷ 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.⁸

⁵ *Supra* note 2.

⁶ 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").

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ANALYSIS

In the present case, appellant requested reconsideration of the determination that his claim for an injury on November 8, 2010 was untimely filed.

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, or advance new and relevant legal argument. OWCP found that the injury claim was untimely filed under 5 U.S.C. § 8122.

The Board finds that appellant has not shown that OWCP erroneously interpreted or applied 5 U.S.C. § 8122. Appellant reiterated arguments that he felt his claim should have been converted to an occupational disease claim. The claim filed was a traumatic injury claim for an injury on November 8, 2010.⁹ As the Board noted, while appellant referred to taking sick leave on November 19 and 30, 2010, he did not discuss job duties on additional dates. Appellant initially identified the date of injury as November 9, 2010, but explained the loading and unloading of the truck occurred on November 8, 2010 and he took sick leave on November 9, 2010.

According to appellant, the last chance agreement provided notice within 30 days of the injury. This argument has no color of validity, as the agreement was signed on October 18, 2010, before the alleged injury on November 8, 2010. Where the legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.¹⁰

Appellant has also alleged that he did not file a traumatic injury claim as reported in the Board's prior decision. The record contains a Form CA-1 filed on October 27, 2014, and this is the claim addressed by OWCP and the Board on appeal. Appellant also refers to not "officially" receive a copy of the Board's decision dated July 21, 2016, but he had a copy of the decision and the Board's decision was issued to his last known address.¹¹ 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.¹²

The Board also finds that, on reconsideration, appellant did not submit any additional evidence. Therefore, appellant did not submit any relevant and pertinent new evidence not previously considered by OWCP.

As appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by OWCP, or submitted relevant and pertinent evidence not previously considered by OWCP, he did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).

⁹ A traumatic injury is condition caused by specific events or incidents within a single workday or shift. 20 C.F.R. § 10.5(ee).

¹⁰ See *Norman W. Hanson*, 40 ECAB 1160 (1989).

¹¹ 20 C.F.R. § 10.127 provides that a copy of the decision shall be mailed to the employee's last known address.

¹² See *Larry L. Hill*, 42 ECAB 596, 600 (1991).

On appeal, appellant has written notes on documents of record arguing that his claim was timely filed. The issue before the Board is whether his reconsideration request met any of the requirements of 20 C.F.R. § 10.606(b)(3). For the reasons discussed above, the Board finds that appellant was not entitled to a merit review of his claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 20, 2016 is affirmed.

Issued: April 19, 2017
Washington, DC

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

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

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