

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

T.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Birmingham, AL, Employer**

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**Docket No. 17-0169
Issued: May 1, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

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 November 3, 2016 appellant, through counsel, filed a timely appeal from a September 29, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated November 5, 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.*

ISSUE

The issue is whether OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

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

On December 19, 2013 appellant, then a 54-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on November 20, 2013 he sustained a low back strain while picking up a tray of mail which had fallen to the floor.

A December 20, 2013 progress report by Dr. Matthew Skinner, a primary care resident, which was cosigned by Dr. Terrence M. Shaneyfelt, a Board-certified internist, diagnosed low back pain and probable lumbar disc herniation. The report noted that appellant sustained a twisting injury at work. A December 28, 2013 magnetic resonance imaging (MRI) scan revealed left-sided L4-5 intraforaminal disc herniation. In a February 3, 2014 attending physician's report (Form CA-20), Dr. Shannon Williams, a treating physician, and Dr. Teresa Bryan, a treating Board-certified internist, diagnosed left L4 radiculopathy, L4-5 intervertebral disc herniation, and disc bulge.

By decision dated February 11, 2014, OWCP denied appellant's claim as it found the evidence insufficient to establish a causal relationship between the diagnosed lumbar conditions and the November 20, 2013 employment incident.

On March 4, 2014 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on September 22, 2014.

In a March 10, 2014 form report, Drs. Bryan and Williams diagnosed left-sided L4-5 intraforaminal disc herniation with nerve root compression and radicular pain, which they attributed to a November "23," 2013 employment incident.

In an April 10, 2014 report, Dr. Martin P. Jones, a treating Board-certified orthopedic surgeon, provided physical examination findings and employment injury history and reviewed objective tests. He diagnosed L4-5 extruded lateral disc herniation with L4 nerve root compression and recommended surgery.

In a May 9, 2014 report, Drs. Bryan and Williams diagnosed lumbar radiculopathy which they attributed to appellant bending over at work to pick up a tray. They related that appellant had sharp shooting pain radiating into his left leg and constant left-sided back pain since the November 2013 bending and lifting incident. They opined that appellant met all of the criteria to establish that his diagnosed lumbar condition had been caused by this employment incident.

³ Docket No. 16-0336 (issued June 24, 2016).

By decision dated November 5, 2014, OWCP's hearing representative affirmed the denial of the claim finding that appellant had not met his burden of proof to establish that his lumbar condition was causally related to the accepted November 20, 2013 employment incident.

On October 16, 2015 OWCP received appellant's request for reconsideration. Appellant resubmitted the May 9, 2014 medical report from Drs. Bryan and Williams.

OWCP denied appellant's request for reconsideration, without merit review, on November 3, 2015.

On December 15, 2015 appellant filed an appeal with the Board. By decision dated June 24, 2016 the Board affirmed OWCP's November 3, 2015 decision denying appellant's request for reconsideration of the merits of his claim. The Board found appellant was not entitled to a merit review as he did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).

On July 22, 2016 OWCP received appellant's request for reconsideration. In support of this request, appellant submitted a December 11, 2015 report, from Dr. William Purdy, Jr., a treating Board-certified internist.

In the December 11, 2015 report, Dr. Purdy noted that appellant was first seen on December 3, 2015. He provided a history of the November 26, 2013 employment incident, and reviewed the medical evidence provided by appellant. A physical examination revealed diminished sensation in both lower extremities, painful lumbar range of motion, and positive left leg straight leg raise. Dr. Purdy diagnosed sciatica issues and chronic back pain which he attributed to a herniated disc caused by the November 25, 2013 work incident.

By decision dated September 29, 2016, OWCP determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁴ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁵ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrate clear evidence that its final merit decision was in error.⁶ Its procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review

⁴ 5 U.S.C. § 8101 *et seq.* 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. *See J.S.*, Docket No. 10-385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

⁵ 20 C.F.R. § 10.607; *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000).

⁶ *B.W.*, Docket No. 10-323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007) *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

demonstrates “clear evidence of error” on the part of OWCP.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To demonstrate 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.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant’s claim for reconsideration of the merits as the request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The only decision over which the Board has jurisdiction is the September 29, 2016 nonmerit decision wherein OWCP denied reconsideration as appellant’s request was untimely filed and failed to demonstrate clear evidence of error. As more than one year elapsed between

⁷ See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: “OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

⁸ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Pasquale C. D’Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Leon J. Modrowski*, *supra* note 6; *Jesus D. Sanchez* *supra* note 6.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *supra* note 8.

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

¹⁵ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

the last merit decision issued in this case on November 5, 2014 and appellant's July 22, 2016 request for reconsideration, the Board finds that OWCP properly found that appellant's request for reconsideration was untimely filed.¹⁶

The Board finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP. In a reconsideration request dated and received on July 22, 2016, counsel requested review of the November 3, 2015 OWCP decision and submitted a December 11, 2015 report by Dr. Purdy, which had not previously been considered. Dr. Purdy provided a history of injury, reviewed medical evidence, and provided physical examination findings. He diagnosed sciatica issues and chronic back pain due to herniated disc which he opined had been caused by the November 25, 2013 work incident. While Dr. Purdy's report provides some support for causal relationship, the standard is whether the evidence is sufficient to show clearly that OWCP erred in finding that diagnosed conditions had not been caused or aggravated by the November 25, 2013 work incident. Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁷ Dr. Purdy's report is insufficient to shift the weight of the evidence in favor of appellant and thus does not raise a substantial question as to the correctness of OWCP's decision.

For these reasons, appellant has not demonstrated clear evidence of error by OWCP in its September 29, 2016 decision.

On appeal counsel argues that the report by Dr. Purdy is sufficient to warrant a merit review by OWCP. As found above, Dr. Purdy's report, while new and relevant to the issue of causal relationship, was insufficient to demonstrate clear evidence of error as it did not raise a substantial question regarding the correctness of OWCP's decision. Counsel also argues that the case should be reopened because of an error of law made in the February 11 and November 5, 2014 OWCP decisions. Specifically, he contends that the discrepancy in date of injury and how the injury occurred noted by the treating physicians was trivial and warrants the case be reopened for a merit review. Contrary to counsel's contentions, the injury was described just as appellant described on his Form CA-1. As well, the date listed as the date of injury, November 20, 2013, is enumerated in both the February 11 and November 5, 2014 decisions. As such, not only are these arguments without merit, they are factually inaccurate. OWCP properly evaluated the medical evidence when it found it insufficient to establish causal relationship due to inconsistent injury dates and lack of rationalized opinion explaining the causal relationship between the diagnosed conditions and the accepted employment incident.

CONCLUSION

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

¹⁶ 20 C.F.R. § 10.607(a).

¹⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016). See also *B.W.*, Docket No. 15-0892 (issued August 26, 2015); *D.G.*, 59 ECAB 455 (2008); *Joseph R. Santos*, 57 ECAB 554 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 29, 2016 is affirmed.

Issued: May 1, 2017
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