

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

P.L., Appellant)	
)	
and)	Docket No. 17-0146
)	Issued: October 24, 2017
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer)	
)	

Appearances:
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 28, 2016 appellant, through counsel, filed a timely appeal from a September 27, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from May 30, 2013, the date of the most recent merit decision, 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 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 denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as outlined in the prior Board decision are incorporated herein by reference. The relevant facts are set forth below.

On December 2, 2006 appellant, then a 37-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that, while in the performance of duty, she sustained multiple injuries on December 1, 2006 when she fell down stairs while in the performance of duty. On June 11, 2007 OWCP accepted the claim for displacement of lumbar intervertebral disc without myelopathy. Appellant untimely returned to full-time work without restrictions on January 2, 2007.

On July 6, 2007 appellant filed a claim for recurrence of disability (Form CA-2a) beginning June 28, 2007. By decision dated February 13, 2009, OWCP accepted her claim for a recurrence of disability on June 28, 2007 and paid wage-loss compensation until she returned to work full time on November 19, 2007.

On April 30, 2009 appellant filed claim for compensation forms (Form CA-7) for leave without pay for the period August 13 to November 18, 2007, July 30, 2008 to April 10, 2009, and April 11 to May 15, 2009.

By decision dated August 3, 2011, OWCP denied appellant's disability claims for the claimed periods.

On September 1, 2011 OWCP referred the case file to a district medical adviser (DMA) for an opinion regarding whether appellant's claim should be expanded to include cervical conditions.

In a September 4, 2011 report, the DMA opined that the claim should be expanded to include cervical radiculopathy, cervical degenerative disc disease, and cervicalgia.

By decision dated September 28, 2011, OWCP expanded the accepted conditions to include cervical radiculopathy, cervicalgia, and temporary aggravation of cervical degenerative disc disease.

On January 25, 2012 appellant underwent C4-5 and C5-6 anterior cervical discectomy and interbody fusion and C4 to C6 anterior cervical plating. The surgery was authorized by OWCP.

³ Docket No. 14-1875 (issued March 20, 2015).

On August 3, 2012 counsel argued that appellant was entitled to disability compensation dating back to 2009 because OWCP had approved her surgery earlier that year. Appellant submitted various medical reports and statements in support of her claim.⁴

By decision dated November 5, 2012, OWCP denied modification of its August 3, 2011 denial of appellant's disability compensation for the period August 13 to November 18, 2007 and July 30, 2008 to May 15, 2009. It found that she had failed to submit medical evidence to establish disability during the claimed periods.

On November 19, 2012 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. In support of her claim, she submitted various medical reports and statements. A hearing was held on March 11, 2013.

By decision dated May 30, 2013, an OWCP hearing representative reversed in part the November 5, 2012 decision, finding that appellant was entitled to wage-loss compensation for the period August 13 to November 18, 2007. It affirmed in part the finding that she had failed to submit sufficient medical evidence to establish disability for the period July 30, 2008 to May 15, 2009. The hearing representative noted that appellant had not established that her work stoppage after returning to work in November 2007 was due to a recurrence of her work-related conditions. The hearing representative further stated that she had not established a change in her modified-duty position which prevented her from returning to work during this period, noting that she was provided with multiple, suitable, modified-duty positions after she stopped work.

On May 5, 2014 appellant, through counsel, requested reconsideration of the May 30, 2013 hearing representative's decision. Counsel stated that he was submitting a March 24, 2014 medical report, not previously considered, from Dr. Michael Haak, a Board-certified orthopedic surgeon, in support of appellant's claim.

In the March 24, 2014 report, Dr. Haak reported that appellant had undergone cervical fusion in January 2012 and lumbar fusion in December 2012 due to complaints of neck, and low back pain. He noted that her original injury was due to her employment and diagnosed cervicalgia, cervical degenerative disc disease, lumbago, and lumbar degenerative disc disease. Dr. Haak reported that appellant's condition had improved and recommended a functional capacity evaluation to determine her capabilities. He further stated that she should not resume employment until after she had the functional capacity evaluation. The remaining medical evidence submitted had previously been considered by OWCP.

By decision dated July 30, 2014, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included pertinent new evidence sufficient to warrant a merit review.

⁴ On February 15, 2012 appellant filed claim for compensation forms for the period beginning December 10, 2009. The Board notes that OWCP approved certain periods of disability for subsequent CA-7 forms filed. The Board further notes that any CA-7 forms filed for the period after May 15, 2009 do not pertain to this claim on appeal as OWCP's decision on appeal addresses the denial of benefits during the period July 30, 2008 to May 15, 2009.

On August 26, 2014 appellant, through counsel, filed an appeal with the Board.

By decision dated March 20, 2015, the Board affirmed the July 30, 2014 OWCP decision denying appellant's request for reconsideration.⁵

On October 12, 2015 appellant, through counsel, requested reconsideration of the May 30, 2013 OWCP decision. In support of the reconsideration request, counsel submitted the deposition transcript from U.S. District Court of Dr. Charles W. Mercier, a Board-certified orthopedic surgeon.

By decision dated September 27, 2017, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁶

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, 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 a reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include precoupment hearing decisions.⁸ Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees Compensation System). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.⁹

⁵ *Supra* note 3.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (October 2011).

⁹ *Id.*

OWCP will consider an untimely application 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.¹⁰

The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been present, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision and must be remanded to OWCP for the application of the appropriate standard of review.¹²

An application for reconsideration must be received by OWCP within one year of the date of a merit review of the claim, including any merit review by the Board.¹³ The last merit decision of record was OWCP's May 30, 2013 decision. On May 5, 2014 appellant submitted a timely reconsideration request of the May 30, 2013 decision and submitted Dr. Haak's March 24, 2014 report in support of her claim. By decision dated July 30, 2014, OWCP denied her reconsideration request finding that she failed to meet the standard for a merit review. Counsel requested an appeal before the Board and by decision dated March 20, 2015, the Board affirmed the July 30, 2014 OWCP decision denying merit review.¹⁴ On October 12, 2015 counsel again requested reconsideration. By decision dated September 27, 2016, OWCP denied appellant's request finding that she had failed to submit evidence sufficient to warrant merit review.

The Board notes that in its September 27, 2016 decision, OWCP erroneously applied the standard of review for a timely request for reconsideration as set forth at 20 C.F.R. §§ 10.605 through 10.607. The last merit decision of record was OWCP's May 30, 2013 decision. As more than one year elapsed since the last merit decision to the filing of appellant's request for reconsideration on October 12, 2015, OWCP should have applied the clear evidence of error legal standard.¹⁵ This is the appropriate standard for cases in which a reconsideration request is untimely filed.¹⁶ OWCP must undertake a limited review to determine whether the application presents clear evidence that the final merit decision was in error.¹⁷ However, it erroneously reviewed the evidence under the standard for timely reconsideration requests pursuant to section

¹⁰ 20 C.F.R. § 10.607.

¹¹ *Supra* note 8 at Chapter 2.1602.5a (October 2011).

¹² *See K.K.*, Docket No. 16-1187 (issued February 7, 2017); *E.B.*, Docket No. 16-0746 (issued June 1, 2016).

¹³ *See Mary E. Schipske*, 43 ECAB 318 (1991); *see also C.V.*, Docket No. 14-1293 (issued February 23, 2015).

¹⁴ *Supra* note 3.

¹⁵ *T.E.*, Docket No. 16-0574 (issued August 18, 2016); *see also John W. O Connor*, 42 ECAB 797 (1991).

¹⁶ *See Donna M. Campbell*, 55 ECAB 241 (2004).

¹⁷ *See Vaile Walders*, Docket No. 97-1955 (issued March 26, 1999).

8128(a) of FECA and 20 C.F.R. § 10.606(b)(3).¹⁸ As such, the Board will remand the case to OWCP for application of the standard for reviewing an untimely request for reconsideration as set forth at 20 C.F.R. § 10.607(b) under the more stringent clear evidence of error standard.¹⁹

Following any necessary further development, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2016 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: October 24, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁸ See *Yvette N. Davis*, 55 ECAB 475 (2004); see also *William A. Couch*, 41 ECAB 548 (1990).

¹⁹ *Dewayne C. Davis*, Docket No. 94-2346 (issued August 14, 1997).