United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
and	)	**Docket No. 16-1583**
	)	**Issued: February 21, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Melbourne, FL, Employer	)	

Appearances:
William Hackney, Esq., for the appellant[1]
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 August 1, 2016 appellant, through counsel, filed a timely appeal from a June 10, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed since the last merit decision dated September 5, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R §§ 501.2(c) and 501.3(e), 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 determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 8, 2013 appellant, then a 57-year-old mail handler/equipment operator, filed a notice of recurrence of disability (Form CA-2a) for an injury he sustained under OWCP File No. xxxxxx058.[3] He indicated that he had a seizure on July 27, 2013 and fell from his powered industrial vehicle (PIV). Because of the nature of the July 27, 2013 employment incident, OWCP considered the claim as a new traumatic injury.

On October 3, 2013 OWCP advised appellant that it required additional factual and medical evidence, including a comprehensive medical report, to support his claim that he sustained an injury on July 27, 2013. Appellant was afforded 30 days to submit the additional evidence.

In an attending physician's report (Form CA-20) dated August 1, 2013, received by OWCP on December 5, 2013, Dr. Denise Taylor, an osteopath, advised that she had treated appellant for seizures caused by intractable epilepsy, triggered by exposure to certain chemicals, on June 12 and July 27, 2013. She reported that he was currently undergoing medical trials and further testing. Dr. Taylor noted that appellant sustained an epileptic seizure in 1995 after exposure to cleaning products and chemicals at work. She diagnosed focal epilepsy.

By decision dated November 7, 2013, OWCP denied appellant's claim, finding that he failed to provide medical evidence sufficient to establish that he sustained an injury causally related to the accepted July 27, 2013 work incident. It found that Dr. Taylor's report was insufficient to establish that the diagnosed condition of focal epilepsy resulted from the July 27, 2013 employment incident. OWCP found that, while Dr. Taylor advised that appellant's seizures were triggered by his exposure to certain chemicals, there was no evidence that he was exposed to any specific chemicals at the employing establishment on July 27, 2013. It further found that Dr. Taylor noted that his first seizure occurred in 1995, after he was exposed to cleaning products and chemicals at work.

In a February 17, 1997 report, received by OWCP on December 5, 2013, Dr. Roberto Mixco, Board-certified in neurology, advised that appellant had experienced a seizure the prior day. He reported that appellant was feeling shaky and confused.

In a September 24, 1998 report, received by OWCP on December 5, 2013, Dr. Stephen H. McDonald, an osteopath, advised that appellant had complaints of seizure disorder which he believed was related to a work injury which occurred between 1994 and 1996. He reported that his initial complaints began in approximately early 1994. Appellant had been working around mail bins, which were lubricated with silicone spray material containing

[3] The Board notes that OWCP File No. xxxxxx058, pertaining to appellant's previous claim, is not before the Board on this appeal.

acetone, xylene, and petroleum distillates. Dr. McDonald believed that his exposure to fumes produced by these chemical agents produced significant symptoms such as severe headaches, nausea, shaking sensations, and dizziness, in addition to flushing of the skin and redness of his hands, lack of coordination, slight memory loss, and eye and throat irritation.

Appellant related that in early 1995 he was evaluated for complaints of seizures and underwent an electroencephalogram (EEG), which was abnormal and showed evidence of epilepsy. Dr. McDonald noted that appellant had seizures which he was unable to control and that his physician believed his seizure activity may have been related to the environmental exposures at his workplace. He noted that after being removed from that work environment his seizures had become relatively controlled and less frequent. Dr. McDonald opined that, because appellant was no longer performing these workplace activities and had not been doing so since 1996, his previous medical complaints should have resolved. He advised that he could have been predisposed to seizure disorder and that his exposure to chemical agents in his workplace may have lowered his seizure threshold potential, causing his seizures to occur while working in these work environments. Dr. McDonald advised that this might explain the fact that his seizure activity appeared to be markedly improved with removal from any additional exposure to these chemical agents.

On November 20, 2013 appellant requested an oral hearing, which was held before an OWCP hearing representative on June 12, 2014. At the hearing, he stated that he was driving a PIV at work on July 27, 2013 when he experienced a seizure, during which he struck his head, left shoulder, and left hip. Appellant related that his physician told him that he began to experience soreness in his hip and shoulder from the brunt trauma he sustained during the July 27, 2013 employment incident. He was represented by counsel, who stated that he was supposed to be restricted from working in an environment where he was exposed to any chemicals or operating a PIV. Appellant asserted that management had violated these restrictions in 2009 and essentially attributed appellant's seizure to exceeding his work restrictions.

In a December 12, 2013 report, received by OWCP on July 17, 2014, Dr. Gary M. Weiss, a Board-certified neurologist, noted that he was treating appellant for toxic encephalopathy with memory loss, seizures, headaches, other cognitive loss, depression, visual symptoms, fatigue, and insomnia. He advised that appellant underwent a magnetic resonance imaging (MRI) scan of the brain on November 19, 2013, which was abnormal, and a brain MRI scan on December 8, 2013, the results of which were normal. Dr. Weiss reported that appellant also underwent EEG tests on November 19 and 25, 2013, the results of which were normal.

In an April 1, 2014 report, Dr. Weiss advised that he continued to treat appellant for his diagnosed conditions and essentially reiterated his previous findings and conclusions. He noted that he also had complaints of spinal pain, left hip pain, and left shoulder pain. Dr. Weiss reported that appellant had fallen a lot lately due to his symptoms and that he seemed to fall mainly on his left side.

In a May 2, 2014 report, Dr. Weiss essentially reiterated his previous findings and conclusions and advised that appellant had bone spurs on his left hip and left shoulder due to the constant falls caused by his seizures. Appellant also reported intermittent cervical pain radiating

to the left upper extremity, with numbness and tingling in his fingers, intermittent thoracic pain with no radiation, and constant lumbar pain with radiation to the bilateral hips, buttocks, and lower extremities. Dr. Weiss indicated that appellant had numbness and tingling in his feet and toes.

In a July 8, 2014 report, Dr. Weiss advised that appellant had a history of seizure disorder due to encephalopathy. He noted that an employing establishment physician had informed appellant that his seizures were due to blunt trauma. Appellant reported that his seizures were currently under control with medication. Dr. Weiss advised that appellant underwent a left hip MRI scan on May 28, 2014, which showed mild degeneration and changes of the bilateral hips. He also underwent a left shoulder MRI scan on June 20, 2014, which showed mild acromioclavicular osteoarthritis. Dr. Weiss noted neck pain with herniated nucleus pulposus at C5-6 and C6-7, thoracic spine pain at T6-7 and lumbar pain with herniated nucleus pulposus at L3-5.

In a statement dated July 8, 2014, appellant's immediate supervisor, J.B., advised that he never mentioned having any work limitations during the two years he worked for him, although he did speak to him regarding a previous workers' compensation case related to seizures caused by exposure to chemicals. J.B related that appellant stated that he was still having seizures, but that they were manageable through medication. He asserted that appellant told him many times that he could file a recurrence claim if he felt that there was something in the building that was causing him to have seizures again. Appellant, however, told J.B. that he was having them at home so he did not know how the work environment could have caused them.

J.B. further advised that, if appellant had produced documentation indicating that he could not drive or be near chemicals, then he would not have driven or been near chemicals. He stated, however, that appellant had never produced such documentation. J.B. noted that when appellant fell off a tow motor on July 27, 2013 he went to the emergency room, but was not injured in the fall.

By decision dated September 5, 2014, an OWCP hearing representative affirmed the November 7, 2013 decision. He found that appellant failed to submit medical evidence sufficient to support a causal relationship between any diagnosed medical condition and the July 27, 2013 work incident.

On February 10, 2016 appellant, through counsel, requested reconsideration. Counsel asserted that neither he nor appellant had received the employing establishment's July 8, 2014 statement responding to the June 12, 2014 hearing transcript. He argued that this prevented appellant from being able to submit a rebuttal to the employing establishment's statement. Counsel argued that OWCP's hearing representative erred by failing to address this omission and by failing to address the issue. He further argued that he did not have a copy of the September 5, 2014 decision or any other document in appellant's file because "a representative" of DOL's Office of the Inspector General and the Postal Inspection Service took every file from "the representative's" office on October 2, 2014. Lastly, counsel contended that Dr. Weiss' October 8, 2015 report was sufficient to establish that appellant's left shoulder and bilateral hip injuries were causally related to his fall from a PIV on July 27, 2013.

In an October 8, 2015 report, received by OWCP on February 10, 2016, Dr. Weiss advised that the MRI scans appellant underwent on June 20 and May 28, 2014, in addition to x-rays, showed that pain and soreness to the hips and shoulder resulted from blunt trauma, which occurred during the July 27, 2013 fall at work due to a seizure. He reiterated his diagnoses of toxic encephalopathy with memory loss, seizures, headaches, other cognitive loss, depression, visual symptoms, fatigue, and seizure disorder due to encephalopathy.

By decision dated June 10, 2016, OWCP denied appellant's request for reconsideration without a merit review, finding the request as or untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[4] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[5] One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.[6] When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.[7]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To demonstrate clear evidence of error, the evidence submitted 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.[8]

[4] This section provides in pertinent part: "[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 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.607 (2012).

[6] *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

[7] *Id.* at § 10.607(b).

[8] *Robert G. Burns*, 57 ECAB 657 (2006).

OWCP procedures note 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.[9] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[10]

ANALYSIS

OWCP received appellant's request for reconsideration on February 10, 2016, which was more than one year after the September 5, 2014 merit decision. Counsel claimed that he had not received the employing establishment's July 8, 2014 statement responding to the June 12, 2014 hearing transcript.[11] He also asserted, as he did in his appeal to the Board, that neither he nor appellant received a copy of the September 5, 2014 decision. The record indicates that OWCP mailed the decision to his last known address, which has remained unchanged since he filed his claim in August 2013. In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.[12] This presumption is commonly referred to as the "mailbox rule."[13] It arises when the record reflects that the notice was properly addressed and duly mailed.[14] It is, therefore, presumed that appellant received the employing establishment's July 8, 2014 statement and the September 5, 2014 decision in due course. As such, the Board finds that the request for reconsideration OWCP received on February 10, 2016 was untimely filed.[15]

[9] *J.S.*, Docket No. 16-1240 (issued December 1, 2016); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

[10] *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

[11] *R.W.*, Docket No. 06-2000 (issued February 22, 2007) (appellant alleged that he was denied due process when he was not served with a copy of the employing establishment's comments following the hearing. While correct that OWCP is required to furnish a copy of any comments made by the employing establishment to the employee and allot him an additional 20 days to comment under 20 CFR § 10.617(e), the Board notes that this is harmless error. In addressing violations of procedural due process under FECA, the Board has held that the opportunity for a hearing or reconsideration by OWCP, together with the Board's review on appeal, constitutes meaningful post deprivation processes whereby the government can address procedural errors. *See Lan Thi Do*, 46 ECAB 366 (1994).

[12] *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

[13] *Id.*

[14] *Id.*

[15] The Board further finds that counsel's argument that he lacked a copy of the September 5, 2014 decision or any other document in appellant's file because "a representative" of DOL's Office of the Inspector General and the Postal Inspection Service took his files on October 2, 2014, does not excuse the failure to timely request reconsideration. Counsel had ample time to request a copy of the September 5, 2014 decision of OWCP's hearing representative and one year in which to file a timely request for reconsideration.

Because appellant's request for reconsideration was untimely filed, he must demonstrate "clear evidence of error" on the part of OWCP in denying his traumatic injury claim.[16] As noted, OWCP denied the claim because he failed to submit medical evidence sufficient to establish that he sustained an injury causally related to the accepted July 27, 2013 work incident. With his request for reconsideration, appellant submitted the October 8, 2015 report from Dr. Weiss, who reiterated his previously reported diagnoses and opined that the MRI scans appellant underwent on June 20 and May 28, 2014 and x-rays of record showed that pain and soreness to the hips and shoulder resulted from blunt trauma which occurred during the July 27, 2013 fall at work due to a seizure. This report did not present medical evidence which explained how appellant's diagnosed conditions were caused or aggravated by the July 27, 2013 work incident. It is of limited probative value as it did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant met his burden to establish an injury causally related to the accepted July 27, 2013 employment incident.

The term clear evidence of error is intended to represent a difficult standard.[17] Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.[18] It is not enough to show that evidence could be construed so as to produce a contrary conclusion.[19] Instead, the evidence must shift the weight in appellant's favor.[20]

Appellant did not submit medical evidence sufficient 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. Consequently, the Board finds that he has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

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(b); *see Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[17] *D.B.*, Docket No. 16-1405 (issued January 9, 2017).

[18] *Id*.

[19] *Leona N. Travis*, *supra* note 16.

[20] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 2018
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