

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

_____)	
G.B., Appellant)	
)	
and)	Docket No. 17-1540
)	Issued: July 24, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Oklahoma City, OK, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 6, 2017 appellant filed a timely appeal from a June 13, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year elapsed from OWCP's last merit decision, dated October 6, 2003, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The record provided to the Board includes evidence received after OWCP issued its June 13, 2017 decision. However, the Board's jurisdiction is limited to the evidence that was part of the record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly determined that appellant's August 14, 2007 and May 27, 2017 requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 11, 2003 appellant, then a 34-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that his cervical disorder was caused or aggravated by his employment in January 1998 when he was "promoted to regular and reassigned to automation," where he was required to lift trays of mail, push/pull containers full of mail, loading/sweeping mail processing machines for 8 or sometimes 10 hours per day.³ He indicated that he first became aware of his claimed condition on October 24, 1990 and that he had undergone cervical surgery in 1991 while he was serving in the U.S Air Force. Appellant added that he first realized that his claimed condition was related to factors of his federal employment on January 20, 1998. He noted that he had not filed a claim for his cervical condition because his lumbar condition, for which he had filed a claim under OWCP File No. xxxxxx390, took priority.⁴ Appellant was last exposed to the conditions alleged to have caused/aggravated his condition on December 31, 2002. No medical evidence was received with the claim.

In a development letter dated July 25, 2003, OWCP advised appellant of the deficiencies in his claim and requested that he provide additional factual and medical information, including a well-rationalized report from his physician which discussed how his federal employment exposure contributed to or aggravated his condition. Appellant was afforded 30 days to provide the necessary evidence.

In a July 29, 2003 response, appellant stated that he retired from active military duty on May 1, 1991 and was hired by the employing establishment on April 15, 1995. He noted that his cervical condition occurred on October 24, 1990 and that he underwent cervical surgery on January 4, 1991. Appellant also detailed his employment duties with the employing establishment.

Medical evidence received by OWCP included reports from Dr. Stanley Cho, a Board-certified family practitioner, dated July 31 and August 8, 1996, which noted cervical radiculopathy at C5 and C6, diagnostic testing and medical reports from the employer's health clinic, and a January 4, 1991 operative report for herniated nucleus pulposus C5-6. A modified job offer dated May 8, 2002 pertaining to OWCP File No. xxxxxx390 was also received, along with an August 14, 2003 statement from appellant's supervisor attesting to appellant's job duties.

³ The present claim was assigned File No. xxxxxx895.

⁴ Under OWCP File No. xxxxxx390, OWCP accepted appellant's occupational disease claim for aggravation of spinal stenosis, lumbar region; and degeneration of lumbar or lumbosacral intervertebral disc. It authorized multiple surgical procedures of the lumbar spine and accepted a recurrence of July 19, 2006. OWCP also issued schedule awards for the left and right lower extremities. Appellant retired on disability from the employing establishment on August 25, 2006.

In an August 27, 2003 letter, OWCP requested that Dr. Cho explain how appellant's current cervical spine diagnosis was caused, accelerated, exacerbated, or aggravated by appellant's modified duties. Dr. Cho was afforded 30 days for his response. However, no response was received.

By decision dated October 6, 2003, OWCP denied appellant's claim as the medical evidence of record was insufficient to establish that the claimed medical condition was causally related to the accepted work factors.

On July 17, 2007 OWCP received appellant's June 30, 2007 request for an oral hearing before an OWCP hearing representative. By decision dated August 9, 2007, a representative of OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing as it was not made within 30 days of the last OWCP decision and appellant was not entitled to an oral hearing or a review of the written record, as a matter of right, on his case. He advised that the issue could be equally well addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which established that the claimed condition was related to the established work factors.

By letter dated August 14, 2007, received on August 22, 2007, appellant requested reconsideration of the October 6, 2003 merit decision.⁵ He argued that OWCP should reinstate his claim in the current file. Appellant noted that he had not been paid since July 2006 and had been using leave without pay (LWOP). He advised that on June 20, 2007 he had surgery to correct disc problems which affected his legs and which required titanium instrumentation to be placed in the L4, L5, and S1 portions of his spine. Appellant asked that OWCP take his June 20, 2007 surgery into consideration when reinstating his claim. No additional evidence was received.

By letter dated May 27, 2017, received on June 9, 2017, appellant again requested reconsideration of the October 6, 2003 merit decision. He indicated that he underwent cervical surgery on January 3, 1991, April 13, 2000, November 5, 2009, August 25, 2014, and November 4, 2015. Appellant stated that he was not aware if OWCP paid the physician, Dr. Charles F. Engles, a Board-certified neurosurgeon, for any of the services provided during the April 13, 2000 procedure. He stated that OWCP had not requested Dr. Engles to provide an opinion as to whether his April 13, 2000 surgery was related to his job and indicated that his claim should be reopened based on that error. Appellant indicated that Dr. Winston Fong, a Board-certified orthopedic surgeon, who performed the 2014 and 2015 procedures, was not aware that the surgeries he performed were workers' compensation injuries. He also requested that Medicare and his private health insurance carrier be reimbursed for payment of all his surgical procedures/hospitalizations as this was a workers' compensation claim. Appellant indicated that he was attaching documentation which he received from OWCP. No additional documentation was received.

⁵ The Board notes that the case record does not contain evidence of a postmark.

By decision dated June 13, 2017, OWCP found that appellant's May 27, 2017 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.⁶

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁷ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁸ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁹

OWCP will consider an untimely request for reconsideration only if the request demonstrates "clear evidence of error" on the part of OWCP in its "most recent merit decision."¹⁰ The request must establish on its face that such decision was erroneous.¹¹ Where a request is untimely filed and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹²

ANALYSIS

The Board finds that OWCP properly determined that appellant's May 27, 2017 request for reconsideration was untimely filed. Its procedures provide that the one-year time limitation

⁶ Although OWCP erred in not adjudicating the April 14, 2007 request for reconsideration, that was harmless error as it was also untimely filed and the May 27, 2017 reconsideration request raised substantially similar arguments.

⁷ This section provides in pertinent part: the 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).

⁸ 20 C.F.R. § 10.607.

⁹ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). 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. The Board notes that, for merit decisions issued prior to August 29, 2011, OWCP's procedures provided that the timeliness for a reconsideration request was determined not by the date OWCP received the request, but by the postmark on the envelope. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004). In the instant case, the decision was issued before August 29, 2011. As the postmark of the request is not available, the date of the request, August 14, 2007, is the date utilized for timeliness purposes.

¹⁰ *Id.* at § 10.607(b).

¹¹ *Id.* To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. *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. 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).

¹² 20 C.F.R. § 10.608(b).

period for requesting reconsideration begins on the date of the original OWCP decision.¹³ In the instant case, OWCP's last merit decision was issued on October 6, 2003. The Board notes appellant requested reconsideration of the October 6, 2003 decision on May 27, 2017. As appellant's May 27, 2017 request for reconsideration was received by OWCP more than one year after the last merit decision of October 6, 2003, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁴

The Board further finds that the arguments submitted by appellant in support of his request for reconsideration did not raise a substantial question as to the correctness of OWCP's October 6, 2003 merit decision and is insufficient to demonstrate clear evidence of error.

In his May 27, 2017 request for reconsideration, appellant indicated that the physicians who performed his 2000, 2014, and 2015 cervical procedures were not aware that it was a workers' compensation claim or asked to provide an opinion on whether his cervical surgeries were related to his job.

The Board finds that appellant did not submit medical evidence that addresses the underlying issue of whether his claimed cervical condition was causally related to the accepted work factors. To demonstrate clear evidence of error, it is not sufficient merely to establish that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹⁵ None of the argument submitted manifests on its face that OWCP committed an error in denying appellant's claim for compensation.¹⁶ Thus, the arguments raised by appellant on reconsideration do not raise a substantial question as to the correctness of OWCP's October 6, 2003 merit decision or demonstrate clear evidence of error.¹⁷

CONCLUSION

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

¹³ See *supra* note 7.

¹⁴ See *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁶ See *James R. Mirra*, 56 ECAB 738 (2005).

¹⁷ See *G.B.*, Docket No. 13-1260 (issued December 2, 2013); see also *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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