

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

_____)	
K.C., Appellant)	
)	
and)	Docket No. 17-0899
)	Issued: June 19, 2018
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer)	
_____)	

Appearances:
Paulette Craig, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 17, 2017 appellant, through his representative, filed a timely appeal from a January 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than one year has elapsed from the last merit decision dated August 29, 1997 to the filing

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 Appellant timely requested oral argument before the Board. By order dated March 15, 2018, the Board exercised its discretion and denied his request, finding that the issues involved could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-0899 (issued March 15, 2018).

of this appeal,³ the Board lacks jurisdiction to review the merits of his claim, pursuant to the Federal Employees' Compensation Act⁴ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts and circumstances as set forth in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On December 22, 1995 appellant, then a 34-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his back and neck in an employment-related motor vehicle accident. He stopped work on December 23, 1995 and returned to his usual employment on January 8, 1996. OWCP accepted the claim for cervical and lumbosacral strain.

On July 26, 1996 appellant underwent a lumbar medial branch neurotomy at L2-3, L3-4, L4-5, and L5-S1 to treat a bilateral herniated disc.

Appellant, on October 17, 1996, filed a recurrence of disability claim (Form CA-2a) beginning July 24, 1996 causally related to his December 22, 1995 employment injury. He indicated that he was scheduled for another surgery on his disc in two weeks. Appellant underwent a repeat lumbar medial neurotomy at L2 through S1 on January 9, 1997.

By decision dated August 29, 1997, OWCP found that appellant's July 1996 and January 1997 bilateral lumbar medial branch neurotomies at L2-3, L3-4, and L4-S1 were not medically necessary due to his December 22, 1995 employment injury. It noted that the surgery was performed for the diagnosed conditions of a herniated lumbar disc and central and lumbar instability with lumbar facet arthropathy, neither of which had been accepted as employment related.

On November 6, 1997 appellant requested reconsideration. By decision dated November 18, 1997, OWCP denied his request for reconsideration after finding that he had not submitted evidence or raised an argument sufficient to warrant reopening his case for further merit review under 5 U.S.C. § 8128(a).

³ For final adverse decisions of OWCP issued prior to November 19, 2008, the Board's review authority is limited to appeals which are filed within one year from the date of issuance of OWCP's decision. *See* 20 C.F.R. § 501.3(d)(2) (2008).

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ Docket No. 99-0149 (issued April 18, 2000); *Order Denying Petition for Reconsideration* (issued October 30, 2000); Docket No. 16-0604 (issued August 18, 2016).

Appellant again requested reconsideration on December 2, 1997. By decision dated December 9, 1997, OWCP denied his request for reconsideration of the merits of his claim under section 8128(a).

Appellant appealed to the Board. By decision dated April 18, 2000, the Board affirmed the November 18 and December 9, 1997 OWCP decisions denying his request to reopen his case for further review of the merits of his claim under section 8128(a).⁶ The Board found that appellant had not submitted evidence or raised an argument sufficient to warrant further merit review of his case.

On January 19, 2001 appellant again requested reconsideration of OWCP's August 29, 1997 decision. He argued that he required multiple surgeries as a result of his December 22, 1995 work injury.

OWCP, by decision dated February 13, 2001, denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found that he had not provided evidence showing that it erred in issuing its last merit decision.

In a letter dated June 25, 2015, appellant advised that he was not receiving workers' compensation. He requested back pay. Appellant resubmitted an October 12, 1998 report from Dr. K.E. Vogel, a Board-certified neurosurgeon. Dr. Vogel attributed appellant's lumbar surgeries in July 1996, January 1997, and February 1998 to his December 1995 work injury.⁷ By letter dated August 26, 2015, OWCP informed appellant that he should follow the appeal rights from its prior decisions.⁸ Appellant, on August 26, 2015, requested reconsideration. He related that Dr. Vogel examined him subsequent to his return to work and found that he had to have three surgeries due to his work injury. Appellant maintained that he was totally disabled from 1995 to May 5, 2000 as a result of his employment injury.

On September 22, 2015 appellant submitted an August 26, 2003 report from Dr. Roberta Bell, a neuropsychologist. Dr. Bell obtained a history of him being unable to function cognitively after the December 22, 1995 employment injury such that he missed a filing deadline to apply for retirement benefits. She found that appellant had an intellectual and academic disability severe enough "to interfere with his ability to complete an application for retirement in a timely manner."

In a letter received by OWCP on September 28, 2015, appellant contended that he had submitted clear evidence that he could not timely file for his workers' compensation benefits as a result of a mental handicap.

⁶ Docket No. 99-0149 (issued April 18, 2000). On October 30, 2000 the Board denied appellant's petition for reconsideration of its April 18, 2000 decision. *Order Denying Petition for Reconsideration*, Docket No. 99-0149 (issued October 30, 2000).

⁷ Dr. Vogel, in an undated report received August 26, 2015, reviewed appellant's history of lumbosacral, cervical, left leg, and left arm pain after a December 1995 motor vehicle accident. He related, "In all medical probability [his] signs and symptoms are casually related to the incident of December 1995." Dr. Vogel further opined that appellant's need for surgery resulted from the December 22, 1995 employment injury

⁸ On August 6, 2015 appellant requested compensation from December 22, 1995 to May 5, 2004. In an August 12, 2015 response, OWCP informed him of the evidence required to establish a recurrence of disability.

In a report dated September 28, 2015, Dr. Karita Kewalramani, a Board-certified internist, discussed appellant's history of a motor vehicle accident on December 22, 1995, two medial branch neurotomies, and a cage fusion at L3-4. She diagnosed lumbar disc syndrome, lumbar mechanical dysfunction at L5-S1, and right L4 and S1 lumbar radiculopathy. Dr. Kewalramani indicated in a November 9, 2015 note that appellant was totally and permanently disabled from employment.

On November 18, 2015 Dr. Vogel examined appellant for lumbosacral pain. He reviewed appellant's history of surgeries in 1996, 1997, and 1998. Dr. Vogel related, "In all medical probability, [appellant's] signs and symptoms at that time and the three subsequent surgeries were necessitated by the motor vehicle injury while at work on December 22, 1995. He reports [appellant] has been unable to return to work since the December 22, 1995 injury."

By decision dated December 23, 2015, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated August 18, 2016, the Board affirmed the December 23, 2015 decision.⁹ The Board found that appellant had not submitted evidence or raised an argument sufficient to demonstrate clear evidence of error.

In a statement received October 17, 2016, appellant indicated that he was submitting evidence for reconsideration. He maintained that FECA time limitation provisions were not applicable because he was incompetent. On October 21, 2016 appellant requested reconsideration.

Appellant resubmitted the September 28, 2015 report from Dr. Kewalramani and the November 18, 2015 report from Dr. Vogel. He also submitted an August 31, 2000 letter from his private disability insurer and evidence from the Office of Personnel Management (OPM) regarding his application for disability retirement. Appellant further submitted a February 10, 1999 return to work certification for the employing establishment.

On May 16, 2016 Dr. Vogel opined that appellant was totally disabled from work from 1996 until February 2000 subsequent to two spinal surgeries.

Dr. Bell, in a report dated September 12, 2016, discussed appellant's history of 1995 and February 2000 motor vehicle accidents. She diagnosed mild mental retardation after the 1995 accident that was permanent. Dr. Bell noted that appellant subsequently experienced multiple strokes from 2005 to 2007. She opined that he was "unable to file paperwork in a timely manner in 2001."

In progress reports dated March 4 and September 28, 2016, Dr. Jacques Whitecloud, a Board-certified physiatrist, discussed his treatment of appellant for low back, knee, and leg pain. He diagnosed chronic pain and lumbar radiculitis. In his September 28, 2016 report, Dr. Whitecloud noted that Dr. Vogel attributed appellant's lumbar radiculitis to his "work[-]related injury in 1995 and subsequent injuries." He related his current symptoms to the 1995 employment injury.

⁹ Docket No. 16-0604 (issued August 18, 2016).

By decision dated January 19, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.¹¹ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System).¹² The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹³

Section 10.607(c) provides, "The year in which a claimant has to timely request reconsideration shall not include any period subsequent to an OWCP decision for which the claimant can establish through probative medical evidence that he or she is unable to communicate in any way and that his or her testimony is necessary in order to obtain modification of the decision."¹⁴ OWCP's procedures further advise that the one-year time limit to request reconsideration does not include any period in which the claimant can establish through the submission of medical evidence that he could not communicate and his testimony was necessary.¹⁵

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.¹⁶ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.¹⁷

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

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹² Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

¹³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹⁴ *See* 20 C.F.R. § 10.607(c).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.4(c) (February 2016).

¹⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.5(a) (February 2016).

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.¹⁸

OWCP's 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.¹⁹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁰

ANALYSIS

OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.²¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²² The last merit decision was issued by OWCP on August 29, 1997. Appellant's October 2016 request for reconsideration was received more than one year after the August 29, 1997 decision and thus it was untimely. Therefore, he must demonstrate clear evidence of error by OWCP in its August 29, 1997 decision.²³

On appeal appellant argues that he should not be subject to the time limitation provisions of FECA because he was not mentally competent. Section 10.607(a) of OWCP's regulations sets forth the time limitation period for requesting reconsideration as one year of the date of the decision for which review is sought.²⁴ The year for filing a timely request for reconsideration does not include any period in which a claimant can establish through probative medical evidence that he was unable to communicate in any way, and his testimony was necessary to obtain modification.²⁵ Appellant has not provided medical evidence supporting that he was unable to communicate and

¹⁸ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁹ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²⁰ *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²¹ 20 C.F.R. § 10.607(a).

²² *See Robert F. Stone*, 57 ECAB 292 (2005).

²³ 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

²⁴ *Id.* at § 10.607(a).

²⁵ *Id.* at § 10.607(c); *see also* Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.4(c) (February 2016); *S.W.*, Docket No. 16-0208 (issued April 21, 2016).

thus could not timely request reconsideration.²⁶ In a September 12, 2016 report, Dr. Bell diagnosed mild mental retardation due to his 1995 motor vehicle accident and indicated that he could not timely file paperwork in 2001. Her report is insufficient to support that appellant's mental condition rendered him unable to communicate during the relevant time period of one year from the date of OWCP's last merit decision dated August 29, 1997.²⁷ Additionally, appellant timely requested reconsideration of the August 29, 1997 decision on November 6, and December 2, 1997. He also appealed OWCP's nonmerit decisions denying his requests for reconsideration to the Board in October 1998. On January 19, 2001 appellant again requested reconsideration of the August 29, 1997 decision. The factual evidence does not support his contention that he was unable to timely request reconsideration of OWCP's last merit decision issued August 29, 1997.

The Board finds that appellant has failed to demonstrate clear evidence of error. On reconsideration appellant resubmitted 2015 reports from Dr. Kewalramani and Dr. Vogel. As this evidence duplicated evidence already of record, it is insufficient to establish clear evidence of error absent a showing that OWCP erred in its evaluation of the evidence.²⁸

Appellant also submitted evidence regarding his application for disability retirement with OPM, a letter regarding his private disability insurance, and a February 1999 return to work certificate. The relevant issue, however, is whether he has established that his July 1996 and January 1997 lumbar surgeries were causally related to his December 22, 1995 employment injury. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.²⁹

Dr. Vogel, in a report dated May 16, 2016, opined that appellant was totally disabled from work from 1996 to February 2000 following two spinal surgeries. Dr. Whitecloud provided progress reports dated March 4 and September 28, 2016 describing his treatment of appellant for low back, knee, and leg pain. On September 28, 2016 he attributed appellant's lumbar radiculitis to his 1995 work injury. The Board finds that these reports fail to demonstrate clear evidence of error on the part of OWCP as they are irrelevant to the underlying issue of causal relationship between the work injury and appellant's 1996 and 1997 surgeries.³⁰ Additionally, as noted, clear evidence of error is intended to represent a difficult standard and even 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.³¹

On appeal appellant contends that the evidence establishes that he was disabled from work subsequent to surgeries necessitated by his employment injury. As noted, however, the issue is whether he has demonstrated clear evidence of error by OWCP in finding that his July 1996 and

²⁶ See *J.H.*, Docket No. 14-0118 (issued April 28, 2014).

²⁷ See *E.P.*, Docket No. 17-1086 (issued October 13, 2017).

²⁸ See *S.E.*, Docket No. 14-0068 (issued July 28, 2014).

²⁹ See *T.G.*, Docket No. 17-0814 (issued October 20, 2017); *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

³⁰ See *L.B.*, Docket No. 17-0760 (issued September 5, 2017).

³¹ See *A.M.*, Docket No. 17-1900 (issued February 22, 2018).

January 1997 spinal surgeries were unrelated to his December 22, 1995 work injury. Appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying appellant's claim. He has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.³²

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2018
Washington, DC

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

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

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

³² See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).