

the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP used the proper standard of review when it treated appellant's attorney's submission as a request for reconsideration and denied it as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 10, 1973 appellant, then a 23-year-old registered nurse, filed a notice of injury or occupational disease claim (Form CA-1 & 2) alleging that on December 5, 1973 she twisted her neck in the performance of duty. OWCP accepted the claim for a neck strain and shoulder sprain.⁴ Appellant stopped work on December 5, 1973 and returned to her usual employment on February 27, 1974. She again stopped work on May 3, 1973 and received wage-loss compensation for total disability from that date until August 22, 1977, when she resumed work as a nurse. On April 22, 1982 OWCP found that appellant's actual earnings effective August 23, 1977 fairly and reasonably represented her wage-earning capacity.⁵ It paid appellant compensation based on her loss of wage-earning capacity.

By decision dated March 13, 2008, OWCP suspended appellant's compensation effective March 16, 2008 pursuant to 20 C.F.R. § 10.528 as she failed to complete a Form CA-1032 providing her earnings and employment activity, if any, within the past 15 months. It noted that federal regulations required her to make an affidavit regarding earnings and employment and that it used a CA-1032 form for that purpose. OWCP advised appellant that she had not completed CA-1032 forms sent to her on December 8, 2006 and December 13, 2007. It informed her that, if she completed and returned the enclosed CA-1032 forms covering the relevant periods with updated medical information, her benefits would be retroactively restored.

On March 8, 2016 appellant completed and signed the December 13, 2007 Form CA-1032 and submitted it to OWCP on September 15, 2016. She indicated that she had been self-employed in legal services from 2005 to 2014 with no pay or earnings. Appellant advised that she had received a pension from a private employer in the past 15 months.

In a report dated November 25, 2015, Dr. Bruce A. Silber, a chiropractor, discussed appellant's history of an injury to her neck at work on December 5, 1973. He diagnosed cervicalgia, cervical facet syndrome, and myalgia myositis. Dr. Silber indicated that x-rays

³ 5 U.S.C. § 8101 *et seq.*

⁴ By decision dated February 6, 1981, OWCP granted appellant a schedule award for five percent permanent impairment of the right arm. In a March 20, 1989 decision, it determined that she was at fault in having received a \$15,423.82 overpayment because it paid her wage-loss compensation for total disability when it should have paid her compensation based on her loss of wage-earning capacity.

⁵ In decisions dated October 29, 1982, OWCP denied modification of its loss of wage-earning capacity determination.

revealed subluxations at C3-4, C-5, C7-T1, and T3-4. He opined that appellant had a permanent condition due to the December 5, 1973 employment injury.

On February 11, 2016 Dr. Thomas Frederick Jan, an osteopath, noted that appellant sustained thoracic outlet syndrome following a 1973 employment injury. He diagnosed right thoracic outlet syndrome “consistent with the history provided regarding her work-related injury in 1973.” In a June 3, 2016 addendum, Dr. Jan provided a history of the December 5, 1973 employment injury.

Appellant, through counsel, requested on September 8, 2016 that OWCP expand acceptance of her claim to include thoracic outlet syndrome and cervical subluxations based on the November 25, 2015 report of Dr. Silber and the February 11 and June 3, 2016 reports of Dr. Jan. He further requested that it reinstate her wage-loss compensation retroactive to March 16, 2008 based on her submission of the Form CA-1032. Counsel maintained that OWCP procedures required reinstatement of compensation upon the submission of a completed Form CA-1032 following the suspension of compensation.

By decision dated March 8, 2017, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that the issue of whether it should reinstate her compensation was not relevant to the issue of whether the March 13, 2008 decision was proper, noting that wage-loss compensation might be reinstated if medical evidence supported disability during the claimed period.

On appeal counsel contends that OWCP erred in failing to conduct a merit review as the issue of claim expansion could be adjudicated when such condition developed. He also maintains that appellant is entitled to retroactive reinstatement of compensation as she has now submitted the Form CA-1032.

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.⁶ 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.⁷ Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s Integrated Federal Workers’ Compensation System).⁸ 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.⁹

⁶ 20 C.F.R. § 10.607(a).

⁷ 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).

⁸ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

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

OWCP may not deny an application for review solely because the application was not timely 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.¹⁰ OWCP 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.¹¹

FECA authorizes the Secretary of Labor to require a partially disabled employee to report her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.¹²

Under section 10.528 of OWCP's implementing federal regulations, an employee in receipt of compensation benefits must complete an affidavit as to any work or activity indicating an ability to work which the employee has performed for the prior 15 months.¹³ If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.¹⁴

ANALYSIS

The Board finds that OWCP used the incorrect standard of review in considering the September 8, 2016 request of appellant's counsel that OWCP expand acceptance of her claim to include additional conditions and reinstate her compensation based on her submission of a CA-1032 form. OWCP determined that the September 8, 2016 correspondence constituted an untimely request for reconsideration and denied the request as it failed to demonstrate clear evidence of error.

Although OWCP characterized appellant's September 8, 2016 letter as a request for reconsideration, the Board finds that OWCP should have adjudicated her claim to determine whether her compensation benefits should continue to be suspended or reinstated.¹⁵ Appellant's counsel advised that she had provided the requested CA-1032 form and maintained that OWCP should reinstate her compensation. As noted, OWCP's regulations provide that, if a claimant fails to file a report regarding any work activities, her compensation is suspended until OWCP receives the requested report. When the report is received, if the employee remains entitled to

¹⁰ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹² 5 USC § 8106(b).

¹³ 20 CFR § 10.528; *see also A.H.*, Docket No. 15-241 (issued April 3, 2015).

¹⁴ *Id.*

¹⁵ See generally *D.D.*, Docket No. 09-0602 (issued January 15, 2010) (finding that OWCP erred in considering appellant's inquiry into how to resume her compensation benefits after it suspended her benefits for failing to attend a scheduled medical examination as an untimely request for reconsideration).

compensation, OWCP will reinstate compensation retroactive to the date of suspension.¹⁶ Section 10.528 provides no time limitation on a claimant's willingness to comply. Thus, OWCP's treatment of appellant's September 6, 2016 request for reinstatement of her compensation based on her submission of a Form CA1032 was improper.¹⁷

Regarding counsel's request that OWCP expand acceptance of her claim, the Board notes that OWCP has not issued a decision regarding this issue. Upon return of the case record, OWCP should consider the request for claim expansion.

CONCLUSION

The Board finds that OWCP applied the improper standard of review when it 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 March 8, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 7, 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

¹⁶ *Supra* note 12.

¹⁷ *Supra* note 14.