

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

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A.K., Appellant)	
)	
and)	Docket No. 17-1254
)	Issued: May 23, 2018
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Palatine, IL, Employer)	
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Appearances:
Appellant, pro se
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 May 17, 2017 appellant filed a timely appeal from a March 1, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated December 7, 2010, to the of filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act¹ (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.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 19, 1997 appellant, then a 30-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she experienced back pain extending into her ankles causally related to factors of her federal employment. OWCP accepted the claim for lumbar radiculopathy, somatic dysfunction, brachial neuritis or radiculitis, bilateral tenosynovitis of the hand and wrist, a tear of the medial meniscus of the left knee, and displacement of a cervical intervertebral disc without myelopathy. Appellant worked in a limited-duty capacity beginning in July 1997.² She sustained intermittent periods of total disability.

On April 13, 2009, OWCP accepted that appellant sustained a recurrence of disability beginning March 6, 2009 and paid her wage-loss compensation as of that date. Appellant subsequently accepted a September 21, 2009 offer of modified employment. On March 24, 2010 the employing establishment sent appellant home under the National Reassessment Program (NRP) as it had no work available. OWCP again paid her wage-loss compensation for total disability.

On May 21, 2010 OWCP referred appellant for vocational rehabilitation. In a report dated June 30, 2010, the vocational rehabilitation counselor advised that her physician wanted to obtain a functional capacity evaluation (FCE) to determine her work restrictions. An FCE was scheduled for July 1, 2010.

Appellant informed the vocational rehabilitation counselor in correspondence dated June 24, 2010 that she was unable to attend the scheduled July 1, 2010 FCE as she would be out of town due to her mother's illness. She related that she would notify the vocational rehabilitation counselor when she was available for the FCE.

The vocational rehabilitation counselor, in an August 31, 2010 report, indicated that appellant left the country in late June 2010 due to a death in her family and that she was supposed to contact OWCP upon her return. The counselor noted that she had unsuccessfully tried to reach appellant by both telephone and mail. In a vocational rehabilitation report dated September 30, 2010, the vocational rehabilitation counselor advised that on, September 17, 2010, appellant's husband related that she remained out of the country, but may return in a few weeks.

By letter dated November 3, 2010, OWCP notified appellant of the penalties under section 8113(b) of FECA³ and section 10.519 of its regulations⁴ for failing to cooperate with vocational rehabilitation without good cause. It noted that she had interrupted vocational rehabilitation services for over 90 days. OWCP afforded appellant 30 days to participate in vocational rehabilitation services or provide good cause for her refusal. It informed her that if she failed to submit a good faith basis for her refusal it would assume that vocational rehabilitation would have

² In decisions dated July 23 and August 17, 2007, OWCP denied appellant's claim for wage-loss compensation (Form CA-7) for the period April 9 to May 21, 2007.

³ 5 U.S.C. § 8113(b).

⁴ 20 C.F.R. § 10.519.

resulted in a return to work with no loss of wage-earning capacity as she failed to participate in the essential preparatory efforts of vocational rehabilitation.

By decision dated December 7, 2010, OWCP reduced appellant's compensation to zero under section 8113(b) of FECA and section 10.519 of its regulations as she failed to cooperate with the initial stages of vocational rehabilitation or establish good cause for not complying. It noted that she had not responded to its November 3, 2010 letter. OWCP informed appellant that the reduction would continue until she, in good faith, participated in the directed vocational testing or showed good cause for her failure to comply.

The employing establishment, on June 5, 2012, issued appellant a notice of removal for being absent without leave. On April 24, 2015 it advised OWCP that, following a settlement agreement, appellant had resumed work in January 2015 without back pay.

Appellant, on April 30, 2015, filed a claim for compensation (Form CA-7) requesting wage-loss compensation for leave without pay from December 6, 2010 to January 15, 2015. She related that she was sent home from work under the NRP. Appellant further filed claims for compensation beginning March 2015.

On September 16, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the December 7, 2010 decision. In an accompanying statement, she maintained that she did not refuse to attend vocational rehabilitation, but instead she had been away due to a family emergency.

By letter dated September 9, 2015, OWCP advised appellant that she was not entitled to compensation as it had reduced her compensation to zero effective December 7, 2010 based on her failure to participate in vocational rehabilitation.⁵

By decision dated July 18, 2016, OWCP denied appellant's request for an oral hearing on the December 7, 2010 decision as it was not timely requested under 5 U.S.C. § 8124(b).⁶ It considered the matter within its discretion and found that her claim could be equally well addressed through the submission of a reconsideration request and evidence showing that she did not refuse to participate with vocational rehabilitation.

Appellant, on August 16, 2016, related that the employing establishment sent her home under the NRP on March 23, 2010 as there was no work available. She met with the vocational rehabilitation counselor, but then had to travel to India for a family emergency. In India appellant

⁵ Counsel, by letter received by OWCP on September 21, 2015, requested a telephone hearing before a representative of OWCP's Branch of Hearings and Review on a purported September 9, 2015 decision. OWCP advised her on October 19, 2015 that the case was not in posture for a hearing regarding its September 9, 2015 correspondence as it was informational in nature and did not constitute a final decision.

⁶ In a decision dated July 13, 2016, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to show that she currently had a ratable permanent impairment. By decision dated March 17, 2017, an OWCP hearing representative set aside the July 13, 2016 decision and remanded the case for consideration by OWCP's medical adviser of newly submitted medical evidence.

sought treatment for her work injury. The employing establishment did not contact her until 2012 and did not tell her that there was work available.

On December 12, 2016 appellant requested reconsideration. She maintained that she did not refuse to participate in vocational rehabilitation. In another statement dated December 12, 2016, appellant asserted that she received compensation from March 23 to December 16, 2010 after being sent home under the NRP, but was not paid from December 17, 2010 through January 14, 2016 even though the employing establishment did not have work available.

Appellant submitted an October 13, 2016 magnetic resonance imaging (MRI) scan study of her cervical spine and January 15, 2012 and November 3, 2016 MRI scan studies of her lumbar spine.⁷ In a January 15, 2012 medical report, Dr. Manish U. Kale, who specializes in emergency medicine, indicated that he was treating her for a lumbar and cervical condition and advised against a journey or standing over two hours. On April 24, 2012 he related that he was treating appellant for a lumbar and cervical disc condition. In a June 23, 2012 report, Dr. Kale advised that she was unable to work or travel due to her lumbar and cervical condition.

Appellant also submitted February 1, April 8, May 6, and June 14, 16, and 24, 2010 work restriction evaluations indicating that she could perform limited-duty employment and providing work restrictions.

In a January 10, 2012 letter, appellant informed the employing establishment that she could not travel as a result of her medical condition and noted that she had been sent home under the NRP.⁸

By decision dated March 1, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant contends that the employing establishment sent her home from work on March 23, 2010 under the NRP, that she had informed OWCP that she had to leave the country because her mother was ill, that she contacted the employing establishment, but was told there was no work available, and that she underwent medical treatment in India. Appellant requests compensation from March 23, 2010 until January 15, 2015.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right. OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁹ One such limitation is that the request for reconsideration must be sent within one year of the date of OWCP's decision for which review

⁷ In an undated statement, an individual advised that appellant traveled to India in June 2010 to take care of her mother and a brother with disabilities.

⁸ Dr. Eugene Lopez, a Board-certified orthopedic surgeon, in a January 5, 2015 work restriction evaluation, found that she could return to work without restrictions.

⁹ 5 U.S.C. § 8101 *et seq.*

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

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.¹³ 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 it committed an error.¹⁴

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ As appellant's request for reconsideration was received on December 12, 2016, more than one year after the December 7, 2010 decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁷

The underlying issue in this case was whether appellant established that she complied with the early and necessary stages of vocational rehabilitation or provided valid reasons for her refusal. In correspondence dated August 16, 2016, she advised that she told her vocational rehabilitation counselor that she had to travel to India for a family emergency. Appellant, however, left the country on June 2010 and did not return for four years. She has the responsibility to cooperate with vocational rehabilitation, and section 8113(b) of FECA provides penalties for claimants who

¹⁰ 20 C.F.R. § 10.607. 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.

¹¹ 20 C.F.R. § 10.607.

¹² *Id.* at § 10.608.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016).

¹⁴ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Robert F. Stone*, *supra* note 14.

¹⁷ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

fail to cooperate with vocational rehabilitation.¹⁸ Appellant has not submitted any evidence to establish that she agreed to cooperate with vocational rehabilitation or that she had provided good cause for refusal after receiving the November 3, 2010 letter from OWCP informing her of the consequences for failing to participate. Therefore, she has not demonstrated clear evidence of error.

Appellant submitted MRI scan studies of both her lumbar and cervical spine and work restriction evaluations dated 2010 finding that she could perform modified employment. She further submitted medical reports dated 2012 from Dr. Kale. In a report dated June 23, 2012, Dr. Kale opined that appellant was unable to work or travel as a result of a lumbar and cervical condition. As noted, however, the relevant issue is whether appellant has established good cause for failing to participate with vocational rehabilitation in 2010. The medical evidence submitted on reconsideration does not establish that she was unable to participate in vocational rehabilitation and thus does not demonstrate clear evidence of error by OWCP.¹⁹

On appeal appellant asserts that the employing establishment sent her home in March 2010 under the NRP and told her that there was no work available for her. OWCP paid her compensation, however, after she stopped work in March 2010 and referred her for vocational rehabilitation services. It reduced appellant's compensation to zero under section 8113(b) effective December 7, 2010 as she did not cooperate with vocational rehabilitation. The fact that she was sent home from work by the employing establishment is irrelevant to the issue of whether she cooperated with vocational rehabilitation.

Appellant further maintains that she left the country because her mother was ill. She did not, however, respond to OWCP's November 3, 2010 letter advising her that she had to participate with vocational rehabilitation within 30 days or show good cause for her refusal.

The term clear evidence of error is intended to represent a difficult standard.²⁰ None of the evidence submitted by appellant manifests on its face that OWCP committed an error in reducing her compensation based on her failure to cooperate with vocational rehabilitation. She has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.²¹ Thus, the evidence is insufficient to demonstrate clear evidence of error.

¹⁸ Section 8113(b) provides that if an individual fails to undergo vocational rehabilitation as directed by OWCP, it may reduce her compensation to what would have been her wage-earning capacity had she cooperated. OWCP's regulations provide that if a claimant fails to participate in the early, but necessary stages of vocational rehabilitation, it will assume that the vocational rehabilitation would have resulted in her returning to work with no loss of wage-earning capacity and reduce her compensation to zero. 20 C.F.R. § 10.519(b), (c).

¹⁹ See *J.R.*, Docket No. 13-0211 (issued June 25, 2013).

²⁰ *Supra* note 12.

²¹ See *R.G.*, Docket No. 15-1927 (issued December 29, 2015); *D.N.*, Docket No. 15-1182 (issued September 9, 2015).

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 March 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 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