

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

M.W., Appellant)	
)	
and)	Docket No. 18-0111
)	Issued: May 9, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Philadelphia, PA, Employer)	
)	

Appearances: *Case Submitted on the Record*
*Louis J. Michelsen, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 13, 2017 appellant, through counsel, filed a timely appeal from an April 18, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days lapsed from the last merit decision, dated March 29, 2016, to the filing of this appeal,

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 The Board notes that appellant submitted additional evidence after OWCP rendered its April 18, 2017 decision. The Board's jurisdiction, however, is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from considering this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.⁴

ISSUE

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

FACTUAL HISTORY

On August 18, 2014 appellant, then a 51-year-old expediter, filed a traumatic injury claim (Form CA-1). He alleged that, on that same date, he sustained a head injury when he was hit on top of the head by the gate as he walked into elevator 10, knocking him to the floor. Appellant stopped work, notified his supervisor, and sought emergency medical treatment on the date of injury at Mercy Fitzgerald Hospital.

In support of his claim, appellant submitted a September 10, 2014 medical report from Dr. David J. Mancini, a treating physician, who noted complaints of pain due to an August employment injury. Dr. Mancini diagnosed lumbar spine pain, lumbar radiculitis, lumbar sprain/strain, and muscle spasm. He restricted appellant from returning to work.

By decision dated October 27, 2014, OWCP denied appellant's claim, finding that the medical evidence of record failed to establish that his diagnosed conditions were causally related to the accepted August 18, 2014 employment incident.

On July 22, 2015 appellant requested reconsideration of OWCP's decision.

In support of his claim, appellant submitted an August 18, 2014 Mercy Fitzgerald emergency room (ER) report from Dr. Greg Casey, Board-certified in emergency medicine. Dr. Casey noted that appellant was hit in the head with a door, ordered a computerized tomography (CT) scan of the brain, and diagnosed a closed head injury.

In a September 17, 2014 report, Dr. Richard J. Katz, Board-certified in internal medicine, reported that on August 18, 2014 appellant was at a freight elevator when the vertical door descended and struck him over the front parietal vertex of his head. Appellant sought emergency medical treatment and was informed that, while the CT scan of the brain showed no accident related findings, it did reveal some abnormality. Dr. Katz noted that appellant remained out of work since the employment incident and was undergoing separate treatment by an orthopedist for neck and back pain. He reported that the August 18, 2014 employment incident was reasonably described in terms of a blunt head injury and ongoing concussion given the absence of loss of consciousness, focal neurologic deficit, and brain scan abnormality.

³ 5 U.S.C. § 8101 *et seq.*

⁴ 20 C.F.R. § 501.3(e).

By decision dated October 19, 2015, OWCP vacated and affirmed in part the October 27, 2014 decision. It found that the medical evidence of record was sufficient to establish a head contusion, but was insufficient to establish additional conditions as causally related to the accepted employment incident. By separate decision dated October 19, 2015, OWCP accepted appellant's claim for contusion of head.

Beginning October 29, 2015, appellant filed claims for compensation (Form CA-7) for intermittent periods of disability beginning August 18, 2014 through October 17, 2015.

By letters dated December 14, 2015 and January 26, 2016, OWCP informed appellant that the medical evidence of record was insufficient to support his claim for compensation. It noted that the employing establishment could not verify 240 of the hours that were being claimed for wage-loss compensation, it could not accept Form CA-7's where multiple dates were entered on the same row or where dates were skipped or omitted, and that his claim required medical evidence which supported either total or partial disability for the periods claimed. OWCP further recommended that, given the more than one year period for which he was claiming leave, he was encouraged to break up his compensation claim into several smaller claims covering periods of only one or two pay periods for each Form CA-7. No additional evidence was received.

By decision dated March 29, 2016, OWCP denied appellant's claim for compensation for intermittent periods of disability from August 18, 2014 through October 17, 2015, finding that the medical evidence of record failed to establish that he was disabled as a result of his accepted August 18, 2014 employment injury. It further noted that his Form CA-7's were incomplete and could not be processed, requiring further clarification by entering each day separately in its own row.

On an appeal request form dated March 28, 2017, appellant requested reconsideration of the March 29, 2016 OWCP decision. The reconsideration request was received on March 31, 2017.

In a May 11, 2016 medical report, Dr. Harvey Azarva, Board-certified in internal medicine, reported that he had been treating appellant since 2007 and appellant's current medical problems began when he struck his head at work on August 18, 2014. He discussed appellant's course of medical treatment and noted ongoing complaints of headache, cervical and lumbar pain, and paresthesias involving the left upper and lower extremities. Dr. Azarva noted that a March 2015 electromyography (EMG) study revealed a right-sided sub-acute chronic radiculopathy of the C8 and T1 level and moderate-to-severe right-sided carpal tunnel syndrome. He opined that appellant's current symptoms were the result of a work-related injury that occurred on August 18, 2014.

In support of his claim, appellant also submitted prescription notes dated April 27, 2015 through June 8, 2016 from Dr. Azarva excusing him from returning to work as a result of his August 18, 2014 work-related injury. He further submitted a March 17, 2016 cervical spine magnetic resonance imaging (MRI) scan.

In a March 27, 2017 medical narrative report, Dr. Bernard Zeliger, a doctor of osteopathic medicine, discussed the August 18, 2014 employment incident, summarized the prior medical

reports of record, reviewed diagnostic testing, and provided physical examination findings. Dr. Zeligler opined that appellant suffered a significant injury to his head when an elevator gate came down and hit him on the head. He noted two protruding discs on the cervical spine at C3-4 and C5-6. Dr. Zeligler reported that appellant suffered a severe ligamentous injury throughout the cervical spine with marked straightening, degenerative changes, and loss of cervical curvature. He explained that appellant suffered an injury to the thoracic and lumbar spine as a result of the elevator gate hitting him in the head and driving him down to the floor of the elevator. Dr. Zeligler further opined that injuries prevented him from performing his occupation at the post office, or any gainful occupation requiring lifting, pushing, or pulling.

By letter dated March 28, 2017, received by OWCP on April 7, 2017, appellant, through counsel, requested reconsideration of the March 29, 2016 decision. Counsel noted prior submission of Dr. Azarva and Dr. Zeligler's reports in support of appellant's claim.

By decision dated April 18, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease, or increase the compensation awarded; or award compensation previously refused or discontinued.⁵

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁶ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employee's Compensation System (iFECS).⁷

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit and it must manifest on its face that OWCP committed an error.⁸

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (February 2016).

⁸ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁹

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹² The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

The Board finds that this case is not in posture for a decision.¹⁴

In its April 18, 2017 decision, OWCP properly found that appellant's March 31, 2017 request for reconsideration was untimely filed. Under OWCP's procedures, appellant had one year from the March 29, 2016 merit decision to request reconsideration. As appellant's reconsideration request was not received by OWCP until March 31, 2017, outside of the one-year time limitation, pursuant to 20 C.F.R. § 10.607(a), his request for reconsideration was untimely filed.¹⁵ Therefore, he must demonstrate clear evidence of error by OWCP.¹⁶

The Board finds, however, that OWCP did not properly make findings regarding the evidence submitted in support of the reconsideration request.¹⁷

Section 8124(a) of FECA provides: OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁸ Its regulations at section 10.126 of Title

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *Id.*

¹³ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

¹⁵ The Board notes that counsel for appellant argues that appellant's reconsideration request was mailed on March 28, 2017, rendering the appeal timely filed. The Board notes that OWCP regulations provide that the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought. In this instance, appellant's request for reconsideration was not received until March 31, 2017, rendering the appeal untimely filed. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations, Time Limitations*, Chapter 2.1602.4 (February 2016).

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

¹⁷ *T.M.*, Docket No. 12-1307 (issued December 12, 2012).

¹⁸ 5 U.S.C. § 8124(a); see *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

20 of the Code of Federal Regulations provide: The decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹⁹ Moreover, OWCP's procedure manual provides: The reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²⁰

In order to determine whether appellant has demonstrated clear evidence of error, OWCP will review the evidence submitted and arguments raised in support of the request and determine whether such evidence or argument is sufficient to demonstrate error in its prior decision.²¹ It shall then issue a decision containing findings of fact and conclusions of law.²² In this instance, OWCP did not discuss any evidence or argument submitted in support of the reconsideration request. Its failure to provide factual findings and explain the basis for its conclusion that appellant did not demonstrate clear evidence of error precludes the Board's review of the decision.

The Board will set aside OWCP's April 18, 2017 decision and remand the case for an appropriate final decision on appellant's untimely reconsideration request.²³

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁹ 20 C.F.R. § 10.126. *See also O.R.*, 59 ECAB 432 (2008); *Teresa A. Ripley*, 56 ECAB 528 (2005); *M.L.*, Docket No. 09-0956 (issued April 15, 2010).

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²¹ *See George C. Vernon*, 54 ECAB 313 (2003).

²² 20 C.F.R. § 10.126.

²³ *M.O.*, Docket No. 13-0413 (issued April 3, 2013).

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with this decision.

Issued: May 9, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board