

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

S.U., Appellant)	
)	
and)	Docket No. 17-1506
)	Issued: October 11, 2018
U.S. POSTAL SERVICE, FORT HAMILTON)	
STATION, Brooklyn, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
*Daniel M. Goodkin, 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 June 27, 2017 appellant, through counsel, filed a timely appeal from a June 21, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated June 22, 2006, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

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 5 U.S.C. § 8101 *et seq.*

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.

On appeal counsel asserts that OWCP committed a clear error in its December 1, 2005 decision. He alleged that OWCP failed to follow sections 2.814.4.d(1)(e) and 2.814.5 of its procedures prior to terminating appellant's wage-loss compensation in accordance with section 8106(c)(2) of FECA.

FACTUAL HISTORY

On February 8, 2001 appellant, then a 35-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back when carrying mail in winter conditions. He stopped work on February 12, 2001. OWCP accepted lumbar sprain, and appellant was placed on the periodic compensation roll. Appellant did not return to work.

Appellant came under the care of Dr. C.S. Bhupathi, a Board-certified orthopedic surgeon, who diagnosed lumbar facet arthritis that caused radiculitis and foraminal narrowing, and osteoarthritis of both hips, more severe on the left. He began pain management on January 18, 2002.

On March 3, 2003 OWCP referred appellant for second opinion evaluations. In a March 25, 2003 report, Dr. Gary Korenman, a Board-certified neurologist and OWCP referral physician, noted the history of injury and provided neurologic examination findings. He advised that appellant had no evidence of ongoing neurologic dysfunction and could return to work.

Also on March 25, 2003 Dr. Lester Lieberman, a Board-certified orthopedic surgeon and also an OWCP referral physician, described the February 5, 2001 employment injury, and noted that appellant had a 1996 back injury from a motor vehicle accident. Following examination he noted loss of back flexion and a negative straight leg raising bilaterally. Dr. Lieberman advised that appellant had a lumbar sprain secondary to the employment injury and could return to his regular work duties on a full-time basis, with an initial weight restriction of 40 pounds. He opined that appellant's hip condition was not due to the February 5, 2001 employment injury.

In a report dated July 9, 2003, Dr. Bhupathi described appellant's medical care. He diagnosed degenerative disc disease of the lumbosacral spine and osteoarthritis of both hips, greater on the left. Dr. Bhupathi indicated that appellant's hip pain continued and advised that he remained totally disabled.

OWCP found that a conflict in medical opinion had been created regarding appellant's employment-related diagnoses and his ability to work, and referred him to Dr. Stanley Soren, a Board-certified orthopedic surgeon, for an impartial evaluation. In a July 29, 2004 report, Dr. Soren described the February 5, 2001 employment injury and appellant's complaints of low back pain with spasms, right-sided groin pain, and left hip pain. He reviewed the statement of accepted facts and the medical record and provided physical examination findings. Dr. Soren diagnosed lumbosacral sprain, right groin adductor sprain, mild lumbar facet arthritis, degenerative disc disease and retrolisthesis at S1 on L5, and right-sided L4-5 radiculopathy and paraspinal

denervation as shown on a January 10, 2002 electrodiagnostic study.³ He advised that the lumbosacral sprain and groin sprain were causally related to the February 5, 2001 employment injury, and that the facet arthritis, lumbar disc disease, and hip conditions were not employment related. Dr. Soren concluded that appellant could return to light duty with restrictions on climbing and a 30-pound lifting restriction.

On April 19, 2005 the employing establishment offered appellant a modified position. The duties were casing mail for up to eight hours daily, and updating route books and case labels for one hour each. Twisting, bending, stooping, pushing, pulling, squatting, and kneeling were limited to two hours daily with no climbing. A 30-pound weight restriction was crossed out on the job offer. Appellant refused the offered position on May 9, 2005, stating that he remained totally disabled.

In an October 11, 2005 letter, OWCP advised appellant that the position offered was suitable. Appellant was notified that, if he did not report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. OWCP advised appellant that he should promptly notify the employing establishment and OWCP of his intentions and, if he did not report for work, provide reasons in justification of this failure. Appellant was given 30 days to respond.

Appellant did not respond to the 30-day letter. Additional medical evidence from Dr. Bhupathi was received. This included reports dated September 15, 2005 in which he noted that appellant had an acute attack of lower back pain and had severely limited trunk motion. Dr. Bhupathi recommended restricted activity and advised that appellant remained totally disabled, noting that he was awaiting authorization for right hip surgery. In a report dated November 1, 2005, he noted his review of Dr. Soren's report. Dr. Bhupathi opined that, in view of appellant's recurrent radiating low back pain, he would not be able to perform such job duties on a regular basis and recommended that appellant be trained in a less strenuous job. He advised that appellant remained totally disabled.

By decision dated December 1, 2005, OWCP terminated appellant's wage-loss compensation, effective November 27, 2005, because he refused an offer of suitable work. It noted that the weight of the medical evidence rested with the opinion of Dr. Soren who provided an impartial medical examination.

Appellant timely requested an oral hearing with OWCP's Branch of Hearings and Review and submitted additional medical evidence. At the hearing, where appellant appeared *pro se*, he testified that, after receiving the job offer, he tried to get clarification, and indicated that he could not perform the duties due to pain and medication.

By decision dated June 22, 2006, an OWCP hearing representative discussed the medical evidence of record including the medical note from Dr. Bhupathi dated November 1, 2005 where he opined that appellant could not perform the job duties on a regular basis and recommended that he be trained on a less strenuous job. He found the weight of the evidence rested with the opinion of Dr. Soren, the referee physician, who advised that appellant was capable of modified duty. The hearing representative noted that appellant did not respond to OWCP's October 11, 2005 letter

³ A copy of the study is found in the case record.

within 30 days and concluded that he refused suitable employment and that the sanctions under section 8106(c) of FECA were appropriate.

On October 26, 2016 appellant, through counsel, requested reconsideration.⁴ Counsel, citing the Board case *R.G.*,⁵ asserted that as appellant submitted additional evidence, OWCP's termination of benefits was procedurally flawed.

In a June 21, 2017 decision, OWCP found that, as appellant's reconsideration request was untimely filed and he did not present clear evidence of error, his request for reconsideration was denied.

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 discretionary authority granted OWCP under section 8128 of FECA.⁹

OWCP may not deny an application for review solely on the grounds that 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 establishes clear evidence of error.¹⁰ 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 shows clear evidence of error on the part of OWCP.¹¹

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

⁴ On October 19, 2016 Daniel M. Goodkin, Esq. began representing appellant.

⁵ Docket No. 15-0492 (issued November 16, 2015).

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).

¹⁰ *See* 20 C.F.R. § 607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ 20 C.F.R. § 607(b); Federal (FECA) Procedure Manual, *supra* note 7 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.¹²

OWCP 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.¹³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

The only decision before the Board in this appeal is the June 21, 2017 decision in which OWCP denied appellant's request for reconsideration because the request was untimely filed and failed to demonstrate clear evidence of error. On October 26, 2016 appellant requested reconsideration of the June 22, 2006 hearing representative's decision, which affirmed the December 1, 2005 termination of his wage-loss compensation under section 8106(c) of FECA. The Board finds that as appellant's reconsideration request was received more than one year after the June 6, 2006 merit decision, OWCP properly determined that it was untimely.¹⁵ Consequently appellant must demonstrate clear evidence of error on the part of OWCP.

The Board finds that appellant has demonstrated clear evidence of error. The Board first notes that the case cited by counsel, *R.G.*,¹⁶ was a decision on the merits of appellant's claim and not an untimely request for reconsideration to be considered by the Board under the difficult clear evidence of error standard.¹⁷

While sections 2.814.4.d(1)(e) and 2.814.5 of OWCP's procedures were issued in June 2013, seven years after the last merit issue in this case, the procedures in effect in December 2005, when OWCP terminated appellant's wage-loss compensation for refusal of suitable employment under section 8102(c) of FECA were similar. Both sets of procedures instruct

¹² *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁴ *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁵ 20 C.F.R. § 10.607(a) (2011).

¹⁶ *Supra* note 5.

¹⁷ *Supra* note 13.

the claimant to provide a written explanation of the reasons for refusing the employment.¹⁸ Both also include language that if the claimant submits evidence and/or reasons for refusing the offered position, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for refusing are valid.¹⁹ Both also indicate that, if the claimant's refusal of the offered job is not deemed justified, OWCP must advise the claimant and allow 15 additional days for him or her to accept the position.²⁰

In the case at hand, while appellant did not reply in writing to OWCP's October 11, 2005 letter advising him that he had 30 days to respond, however, he did submit additional medical evidence from Dr. Bhupathi, an attending orthopedic surgeon which was referenced in the decision of June 26, 2006.

As noted above, both the 1997 and 2013 OWCP procedures specifically provide that, if the claimant submits evidence and/or reasons for refusing the offered position, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for refusing are valid.²¹ Both also provide that, if OWCP determines that the claimant's refusal of the offered job is not deemed justified, OWCP must advise the claimant and allow 15 additional days for him or her to accept the position.²² In this case, OWCP did not issue a 15-day letter.

Certain procedural safeguards are necessary to allow an employee to have a final opportunity to accept a position offered by an employing establishment before OWCP may terminate compensation based on refusal of a suitable position. As in the case *Maggie L. Moore*,²³ in the case at hand OWCP did not afford appellant an opportunity to accept the position after finding his reasons unacceptable. The clear mandate of *Maggie L. Moore* was that claimant's receive notice of the intentions of OWCP and be given a reasonable period of time to make the requisite decision to either accept or reject an offer of suitable employment.²⁴ The Board finds that, as OWCP denied appellant an additional 15-day opportunity to accept an offer of suitable work, this raised a substantial question as to the correctness of OWCP's December 1, 2005 decision and demonstrates clear evidence of error.²⁵

¹⁸ Federal (FECA) Procedure Manual, *supra* note 7. Compare section 2.814.4.c(5) (July 1997) with section 2.814.4(c) (June 2013).

¹⁹ Section 2.814.5 (July 1997) and (June 2013).

²⁰ Compare section 2.814.5.d(a) (July 1997) and section 2.814.5.e(3) (June 2013).

²¹ Section 2.814.5 (July 1997) and (June 2013).

²² *Supra* note 20; *id.*

²³ 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992).

²⁴ *Id.*

²⁵ *T.J.*, Docket No 11-1197 (issued January 6, 2012). See generally *A.D.*, Docket No. 16-1366 (issued April 6, 2017).

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 11, 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