

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

M.S., Appellant)	
)	
and)	Docket No. 18-1631
)	Issued: April 1, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Indianapolis, IN, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 28, 2018 appellant, through counsel, filed a timely appeal from a July 26, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from the last merit decision dated September 21, 2016 to the filing of this

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 following the July 26, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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

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 December 3, 2014 appellant, then a 38-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that, on November 22, 2014, he injured his lower back repetitively loading mail trays onto a belt while in the performance of duty. OWCP accepted the claim for lumbar sprain, a permanent aggravation of displacement of a lumbar intervertebral disc at L4-5 and L5-S1 without myelopathy, an aggravation of lumbosacral spondylosis, and an aggravation of spondylolisthesis. Appellant stopped work on November 22, 2014 and returned to full-time modified employment on December 16, 2015.

On August 10, 2016 appellant filed claims for compensation (Form CA-7) requesting wage-loss compensation for disability beginning February 10, 2016.

By decision dated September 21, 2016, OWCP denied appellant's claim for wage-loss compensation for disability beginning February 10, 2016. It found that he had not submitted medical evidence establishing that he was unable to work for the period claimed due to his accepted employment injury.

On December 18, 2017 appellant, through counsel, requested reconsideration. He contended that the accompanying September 19, 2017 medical report from Dr. Kenneth L. Renkens, Jr, a Board-certified neurosurgeon, supported that he was disabled from employment beginning February 10, 2016. Counsel noted that OWCP had failed to consider the report and cited Board case law finding that OWCP must review all evidence in reaching its decision.

Dr. Renkens reviewed the medical evidence on September 19, 2017. He advised that he had treated appellant from March 27, 2015 to February 2, 2017. Dr. Renkens discussed appellant's history of a November 22, 2014 employment injury and lumbar fusion at L4-5 and L5-S1 on August 24, 2015. He noted that appellant had resumed modified employment after the surgery. Dr. Renkens indicated that he had evaluated appellant on August 26, 2016 for increased back pain and had recommended a lumbar computerized tomography (CT) myelogram study based on his level of pain to "assess the status of his fusion to be sure that he did not have a pseudoarthrosis or a nonunion or nonhealing of the fusion at that time...." He noted that the CT myelogram study had shown a solid fusion, but that electrodiagnostic testing had revealed changes in the nerve roots of the lower lumbar spine. Dr. Renkens diagnosed an aggravation of an underlying degenerative condition. He advised that he had taken appellant off work pending the results of the CT myelogram as the fusion could be aggravated by his employment duties if it was not solid. Dr. Renkens related, "Unfortunately, during that period from August 26, 2016 through

³ 5 U.S.C. § 8101 *et seq.*

December 21, 2016, there was a delay in approval and authorization for that testing so he would be considered off work and would justify his inability to work at that time.” He opined that appellant’s employment had aggravated a degenerative condition.

By decision dated July 26, 2018, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.⁵ The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁶ Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s integrated Federal Employees’ Compensation System).⁷ 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.⁸

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.⁹ 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 shows clear evidence of error on the part of OWCP.¹⁰

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 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.¹¹ The Board notes that clear evidence of error is intended to represent a difficult standard.¹² Evidence that does

⁴ 5 U.S.C. § 8128(a); *see also* *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

⁷ *Id.* at Chapter 2.1602.4(b) (February 2016).

⁸ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

⁹ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

¹⁰ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹¹ *R.M.*, Docket No. 18-1393 (issued February 12, 2019).

¹² *R.L.*, Docket No. 18-0496 (issued January 9, 2019).

not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP issued its last merit decision on September 21, 2016. Appellant, therefore, had until September 21, 2017 to request reconsideration of that decision.¹⁷ As his reconsideration request was not received until December 18, 2017, more than one year after the September 21, 2016 decision, OWCP properly determined that the reconsideration request was untimely filed.¹⁸ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP. In its most recent merit decision dated September 21, 2016, OWCP denied his claim for wage-loss compensation beginning February 10, 2016 as the medical evidence was insufficient to support that he was disabled causally related to his November 22, 2014 employment injury.

On reconsideration, appellant submitted a September 19, 2017 report from Dr. Renkens. Dr. Renkens discussed appellant's history of a November 22, 2014 employment injury treated with a lumbar fusion at L4-5 and L5-S1 and his subsequent return to modified employment. On August 26, 2016 he indicated that he had evaluated appellant for complaints of increased pain in his back and had found that he should not work pending a lumbar CT myelogram study to evaluate the state of his fusion. Dr. Renkens advised that he was off work until December 21, 2016 due to a delay in the authorization of the diagnostic testing. He opined that the CT myelogram study had revealed a solid fusion, but that electrodiagnostic testing had demonstrated changes in the nerve roots of the lower lumbar spine. Dr. Renkens diagnosed an aggravation of an underlying degenerative condition due to appellant's work injury. While he provided some explanation for his disability determination, as previously noted, clear evidence of error is intended to represent a difficult standard.¹⁹ Even the submission of a detailed, well-rationalized report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further

¹³ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹⁴ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

¹⁵ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

¹⁶ *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

¹⁷ *See P.B.*, Docket No. 17-1963 (issued October 23, 2018).

¹⁸ *Supra* note 5.

¹⁹ *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

development, does not constitute clear evidence of error.²⁰ It is not enough to show that evidence could be construed so as to produce a contrary conclusion.²¹ Instead, the evidence must shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision in appellant's favor.²² The Board finds that the September 18, 2017 report from Dr. Renkens does not rise to the level of clear evidence of error.²³

Counsel, on reconsideration, contended that OWCP had not considered Dr. Renkens' September 18, 2017 report in its September 21, 2016 decision and noted that Board case law required OWCP to consider all evidence submitted.²⁴ Dr. Renkens' September 18, 2017 report, however, was not before OWCP at the time of the last merit decision issued on September 21, 2016. OWCP properly undertook a limited review of the report to determine whether it was sufficient to establish clear evidence of error.²⁵

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.

²⁰ *E.K.*, Docket No. 18-0422 (issued August 22, 2018).

²¹ *Id.*

²² *R.S.*, Docket No. 18-0505 (issued July 24, 2018).

²³ *Supra* note 19.

²⁴ Counsel cited *I.C.*, where the Board found that a letter from a claimant's counsel received by OWCP prior to the one-year time limitation constituted a request for reconsideration. Docket No. 13-0738 (issued July 8, 2013). The issue in this case, however, is whether the evidence submitted and arguments raised on reconsideration are sufficient to demonstrate clear evidence of error.

²⁵ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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