

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

M.P., Appellant)	
)	
and)	Docket No. 19-0674
)	Issued: December 16, 2019
DEPARTMENT OF THE TREASURY,)	
BUREAU OF PRINTING & ENGRAVING,)	
Washington, DC, 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 February 5, 2019 appellant, through counsel, filed a timely appeal from a December 19, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days had elapsed from the last merit decision, dated June 21, 2017, 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 this case.

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.

FACTUAL HISTORY

On February 25, 2015 appellant, then a 48-year-old sheet examiner, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a lumbar strain and sciatica when he lifted a "50 subject sheet" while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that he stopped work on the date of injury. On March 26, 2015 OWCP accepted the claim for temporary aggravation of left-sided sciatica. Appellant received continuation of pay (COP) for lost time benefits from February 26 through April 10, 2015 and OWCP paid intermittent wage-loss benefits on the supplemental rolls from April 11, 2015 through July 7, 2016.

In a work excuse note dated April 10, 2015, Dr. Hien T. Nguyen, a Board-certified family practitioner, indicated that appellant could return to work on April 13, 2015 with light-duty restrictions including no heavy lifting more than 15 pounds, and no prolonged standing, bending, pulling, or extended walking. Appellant returned to modified work on April 15, 2015.

On June 17, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF) and medical record, to Dr. Willie Thompson, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant had any residuals or disability from his accepted February 25, 2015 employment injury.

In a report dated July 7, 2016, Dr. Thompson reviewed the SOAF and the medical record. He reviewed the diagnostic studies of appellant's lumbar spine, and indicated that appellant did not have sciatica as his computerized tomography (CT) and magnetic resonance imaging (MRI) scans were within normal limits. Dr. Thompson noted that appellant suffered a soft tissue sprain-/strain-type injury to his lower back at the time of injury, which had "long since resolved." He indicated that there was no objective evidence to document the need to place any physical limitations on appellant, and noted that he could safely return to work immediately without restrictions.

On August 10, 2016 OWCP issued a notice of proposed termination of compensation finding that the weight of the medical evidence of record established that appellant no longer suffered from any residuals or continuing disability from work stemming from his accepted condition. It afforded him 30 days to submit additional evidence to refute the proposed termination of benefits.

By decision dated September 20, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, based on Dr. Thompson's opinion that appellant was no longer disabled from work as a result of the accepted injury as his lower back sprain/strain had resolved.

On October 7, 2016 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On May 1, 2017 a telephonic hearing was held. Appellant testified stating that, following the February 25, 2015 employment injury, he returned to light duty, and never returned to regular duty. He noted that he continued to seek care for his back condition every two weeks. The hearing representative left the record open for 30 days for appellant to submit additional evidence.

In a report dated May 17, 2017, Dr. Ulric Bigby, a general surgery specialist, examined appellant for low back pain. He noted that his pain was positional, and indicated that appellant injured his back when lifting at work. Dr. Bigby asserted that a herniated disc was likely, but did not opine as to the cause of appellant's condition.

By decision dated June 21, 2017, OWCP's hearing representative affirmed OWCP's September 20, 2016 decision, finding that OWCP met its burden of proof to terminate wage-loss compensation and medical benefits.

On August 16, 2017 appellant, through counsel, requested reconsideration of the June 21, 2017 decision. Appellant submitted additional medical evidence along with his request.

A June 16, 2017 MRI scan noted findings of no significant spinal canal stenosis, and mild left neural foraminal narrowing at L4-5 due to small lateral disc protrusion and annular fissure. In a report dated June 16, 2017, Dr. Nguyen diagnosed chronic lumbar pain, which he related was consistent with appellant's MRI scan findings. He indicated that appellant required a moderation of activities in the form of light duty because any higher level of duty would aggravate his medical condition.

By decision dated November 14, 2017, OWCP denied appellant's request for reconsideration, finding that the new evidence was irrelevant or immaterial to the underlying issue. It further informed him that any future request for reconsideration must be made within one year from the last merit decision dated June 21, 2017.

On June 4, 2018 OWCP received a January 2, 2018 report from Dr. Ian Gordon, a Board-certified orthopedic surgeon, who diagnosed lumbar degenerative disc disease with aggravation, and opined that it was an employment-related injury.

On September 20, 2018 appellant, through counsel, requested reconsideration of the June 21, 2017 decision. Counsel contended that OWCP had a duty to develop the additional evidence submitted on June 4, 2018. He further argued that this new evidence, from Dr. Gordon, received by OWCP on June 4, 2018, should have been treated as a reconsideration request, and cited two Board decisions purportedly supporting his argument.

By decision dated December 19, 2018, 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 does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that for merit decisions issued on or after August 29, 2011, 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 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).⁶ 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.⁷

A claimant may request reconsideration of a final decision regardless of the date of injury or death. While no special form is required, the request must be in writing, be signed and dated by the claimant or the authorized representative and be accompanied by relevant new evidence or argument not considered previously. The request should also identify the decision and the specific issue(s) for which reconsideration is being requested.⁸

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, OWCP must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.⁹ 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 request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise and explicit and

³ This section provides in pertinent part: "the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ *Id.* at Chapter 2.1602.4 (February 2016).

⁷ 5 U.S.C. § 8128(a); *A.B.*, Docket No. 18-0015 (issued June 11, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ 20 C.F.R. § 10.606(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, 2.1602.2(a) (October 2011); *see A.J.*, Docket No. 14-1617 (issued December 23, 2014).

⁹ *See* 20 C.F.R. § 10.607(b); *B.C.*, Docket No. 18-1496 (issued May 22, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹¹ *A.B.*, *supra* note 7; *see Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

must manifest on its face that OWCP committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ The evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion evidence 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.¹⁴

The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁹ Where a request for reconsideration is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request without reopening the case for a review on the merits.²⁰

ANALYSIS

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.

As previously noted, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.²¹ As counsel's request for reconsideration was not received by OWCP until September 20, 2018, more than one year after the issuance of the June 21, 2017 merit decision, it was untimely filed. Consequentially, appellant must demonstrate clear evidence of error.

¹² 20 C.F.R. § 10.607(b); *A.B., id.*; *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *B.C., supra* note 9; *see Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ *R.C.*, Docket No. 17-0198 (issued January 28, 2019); *Thankamma Mathews*, 44 ECAB 765 (1993).

¹⁵ *B.C., supra* note 9; *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹⁶ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019); *Jimmy Day*, 48 ECAB 652 (1997).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *A.B., supra* note 7; *see Pete F. Dorso*, 52 ECAB 424, 427 (2001).

²⁰ 20 C.F.R. § 10.608(b).

²¹ *See supra* note 5.

In support of the untimely request for reconsideration, OWCP received the January 2, 2018 report from Dr. Gordon. Dr. Gordon's report does not establish clear evidence of error in OWCP's June 21, 2017 decision because it is irrelevant to the underlying issue in this case.²² The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error in its June 21, 2017 decision.²³ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.²⁴ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.²⁵

While counsel argued that the medical report received from Dr. Gordon on June 4, 2018 constituted a timely request for reconsideration, consistent with the Board's prior decisions in *S.C.*,²⁶ and *I.C.*,²⁷ the Board finds that pursuant to OWCP's regulations and procedures, and Board case law, including *S.C.* and *I.C.*, the request for reconsideration must be in writing, be signed and dated by the claimant or the authorized representative, be accompanied by relevant new evidence or argument not considered previously, and the request should also identify the decision and the specific issue(s) for which reconsideration is being requested. Dr. Gordon was not appellant's authorized representative, not did his report identify the decision and specific issues for which reconsideration was requested. As such, Dr. Gordon's report does not constitute a request for reconsideration.

The Board finds that appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in terminating his wage-loss compensation and medical benefits effective September 20, 2016. Appellant has therefore not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that the request failed to demonstrate clear evidence of error.²⁸

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.

²² See *B.C.*, Docket No. 16-1404 (issued April 14, 2017); *F.R.*, Docket No. 09-0575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

²³ See *supra* note 5 at Chapter 2.1602.5 (February 2016); see also *supra* note 10.

²⁴ See *E.B.*, Docket No. 18-1091 (issued December 28, 2018); see also *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

²⁵ See *E.B.*, *id.*; see also *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²⁶ Docket No. 13-0738 (issued July 8, 2013).

²⁷ Docket No. 14-0170 (issued June 3, 2014).

²⁸ *E.B.*, *supra* note 24; see *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 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