

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

_____)	
J.S., Appellant)	
)	
and)	Docket No. 19-1147
)	Issued: December 17, 2019
DEPARTMENT OF THE TREASURY,)	
BUREAU OF ENGRAVING, Fort Worth, TX,)	
Employer)	
_____)	

Appearances:
Sara Kincaid, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On April 22, 2019 appellant, through counsel, filed a timely appeal from an October 26, 2018 decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 19-1147.²

The Board has duly considered the matter and finds that the case is not in posture for a decision.

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 October 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.*

On August 6, 2013 appellant, then a 66-year-old plate printer, filed an occupational disease claim (Form CA-2) alleging binaural hearing loss due to factors of his federal employment. On November 21, 2013 OWCP accepted his claim for bilateral hearing loss. On February 25, 2015 appellant filed a claim for compensation (Form CA-7) for leave without pay for total disability for the period February 2 to 13, 2015. By decision dated April 22, 2015, OWCP denied his claim for wage-loss compensation for total disability for the dates February 2 to 13, 2015, finding that the medical evidence of record did not support that he was totally disabled due to his accepted condition. On May 15, 2015 appellant, through counsel, requested reconsideration of OWCP's April 22, 2015 decision. By decision dated July 9, 2015, OWCP denied modification of its April 22, 2015 decision finding that the evidence of record had failed to establish that the residuals of appellant's hearing loss were such that it prevented him from continuing to perform his federal employment duties.

On May 5, 2016 appellant requested that his claim be expanded to accept additional conditions to include adjustment disorder with anxiety. In an April 15, 2016 report, James Currin, Ph.D., a licensed psychologist, diagnosed adjustment disorder with anxiety related to appellant's accepted employment injury.

On June 22, 2016 appellant, through counsel, requested reconsideration of OWCP's July 9, 2015 decision. By decision dated December 29, 2016, OWCP denied modification of its July 9, 2015 decision finding that there continued to be a lack of rationalized medical evidence to support that appellant was totally disabled due to his accepted employment condition. It also noted that the anxiety disorder claimed was not an accepted condition in his case.

On September 26, 2017 appellant, through counsel, requested reconsideration of OWCP's December 29, 2016 decision. By decision dated October 23, 2017, OWCP denied modification of its December 29, 2016 decision finding that the evidence of record was insufficient to establish that the requested emotional condition was due to factors of employment and did not support that the accepted condition caused total disability from work.

On June 27, 2018 appellant, through counsel, requested reconsideration of OWCP's October 23, 2017 decision. He submitted argument from counsel, the same claim expansion request from Dr. Currin, statements from his brother and coworker, a copy of a hearing safety training presentation, handwritten leave records from 2010 to 2014, an employing establishment memorandum regarding assignment of overtime work dated February 17, 2010, as well as a February 5, 2018 letter from Chase Baxter of Baxter Hearing Specialists. In this letter, Mr. Baxter explained that hearing aid technology at the time of appellant's diagnosis did not provide treatment for tinnitus. However, new devices were available for treatment of tinnitus, however, authorization for such treatment had not been authorized.

By decision dated October 26, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim. It noted that it had only reviewed and considered argument from counsel, the same claim expansion request from Dr. Currin, statements from his brother and coworker, a copy of a hearing safety training presentation, handwritten leave records from 2010 to 2014, and an employing establishment memorandum regarding assignment of overtime work dated February 17, 2010. OWCP did not reference receipt of the February 5, 2018 letter from Mr. Baxter.

In the case of *William A. Couch*,³ the Board held that when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. The Board finds that, as OWCP failed to review the February 5, 2018 letter from Mr. Baxter, the case will be remanded to OWCP to enable a proper consideration of the evidence of record at the time of its October 26, 2018 nonmerit decision.

The Board further finds that the delay in issuance of a reconsideration decision by OWCP has impacted appellant's ability to submit additional evidence or argument and bring a timely request for reconsideration before OWCP. OWCP has a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.⁴ Its procedures provide that when a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review.⁵ The Board has also explained that a delay in issuance of a reconsideration decision by OWCP can impact appellant's ability to submit additional evidence or argument and bring a timely request for reconsideration before OWCP. An untimely request for reconsideration is subject to review under the clear evidence of error standard, a much higher burden of proof.⁶ In the present case, OWCP issued its October 26, 2018 decision more than 90 days after appellant's June 27, 2018 request for reconsideration, and more than one year after its October 23, 2017 merit decision. Under such circumstance, to preserve appellant's right to file a timely request for reconsideration, and to afford the ability to present further evidence or argument to establish the claim, the case will be remanded to OWCP for a merit review of the evidence of record followed by an appropriate decision.⁷

To preserve appellant's right to file a timely request for reconsideration, and to afford him the ability to present further evidence or argument to establish his claim, this case will be remanded to OWCP for a merit review of the evidence of record followed by an appropriate decision. Following such further development as OWCP deems necessary, it shall issue an appropriate decision on appellant's request for reconsideration of the merits of the claim.

³ 41 ECAB 548 (1990).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (October 2011).

⁵ *Id.* at Chapter 2.1602.7.

⁶ *See E.I.*, Docket No. 18-0634 (issued January 23, 2019).

⁷ *Id.*; *see also L.R.*, Docket No. 18-1311 (issued April 19, 2019).

IT IS HEREBY ORDERED THAT the October 26, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: December 17, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board