

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

_____)	
D.G., Appellant)	
)	
and)	Docket No. 18-1038
)	Issued: January 23, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Monroe Township, NJ, Employer)	
_____)	

Appearances:
Robert D. Campbell, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 23, 2018 appellant, through counsel, filed a timely appeal from a January 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated December 9, 2016, 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 over the merits of this case.³

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.*

³ The Board notes that following the January 3, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to 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.

ISSUE

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

FACTUAL HISTORY

On January 17, 2015 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on December 2, 2014 when a garbage truck backed into his delivery vehicle while in the performance of duty. He received medical treatment on December 8, 2014. Appellant stopped work on December 31, 2014.

By decision dated February 25, 2015, OWCP denied the claim as the factual component of fact of injury had not been established. It also noted that the medical evidence of record did not contain a physician's rationalized opinion as to whether and how any of the diagnosed conditions were caused or aggravated by the accepted December 2, 2014 employment incident.

Appellant, through counsel, requested reconsideration on December 15, 2015. By decision dated March 1, 2016, OWCP affirmed the denial of the claim. It modified its previous decision to reflect that appellant had established the factual component of fact of injury, but that his claim remained denied because he had not established causal relationship between the claimed conditions and the accepted December 2, 2014 employment incident.

On September 26, 2016 appellant, through counsel, requested reconsideration.

By decision dated December 9, 2016, OWCP denied modification of its March 1, 2016 decision. It found that the medical reports of record did not provide a well-reasoned and unequivocal explanation as to how the diagnosed conditions were caused or aggravated by the accepted December 2, 2014 employment incident.

Following its December 9, 2016 decision, OWCP received additional medical evidence in the form of progress reports from Dr. David Weiss, an osteopath and Board-certified family practitioner. In December 1 and 29, 2016 and January 26, March 30, April 27, May 25, June 22, July 20, August 24, September 21 and November 2, 2017 progress reports, Dr. Weiss noted that appellant was seen in follow-up for a work-related motor vehicle accident of December 2, 2014 where he sustained injuries to the cervical spine. He provided diagnoses of chronic post-traumatic cervical spine strain and sprain, aggravation of preexisting age-related degenerative disc disease of cervical spine, aggravation of preexisting cervical spine pathology from a 2007 motor vehicle accident, right C5-6 radiculopathy and left C6 radiculopathy, post-traumatic cervical facet joint syndrome, and C4-5, C5-6, and C6-7 disc bulges.

On December 12, 2017 OWCP received appellant's January 31, 2017 letter entitled "Relevant New Evidence." Appellant discussed the effect the December 2, 2014 employment incident had on his life. Duplicative medical evidence in support of his request was received along with new medical reports.

In a February 14, 2017 report, Dr. Weiss noted that on December 2, 2014 appellant was involved in a work-related motor vehicle accident and sustained significant musculoskeletal pathology to his cervical spine. He set forth examination findings as well as his review of June 8,

2015 magnetic resonance imaging (MRI) scan of cervical spine. Dr. Weiss diagnosed chronic post-traumatic cervical strain and sprain; aggravation of preexisting age-related degenerative disc disease and osteoarthritis of the cervical spine; and aggravation of preexisting cervical spine pathology (motor vehicle accident in 2007 with documented disc herniations at C4-5, C5-6, and C6-7). He concluded that appellant sustained significant musculoskeletal trauma to his cervical spine secondary to the December 2, 2014 employment incident. Dr. Weiss also indicated that appellant had sustained permanent orthopedic impairment with a permanent disability to his cervical spine, either through direct causation or aggravation, with the common factor being his December 2, 2014 work-related accident.

In a December 6, 2017 report, Dr. Weiss noted that on December 2, 2014 appellant was in his mail truck at a stop when a garbage truck backed into his vehicle. At the time of impact, appellant braced himself with his right arm and was thrown backwards and forwards. Dr. Weiss indicated that appellant initially injured his cervical spine, right elbow, and right knee. He indicated that the December 2, 2014 work-related motor vehicle accident released neurogenic chemical mediators from cell bodies of the sensory neurons and non-neurogenic mediators from tissue which initiated and perpetuated an inflammatory response. Dr. Weiss explained that this inflammatory response led to irritated nerve roots and radicular pain, as evinced on a July 28, 2015 electromyogram/nerve conduction velocity (EMG/NCV) study. He also indicated that appellant's cervical bulging discs and protruding disc at C4-5 increased his vulnerability to trauma as his cervical spine was already compromised. Dr. Weiss concluded that the December 2, 2014 work-related injury was responsible for appellant's current cervical spine pain symptoms.

A June 18, 2015 cervical spine magnetic resonance imaging (MRI) scan contained impressions of degenerative disc and joint disease with multilevel neural foraminal stenosis from C4-5 through C6-7 and a nonspecific straightening of the spine. The scan did not demonstrate disc herniation or central canal stenosis.

The previously noted July 28, 2015 EMG/NCV study contained handwritten impressions of left C6 radiculopathy, active; right C5-6 mild radiculopathy; borderline carpal tunnel syndrome (CTS), sensory; and left ulnar sensory entrapment.

On December 14, 2017 appellant, through counsel, requested reconsideration.

By decision dated January 3, 2018, OWCP denied appellant's December 14, 2017 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that, while appellant had submitted additional medical evidence, he failed to provide any explanation as to why OWCP's December 9, 2016 decision was improperly decided.

LEGAL PRECEDENT

OWCP, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁴ It will not review a decision denying or terminating a

⁴ 5 U.S.C. § 8101 *et seq.* 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. *See J.S.*, Docket No. 10-0385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

benefit unless the application for review is filed within one year of the date of that decision.⁵ Timeliness is determined by the document receipt date (*i.e.*, the received date in OWCP's 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

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.⁸ Its 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, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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 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 It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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

⁵ 20 C.F.R. § 10.607; *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000).

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

⁷ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *See Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *See Leon J. Modrowski*, *supra* note 8; *Jesus D. Sanchez*, *supra* note 8.

¹⁴ *See Leona N. Travis*, *supra* note 12.

¹⁵ *See Nelson T. Thompson*, *supra* note 10.

the correctness of OWCP's decision.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁷

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.

The last merit decision of record was OWCP's December 9, 2016 decision. Appellant had one year from that decision, *i.e.*, Saturday, December 9, 2017, to request reconsideration. If the last day of the one-year time period falls on a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.¹⁸ Appellant, therefore, had until Monday, December 11, 2017 to timely request reconsideration. Timeliness is determined by the received date in OWCP's iFECS.¹⁹ As appellant's request for reconsideration was received in iFECS on December 12, 2017, the Board finds that OWCP properly found that appellant's request for reconsideration was untimely filed.²⁰

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP. In support of his reconsideration request, appellant submitted his own statement which discussed the effect the December 2, 2014 employment incident had on his life. The underlying issue in this case, however, was whether the December 2, 2014 employment incident caused or aggravated his diagnosed medical conditions. The issue is medical in nature. Appellant's general contention did not demonstrate clear evidence of error as it did not raise a substantial question as to the correctness of OWCP's decision which denied his claim.²¹ His statement was not medical evidence establishing a causal relationship between his diagnosed conditions and the accepted December 2, 2014 employment incident. It is, therefore, insufficient to demonstrate clear evidence of error.²²

Appellant also submitted medical reports from Dr. Weiss and copies of diagnostic testing dated June 18 and July 28, 2015. While the medical reports from Dr. Weiss discuss causal relationship, OWCP denied the claim as none of the physicians provided a well-reasoned and unequivocal explanation as to how the diagnosed conditions were caused or aggravated by the December 2, 2014 employment incident. In his February 14, 2017 report, Dr. Weiss concluded without any explanation that appellant sustained significant musculoskeletal trauma along with

¹⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁷ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁸ See *supra* note 6 at Chapter 2.1602.4 (February 2016); see also *C.W.*, Docket No. 17-0836 (issued August 7, 2017).

¹⁹ See *supra* note 6.

²⁰ 20 C.F.R. § 10.607(a).

²¹ See *N.S.*, Docket No. 17-1420 (issued January 23, 2018); see *D.W.*, Docket No. 16-0945 (issued July 27, 2016).

²² See *N.S.*, *id.*

permanent orthopedic impairment and disability to his cervical spine secondary to the December 2, 2014 work incident. While he provided an explanation in his December 6, 2017 report as to how the December 2, 2014 work-related motor vehicle accident led to irritated nerve roots and radicular pain and how appellant's cervical bulging discs and protruding disc at C4-5 had increased his vulnerability to trauma, this report, which may have required further development if submitted prior to OWCP's denial, it is not manifest on its face that OWCP committed an error in denying appellant's claim. The Board has explained that a detailed, well-rationalized medical report which would have required further development if submitted prior to issuance of the denial decision, does not demonstrate clear evidence of error.²³ Additionally, the diagnostic testing results, are insufficient to establish that OWCP erred in its denial of appellant's claim.²⁴ The diagnostic testing does not raise a substantial question as to the correctness of OWCP's December 9, 2016 merit decision or demonstrate clear evidence of error as it does not discuss the relevant issue of causal relationship.²⁵ These reports therefore do not demonstrate clear evidence of error and would not require a review of a case.²⁶ Thus, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

On appeal counsel contends that OWCP used the wrong dates to calculate the time limit as appellant's request for reconsideration was delivered by Federal Express and duly served on OWCP on December 8, 2017 at 11:43 a.m. Proof of the delivery date and time was submitted. However, as previously noted, OWCP's procedures provide that timeliness is determined by the received date as recorded in iFECS.²⁷ As the date recorded in iFECS was December 12, 2017, more than one year after OWCP's December 9, 2016 merit decision, appellant's reconsideration request was untimely filed.

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.

²³ See *E.P.*, Docket No. 17-1086 (issued October 13, 2017).

²⁴ See *G.B.*, Docket No. 13-1260 (issued December 2, 2013); see also *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²⁵ See *G.B.*, *id.*

²⁶ See *M.C.*, Docket No. 16-1135 (issued September 11, 2017); see also *G.B.*, *supra* note 24.

²⁷ See *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2019
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