

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

_____)	
A.B., Appellant)	
)	
and)	Docket No. 18-0015
)	Issued: June 11, 2019
DEPARTMENT OF THE AIR FORCE,)	
NORTON AIR FORCE BASE, CA, Employer)	
_____)	

Appearances:
Daniel F. Read, 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
JANICE B. ASKIN, Judge

JURISDICTION

On October 2, 2017 appellant, through counsel, timely appealed from a June 22, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 29, 2012, 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.

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 as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On December 27, 1978 appellant, then a 33-year-old jet engine mechanic, sustained a traumatic injury helping to move an engine fan case while in the performance of duty. He described the nature of his injury as "left side of back (possible pulled muscle)." OWCP accepted appellant's claim for low back strain and herniated nucleus pulposus at L4-5.

By decision dated December 29, 1998, OWCP terminated appellant's wage-loss compensation and medical benefits, finding that the weight of the medical evidence established that he no longer had residuals or disability due to the accepted employment conditions. Appellant subsequently requested an oral hearing, held on June 21, 1999. By decision dated February 17, 2000, an OWCP hearing representative upheld the December 29, 1998 termination decision.

Appellant subsequently exercised his appeal rights several times, but the December 29, 1998 termination decision remained upheld.

On May 8, 2012 appellant again requested reconsideration.

By decision dated June 29, 2012, OWCP reviewed the merits of the case, but denied modification of its prior decisions relating to the December 29, 1998 termination of appellant's wage-loss compensation and medical benefits.

Appellant again submitted multiple requests for reconsideration. However, OWCP issued nonmerit decisions denying his requests, finding that he had not presented relevant and pertinent new medical evidence or argument sufficient to warrant merit review.

On June 20, 2017 appellant, through counsel, again requested reconsideration of OWCP's June 29, 2012 decision. Counsel argued that a recurrence would be appropriate in appellant's claim and attached several reports from Dr. James Bryan Cooper, a Board-certified neurologist.⁴

³ *Order Denying Petition for Reconsideration*, Docket No. 14-1367 (issued July 29, 2015); Docket No. 14-1367 (issued October 14, 2014); *Order Dismissing Appeal*, Docket No. 10-2346 (issued June 27, 2011); *Order Denying Petition for Reconsideration*, Docket No. 10-0206 (issued June 30, 2010); Docket No. 10-0206 (issued February 26, 2010); *Order Denying Petition for Reconsideration*, Docket No. 09-0023 (issued September 18, 2009); Docket No. 09-0023 (issued June 16, 2009); *Order Denying Petition for Reconsideration* (issued February 7, 2007); Docket No. 06-0746 (issued September 7, 2006); Docket No. 96-1544 (issued June 15, 1998).

⁴ By letter dated June 14, 2016, appellant, through counsel, had filed a claim for recurrence (Form CA-2a) commencing September 1, 2011. Counsel noted that a recent medical report indicated that appellant's medical problems continued to worsen at the same site of the original injury. He argued that this was a natural progression of the original injury, and as appellant had not been working, there was no question of filing a new claim based on new factors of employment.

In an April 19, 2012 report, Dr. Cooper noted that he had examined appellant for a complaint of lower back pain. He related that appellant had an injury from December 27, 1978. Appellant had injured his back when he had picked up fan blades on an aircraft with a group of men, one of the men dropped his portion, and the fan blades crashed onto appellant. He immediately felt a pop in his back and ruptured the disc. Appellant was placed on light-duty work, and in 1983, was diagnosed with mild facet degenerative disease. On review of a magnetic resonance imaging (MRI) scan, Dr. Cooper noted that appellant had severe facet degenerative disease, beyond what would be expected for a man of his age. He opined, "It is with a reasonable degree of medical certainty that [appellant's] dis[c] degenerative disease and advanced and severe facet degenerative disease are due to the accident in 1978." Dr. Cooper noted a past surgical history of knee replacement and laminectomy of the lumbar spine around 2000. On examination, he noted decreased vibratory sensation in the bilateral feet with some neuropathy. Appellant had a stiff, antalgic gait with difficulty arising/walking. Dr. Cooper diagnosed lower back pain, facet arthropathy, and bulging discs related to a military-service related incident in 1978 while working on aircraft.

In a May 30, 2012 report, Dr. Cooper noted examining appellant for a complaint of lower back pain. He noted that appellant had been injured in the civil service years before while working on aircraft. On examination, Dr. Cooper noted pain to palpating in the lower back and difficulty arising, a left greater than right positive straight leg raise, and superimposed neuropathy.

Dr. Cooper, in a report dated August 7, 2012, again noted examining appellant for a complaint of back pain. He noted that on December 27, 1978 appellant sustained an employment injury and immediately had a pop in his back. Dr. Cooper noted that appellant did not have back pain prior to this incident. Appellant was diagnosed with a ruptured disc and subsequently developed worsening facet arthropathy. Dr. Cooper indicated that appellant's conditions were out of proportion from what would be expected for his age, noting, "[Appellant] did not have pain and did not seek medical care prior to that, thus it is medically reasonable that the incident, on December 27, 1978, caused this." On examination, appellant noted persistent lower back pain with difficulty arising/walking.

On October 8, 2012 Dr. Cooper examined appellant for a complaint of back pain. He noted that appellant's lower back pain was related to a work-related incident remotely. On examination, Dr. Cooper observed that appellant had pain on palpation, left greater than right, and decreased sensation from the knee down. Appellant had difficult arising/walking and had an antalgic gait. Dr. Cooper diagnosed facet arthropathy, lumbosacral neuritis, and diabetic neuropathy, as well as assessing appellant with low back pain.

In a report dated November 6, 2012, Dr. Cooper examined appellant for a complaint of back pain. He noted that appellant had significant degenerative disease, facet arthropathy, and lumbosacral neuritis. On examination, Dr. Cooper noted pain on palpation to the lower back with difficulty arising/walking.

On March 10, 2014 Dr. Cooper examined appellant for complaints of lumbosacral neuritis and backache. He noted that appellant had been using a spinal cord stimulator for one year with significant reduction in leg pain, although appellant continued to have lower back pain, greater on the right. On examination, Dr. Cooper observed pain on palpation at L3-4, L4-5, and L5-S1. He diagnosed lumbosacral neuritis. Dr. Cooper performed a facet injection.

On April 3, 2017 Dr. Cooper examined appellant for a complaint of back pain. He noted that appellant reported that he had been injured on December 27, 1978. In 1983, Dr. Cooper was diagnosed with mild facet degenerative disease. He indicated his opinion that these conditions were due to the incident in 1978 within a reasonable degree of medical certainty. In 2002, appellant underwent a laminectomy and in 2013, he had a spinal cord stimulator placed. He most recently underwent a radiofrequency ablation in November 2016, which provided adequate pain relief through January 2017, when it returned. On examination, appellant noted decreased vibratory sensation in the feet bilaterally, which was likely neuropathy. He had difficulty arising, with a stiff antalgic gait. Appellant had significant pain to palpation at L3-4, L4-5, and L5-S1 bilaterally, with the right greater than the left. Dr. Cooper diagnosed lumbosacral spondylosis without myelopathy. He administered an injection at facet joints on the right at L3-4, L4-4, L5-5, and L5-S1.

In a report dated May 5, 2017, Dr. Cooper examined appellant and noted that appellant had ongoing spinal stenosis and degenerative disc disease, with a remaining herniated disc. He noted that appellant had a work-related injury and still suffered the consequences. On examination, Dr. Cooper observed that appellant had pain on palpation to the lower back and difficulty arising/walking.

In a letter dated May 31, 2017, Dr. Cooper noted that he had previously written to express his opinion that appellant's current back problems were a direct consequence of a work-related injury in 1978. He noted that appellant was in reasonably good health until 1978 without significant complaints of back pain and again noted how the injury occurred. Dr. Cooper indicated that, while an impartial medical specialist of record had reviewed MRI scans and concluded that appellant did not have a herniated disc in 1998, he disagreed, noting that appellant had a disc rupture, annular tear, and that "the old rupture is not completely healed." He explained that, in 1998, there was no fresh and overtly ruptured disc, but that disc ruptures and bulges are "a continuum of issues that must be both radiologically and clinically diagnosed and treated." Dr. Cooper opined that appellant's current condition stemmed from the 1978 work incident and that there was no indication or proof of intervening injury. He observed that appellant's L4-5 disc was severely degenerated and was the primary source of his chronic pain, with related features of facet arthropathy and sacroiliitis. Dr. Cooper recommended a laminectomy.

By decision dated June 22, 2017, OWCP denied appellant's request for reconsideration of its June 29, 2012 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error. It further noted that because appellant's work-related injury had resolved, it could not consider recurrence.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that for merit decisions issued on or

⁵ This section provides in pertinent part: "[t]he 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).

⁶ 20 C.F.R. § 10.607.

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.⁷ 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).⁸ 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.⁹

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it 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.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 demonstrates 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.¹² The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ 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.¹⁵

The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁶ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁷ It is not enough merely to show that the

⁷ *Id.* at § 10.607(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *Id.* at Chapter 2.1602.4 (February 2016).

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

¹⁰ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹² *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁵ *R.C.*, Docket No. 17-0198; *Thankamma Mathews*, 44 ECAB 765 (1993).

¹⁶ *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹⁷ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019); *Jimmy Day*, 48 ECAB 652 (1997).

evidence could be construed so as to produce a contrary conclusion.¹⁸ 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.¹⁹ 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.²⁰ Where a request is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.²¹

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.

An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.²² As appellant's request for reconsideration was not received by OWCP until June 20, 2017, more than one year after issuance of its June 29, 2012 merit decision, the Board finds that it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its June 29, 2012 decision.²³

The Board finds that appellant has not demonstrated clear evidence of error. Appellant failed to submit the type of positive, precise, and explicit evidence that manifests on its face that OWCP committed an error in its June 29, 2012 decision.²⁴

In the decision dated June 29, 2012, OWCP denied modification of its December 29, 1998 decision to terminate compensation for accepted medical conditions. The December 29, 1998 decision to terminate appellant's medical and compensation benefits found that the weight of the medical evidence, as represented by the opinion of an impartial medical specialist, established that he no longer had residuals of the accepted employment injury.

In his request for reconsideration, appellant, through counsel, argued that a recurrence would be appropriate in appellant's claim and attached reports from Dr. Cooper, dated April 19, 2012 to May 31, 2017. In these reports, Dr. Cooper expressed his opinion that appellant's current lumbar conditions were related to the accepted work-related injury on December 27, 1978. His reports contain results of examination and diagnostic testing along with a history of injury and his opinion on the causal relationship between appellant's December 27, 1978 work-related injury and appellant's present conditions. These reports fail to demonstrate clear evidence of error on the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See Pete F. Dorso*, 52 ECAB 424, 427 (2001); *supra* note 15 at 44 ECAB 765, 770 (1993).

²¹ 20 C.F.R. § 10.608(b).

²² *Supra* note 4.

²³ *Supra* note 7.

²⁴ *Id.* *See also* A.C., Docket No. 17-0663 (issued October 24, 2017).

part of OWCP in issuing its June 29, 2012 decision denying modification of termination of appellant's compensation benefits.

As noted, clear evidence of error is intended to represent a difficult standard.²⁵ The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁶ None of the evidence submitted on reconsideration manifests on its face that OWCP committed an error in terminating appellant's compensation benefits. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWC's June 29, 2012 decision. Thus, the Board finds that OWCP properly denied his request for reconsideration.

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.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 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

²⁵ *Supra* note 16.

²⁶ *See F.R.*, Docket No. 09-0575 (issued January 4, 2010).