

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

M.M., Appellant)	
)	
and)	Docket No. 19-0021
)	Issued: May 6, 2019
DEPARTMENT OF THE AIR FORCE,)	
LACKLAND AIR FORCE BASE, TX, Employer)	
)	

Appearances:
Wayne Johnson, 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 October 3, 2018 appellant, through counsel, filed a timely appeal from an April 6, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 28, 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 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, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 14, 2017 appellant, then a 40-year-old air conditioning equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on November 16, 2016 he sustained a ruptured lumbar disc when he climbed a ladder to access the blower compartment of an air handling unit while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that he stopped work on November 16, 2016.

Appellant was initially treated on November 17, 2016 by Raul Canales Jr., a physician assistant. Mr. Canales noted that appellant had pain radiating from his upper back to his chest for one week, with left arm numbness. He also noted "no trauma/injury."

By development letter dated February 21, 2017, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the additional factual and medical evidence needed to support his claim. OWCP afforded appellant 30 days to submit the necessary evidence.

In a January 16, 2017 report, Dr. Ralph De La Rosa, Board-certified in family medicine, noted that appellant was disabled from work from January 16 through February 2, 2017.

In an attending physician's report (Form CA-20) dated March 21, 2017, Dr. De La Rosa, diagnosed extruded disc on the right L2 extending superior from L2-3. He checked a box marked "yes" indicating that he believed that appellant's condition was caused or aggravated by the November 16, 2016 employment incident. Dr. De La Rosa also noted that appellant's acute lower back injury was related to the injury that occurred at work on November 16, 2016. He related that appellant's period of partial disability was for the period November 17, 2016 to January 11, 2017, and that from January 11, 2017 and onward appellant was totally disabled and could not return to work. Dr. De La Rosa checked a box marked "yes" when asked whether appellant had a history or if there was evidence of concurrent or preexisting injury, and noted that his paroxysmal atrial fibrillation was aggravated by the extruded disc at L2-3.

In a separate report dated March 21, 2017, Dr. De La Rosa diagnosed lumbar disc herniation with radiculopathy and chronic paroxysmal atrial fibrillation.

By decision dated March 28, 2017, OWCP denied appellant's claim, finding that he had not submitted evidence containing a medical diagnosis causally related to the accepted November 16, 2017 employment incident. It noted that appellant's treating physician neither provided a complete history of appellant's injury, nor a well-reasoned medical opinion supported by objective findings explaining how the diagnosed conditions had been caused or aggravated by the November 16, 2016 employment incident.

On March 30, 2018 appellant, through counsel, requested reconsideration of OWCP's March 28, 2017 decision and submitted additional medical evidence and argument along with his request.

In an April 25, 2017 report Dr. Sarah E. Trampota, Board-certified in anesthesiology and pain management, related that appellant's pain began suddenly in January 2017 when he was at home. She diagnosed chronic pain syndrome, intervertebral disc degeneration lumbosacral region, spondylosis lumbosacral region, myalgia, and neuralgia.

In reports dated May 15 and 22, 2017, Dr. Trampota, related that she had performed right-sided L2, L3, and L4 transforaminal epidural steroid injections. She again indicated diagnoses of chronic pain syndrome, pain in limb, lumbosacral intervertebral disc degeneration, and lumbosacral spondylosis. On June 6, 2017 Dr. Trampota related that appellant's symptoms had improved by 40 percent since his epidural injections.

By decision dated April 6, 2018, OWCP denied appellant's reconsideration request, 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.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ The one-year period begins on the next day after the date of the originally contested decision.⁵ In addition, when determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, a Sunday, or a legal holiday.⁶ 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).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited

³ 5 U.S.C. § 8128(a); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁶ *Id.* See *M.A.*, Docket No. 13-1783 (issued January 2, 2014).

⁷ *Supra* note 5 at Chapter 2.1602.4(b) (February 2016).

⁸ *J.W.*, *supra* note 3; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

review to determine whether it demonstrates clear evidence of error.⁹ If an application demonstrates clear evidence of error, it will reopen the case for merit review.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 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.¹⁶

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁷ The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); see also *id.* at § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

¹¹ *J.D.*, Docket No. 16-1767 (issued January 12, 2017); see *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *J.D.*, *supra* note 11; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *J.W.*, *supra* note 3; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁷ *Supra* note 12.

¹⁸ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹⁹ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

Appellant had one year from OWCP's March 28, 2017 decision to timely request reconsideration. He, therefore, had until Wednesday, March 28, 2018 to timely request reconsideration. As OWCP did not receive appellant's reconsideration request until March 30, 2018, more than one year after the March 28, 2017 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his claim.²⁰

Appellant submitted reports from Dr. Trampota dated April 25, May 15 and 22, and June 6, 2017 as well as counsel's argument dated March 30, 2018. The underlying issues in this case are medical in nature, namely whether appellant had established a medical diagnosis causally related to the accepted November 16, 2016 employment incident. Dr. Trampota related and reiterated her diagnoses, but failed to provide a medical opinion explaining how the diagnosed conditions were caused or aggravated by the accepted November 16, 2016 employment incident. Rather, in her April 25, 2017 report, she related that appellant's pain began in January 2017 at home. Thus this report is insufficient to establish clear evidence of error by OWCP in its March 28, 2017 decision.

Counsel's argument in his March 30, 2018 letter regarding the probative value of the medical evidence is also insufficient to shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of OWCP's decision as it constitutes a lay opinion which lacks evidentiary value.²¹

Clear evidence of error is intended to represent a difficult standard. 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.²² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²³

For these reasons, the Board finds that appellant has not demonstrated clear evidence of error by OWCP in its March 28, 2017 decision. Consequently, OWCP properly performed a limited review of his argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied his untimely request for a merit reconsideration.²⁴

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

²⁰ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

²¹ *B.H.*, Docket No. 15-0978 (issued October 22, 2015).

²² *Supra* note 17.

²³ *Supra* note 19.

²⁴ *See W.A.*, Docket No. 18-0297 (issued July 18, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 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