United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
	)	**Docket No. 18-0340**
and	)	**Issued: October 22, 2019**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Sevierville, TN, Employer	)	

Appearances:
Ronald L. Coile, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 6, 2017 appellant, through his representative, filed a timely appeal from a November 8, 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 March 16, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

[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 of the merits of his claim pursuant to 5 U.S.C. § 8128(a) because his September 25, 2017 request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 13, 2014 appellant, then a 69-year-old sales, services, and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on June 12, 2014 he injured his left shoulder when trying to separate two hampers while in the performance of duty. On the reverse side of the claim form the employing establishment indicated that appellant regularly worked 9:00 a.m. to 6:00 p.m., Monday through Friday. Appellant stopped work on June 13, 2014.

On June 20, 2014 V.F., supervisor of customer services, offered appellant a modified assignment as a nontraditional full-time (NTFT) clerk, which was effective June 21, 2014. Appellant's duties included "[working] the window" with no lifting overhead or lifting over three pounds with the left arm.[3] He was expected to work 9:00 a.m. to 6:00 p.m., with a one hour lunch break. Appellant accepted the limited-duty job offer on June 20, 2014. He returned to work on June 23, 2014.

On August 13, 2014 OWCP accepted appellant's claim for other affections of the left shoulder region and partial tear of the left rotator cuff. On September 17, 2014 appellant underwent an authorized left shoulder arthroscopic procedure.

On September 22, 2014 OWCP received a claim for wage-loss compensation (Form CA-7) for the period September 17 to 30, 2014. The employing establishment noted that appellant's surgery was September 17, 2014 and that he had worked a fixed 40 hours per week schedule. It further noted that he was an NTFT Career Flexible employee and guaranteed 34 hours per week, with an annual pay rate of $43,846.00 (one year prior to date of injury), effective June 12, 2014, which resulted in a weekly pay rate of $843.19. Therefore, based on the augmented rate, appellant's weekly compensation rate was $632.49.

In a September 29, 2014 memorandum of telephone call, the employing establishment advised that appellant was paid continuation of pay (COP) for the period June 26 to July 8, 2014 for medical appointments. Additionally it was noted that they indicated that appellant was guaranteed 34 hours per week, but the box was checked that he worked 40 hours. OWCP explained that the employing establishment indicated that the box should not have been checked as he had not worked 40 hours a week. It was noted that appellant's hours were averaged and they came out to 34 hours per week.

OWCP spoke with B.F., a health and resource management specialist, *via* telephone on October 3, 2014 and she indicated that appellant was a part-time regular employee who worked a guaranteed 34 hours per week.

[3] Additional duties included assisting customers using the self-service kiosk (SSK), as necessary.

An October 6, 2014 memorandum of telephone call, from J.P., the acting human resources specialist, indicated that appellant was on annual leave/sick leave from June 13 through 21, 2014 due to his injury and that he returned to work on June 23, 2014. Furthermore, the period June 26 to July 8, 2014 was for medical appointments only and the correct continuation of pay was from June 13 to July 27, 2014. A pay rate memorandum indicated that for the June 12, 2014 effective pay rate date, appellant had a weekly pay rate of $843.19 based upon a 34-hour week.

In November 2014, OWCP paid wage-loss compensation for temporary total disability beginning September 17, 2014, and placed appellant on the periodic compensation rolls effective September 21, 2014.[4] On November 16, 2014 appellant returned to work for two days per week (Sunday and Monday), working two hours each day. OWCP subsequently removed her from the periodic compensation rolls.

In a November 21, 2014 memorandum of telephone call, appellant's representative called to explain that appellant should be paid based upon a 40-hour workweek since that was what he had worked for many years.

In a letter dated November 26, 2014, B.F. provided information regarding appellant's status. She noted that when appellant was injured he was an NTFT clerk which was a regular employee that was not guaranteed 40 hours per week. B.F. explained that his guarantee was/is 34 hours per week and he was considered an hourly rate employee at $26.62 per hour. She advised that appellant physically worked 1565.33 hours one year prior to date of injury but he also used leave on most weeks to achieve pay for 40 hours per week. For the year prior to the date of injury, B.F. indicated that he used 486.12 hours of leave which was a combination of holiday pay, sick leave and annual leave. She noted that she was advising OWCP of this information because appellant believed that his compensation was incorrect. B.F. also noted that appellant returned to work on November 16, 2014 for two hours and worked on November 17, 2014 for two hours. She advised that he was informed to submit Form CA-7 forms for compensation.

In a December 3, 2014 memorandum of telephone call, appellant's representative indicated that the letter from the employing establishment was incorrect. He argued that appellant was guaranteed 34 hours, but was scheduled for a 40-hour week. OWCP advised the representative that he should contact the employing establishment if they disagreed.

By letters dated December 10, 2014 and January 19, 2015, appellant's representative, alleged that appellant's compensation should be based on a 40-hour workweek versus a guaranteed 34-hour workweek. He advised that this was a minimum number of hours and not a maximum. Appellant's representative noted that B.F. indicated that appellant took assorted leave in the year prior to his injury and explained that appellant was a regular employee entitled to use earned leave. He explained that appellant was a regular employee and noted that pay stubs going back to the year prior to his accident of June 2014 revealed that appellant was scheduled five days a week, Monday through Friday, for a minimum of eight hours per day. Appellant's representative noted that appellant worked overtime as well. He indicated that he received weekly clock rings and print outs and noted that after the injury, his supervisor changed the schedule to reflect different work

[4] Appellant's compensation was calculated based on a weekly pay rate of $843.19.

days and shorter hours of work per day and week. However, appellant's representative noted for the previous two years, appellant worked 40 hours a week.

In a letter dated March 17, 2015, OWCP advised appellant and his representative of the employing establishment's determination of the 34-hour workweek and provided a copy of the employing establishment's letter of November 26, 2014. It explained that if it was determined by the employing establishment that they had provided correct information, upon notification, his case file would be updated and appellant would receive compensation based upon the corrected pay rate.

In a letter dated April 13, 2015, appellant's representative indicated that he was submitting additional information regarding the amount of hours appellant worked prior to his injury. In correspondence dated April 11, 2015, M.W., a union official, provided additional information regarding the hours worked by appellant. He provided a statement dated April 11, 2015 from V.F., the manager of customer service at the employing establishment who responded in the form of e-mail correspondence, that appellant worked a minimum of 40 hours a week in five days for one year prior to his injury. She also confirmed that appellant used leave in accordance with the proper rules and regulations of the employing establishment. However, V.F. did not sign the documentation.

In a letter dated January 19, 2016, OWCP again requested information from the employing establishment regarding appellant's weekly pay rate. It specifically requested an explanation between the noted 34 hours a week, and appellant's indication that he worked 40 hours a week. In a memorandum of telephone call dated February 1, 2016, an employing establishment representative, B.F., indicated that appellant worked "34" hours per week, which included 6 hours per day, Monday through Friday, and 6 hours on Saturday.

By decision dated March 16, 2016, OWCP found that appellant failed to establish that he had worked 40 hours per week on or before his June 12, 2014 date of injury. Instead, the evidence supported that he was only guaranteed 34 hours of work per week, which weekly pay rate ($843.19) formed the basis for his award of compensation for the period September 17, 2014 to December 19, 2015, and would remain the official pay rate effective June 12, 2014.

Appellant's representative contacted OWCP *via* telephone on March 17 and 21, 2017 regarding the pay rate and indicated that he did not know how to correct it. He was advised to contact the employing establishment.

On September 25, 2017 appellant, through his representative, requested reconsideration. He again argued that appellant was technically a 40-hour a week regular employee. Appellant's representative argued that there was nothing in the manual that gave the employing establishment the right to deny appellant his 40-hour-a-week pay rate. He also argued that appellant's original bid should have been 36 hours a week, at a minimum. Appellant's representative argued that appellant worked a minimum of 36 hours a week until he retired. He also indicated that he was resubmitting paperwork from V.F. and M.W., which was now signed. Appellant's representative repeated his argument that appellant should be properly paid for his work.

OWCP received copies of the previously submitted correspondence dated April 11, 2015 from V.F., a supervisor and manager of customer service, and a September 13, 2017 letter from M.W., a union representative. The correspondence was identical to the previously submitted paperwork confirming appellant worked a minimum of 40 hours a week, in five days, prior to his injury. However, both documents were now signed by their respective authors.

By decision dated November 8, 2017, OWCP denied appellant's request for further merit review because his request 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.[5] 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.[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 request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.[9] If an application demonstrates clear evidence of error, OWCP 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. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely demonstrate that the evidence could be construed so as to produce a contrary conclusion. 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. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the

[5] 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[6] 20 C.F.R. § 10.607(a).

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

[8] *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.[11]

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrate that OWCP made an error (for example, proof that a schedule award was miscalculated). 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.[12] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[13]

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 Board first finds that OWCP properly determined that appellant's failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[14] As appellant's request for reconsideration was not received by OWCP until September 25, 2017, more than one year after the issuance of its March 16, 2016 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error on the part of OWCP in issuing the March 16, 2016 decision. The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[15]

The Board finds that appellant has not met his burden of proof to demonstrate clear evidence of error on the part of OWCP in issuing its March 16, 2016 decision. Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its March 3, 2016 decision.[16] The evidence and argument he submitted did not raise a substantial question concerning the correctness of OWCP's prior decision.[17]

OWCP issued its March 16, 2016 decision finding that appellant's compensation for the period September 17, 2014 to December 19, 2015 was paid at a guaranteed weekly rate of 34 hours per week as opposed to 40 hours per week. In making its decision, it noted the paperwork from V.F., but declined to accord merit to her statement because the paperwork was unsigned. Instead,

[11] *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

[12] *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

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

[14] *Supra* note 6.

[15] *G.G., supra* note 8; *Nancy Marcano*, 50 ECAB 110 (1998).

[16] *See T.M.*, Docket No. 18-1221 (issued September 3, 2019).

[17] *Id*.

OWCP concluded that the evidence supported that appellant was only guaranteed 34 hours of work per week, for a weekly pay rate of $843.19, which formed the basis for his award of compensation for the period September 17, 2014 to December 19, 2015, and would remain the official pay rate effective June 12, 2014.

In his request for reconsideration, appellant's representative argued that appellant was "technically a 40-hour a week regular employee." To support his argument, he merely resubmitted the paperwork from V.F., now signed, confirming that appellant had worked 5 days a week and 40 hours a week in the year prior to his injury.

Although the representative made an assertion that appellant was a 40-hour per week employee, the only proof submitted was a document previously of record which was now signed. The Board finds, however, that appellant has not explained how this generalized argument raised a substantial question as to the correctness of OWCP's March 16, 2016 decision. The newly signed paperwork from V.F. does not, on its face, demonstrate clear evidence of error in the March 16, 2016 decision. The Board has reviewed the new factual documents and conclude that they do not, on their face, establish that appellant was consistently working a 40-hour workweek prior to his accepted employment injury. The submitted documents are vague in nature, merely documenting an observation from V.F., who did not base her statement on payroll records or other verifiable evidence which clearly establishes 40 hours per week of work.

The Board has long held that clear evidence of error is intended to represent a difficult standard.[18] Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. 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.[19]

The Board finds that appellant's request for reconsideration does not show, on its face, that OWCP committed error when it found in its March 16, 2016 decision that the employee had not established a 40-hour workweek.[20] Therefore, OWCP properly determined that appellant had not demonstrated clear evidence of error in the March 16, 2016 decision.

[18] *See supra* note 12.

[19] *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

[20] *See S.F.*, Docket No. 09-0270 (issued August 26, 2009).

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 November 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board