

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

R.T., Appellant)	
)	
and)	Docket No. 19-0604
)	Issued: September 13, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Las Vegas, NV, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 22, 2018 appellant filed a timely appeal from an August 29, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a decision of the Board dated May 5, 2017, which became final after 30 days of issuance, and is not subject to further review.¹ As there was no merit decision issued by OWCP within 180 days from 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 20 C.F.R. § 501.6(d); *see M.S.*, Docket No. 18-0222 (issued June 21, 2018); *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. 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.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 12, 2013 appellant, then a 27-year-old postal support employee clerk, filed a traumatic injury claim (Form CA-1) alleging an injury to his left shoulder on September 6, 2012 after lifting and pitching parcels into designated locations while in the performance of duty.

By decision dated March 29, 2013, OWCP denied the claim, finding that, while the September 6, 2012 employment incident had occurred as alleged, the medical evidence of record was insufficient to establish left shoulder, cervical, and/or thoracic conditions causally related to the accepted work incident.

On May 9, 2013 appellant requested reconsideration and submitted additional medical evidence.

By decision dated August 2, 2013, OWCP denied modification of its prior decision, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed condition and work incident.

On May 20, 2014 appellant requested reconsideration and submitted additional evidence in support of his claim.

By decision dated August 29, 2014, OWCP denied modification of its prior decision. Appellant, through counsel, then appealed to the Board.

By decision dated April 16, 2015, the Board affirmed OWCP's August 29, 2014 decision finding that the medical evidence of record was insufficient to establish that appellant's medical conditions were caused or aggravated by the accepted September 6, 2012 employment incident.

On April 12, 2016 appellant requested reconsideration and submitted additional medical evidence.

By decision dated June 15, 2016, OWCP denied modification of its prior decision. It found that the evidence submitted did not explain how the work factors claimed would have resulted in the diagnosed conditions. Appellant, through counsel, then appealed to the Board.

In a decision dated May 5, 2017, the Board affirmed OWCP's June 15, 2016 decision again finding that the medical evidence was insufficient to establish causal relationship.

⁴ Docket No. 15-0256 (issued April 16, 2015); Docket No. 16-1518 (issued May 5, 2017).

On August 22, 2017 appellant requested reconsideration.

By decision dated November 20, 2017, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant a merit review.

OWCP subsequently received a March 29, 2018 report from Dr. John Champlin, a Board-certified family practitioner, who opined that appellant's diagnosed conditions of a compression fracture of the cervical spine, left shoulder anterior labral tear, left shoulder joint derangement, acquired deformity of the spine, and left shoulder muscle spasms were causally related to lifting and pitching mail at work on September 6, 2012.

On June 6, 2018 appellant requested reconsideration of the Board's May 5, 2017 decision. By decision dated August 29, 2018, OWCP summarily denied his request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.⁵

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁶ 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.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 Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

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 review to determine whether it demonstrates clear evidence of error.¹⁰ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹¹

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

⁵ The Board notes that OWCP is not authorized to review Board decisions. Board decisions are not subject to review except by the Board and they become final after 30 days. Although the May 5, 2017 Board decision was the last merit decision of record, OWCP's June 15, 2016 denial of modification is the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d).

⁶ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁹ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

¹¹ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (February 2016).

question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

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 shows 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.¹³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁵ Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons. The Board has held that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant's June 6, 2018 request for reconsideration was untimely filed. The last merit decision was issued by the Board on May 5, 2017 and OWCP received appellant's request for reconsideration on June 6, 2018. As appellant's request for reconsideration was not received by OWCP within the one-year time limitation, pursuant to 20 C.F.R. § 10.607(a), his request for reconsideration was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim.¹⁷

¹² *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹⁴ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁵ 5 U.S.C. § 8124(a).

¹⁶ *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *D.E.*, Docket No. 13-1327 (issued January 8, 2014); *L.C.*, Docket No. 12-0978 (issued October 26, 2012); Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances* Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

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

The August 29, 2018 OWCP decision found that appellant's reconsideration request did not present clear evidence of error. The Board finds, however, that OWCP did not make any findings regarding the evidence submitted in support of the reconsideration request.¹⁸

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁹ Its regulations at section 10.126 of Title 20 of the Code of Federal Regulations provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.²⁰ As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²¹

To determine whether appellant has established clear evidence of error, OWCP will review the evidence submitted and arguments raised in support of the request and determine whether such evidence or argument is sufficient to show error in its prior decision.²² It shall then issue a decision containing findings of fact and a statement of reasons. In the instant case, OWCP provided no discussion relative to the new medical evidence submitted by appellant from Dr. Champlin. Its failure to provide factual findings and explain the basis for its conclusion that appellant did not demonstrate clear evidence of error precludes the Board's review of the decision.²³

The Board finds that OWCP failed to properly explain the findings with respect to the issue presented. Thus, OWCP, in its August 29, 2018 decision, did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision, *i.e.*, whether he demonstrated clear evidence that OWCP's last merit decision was incorrect.

The Board will set aside OWCP's August 29, 2018 decision and remand the case for an appropriate decision on appellant's untimely reconsideration request.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁸ See *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

¹⁹ 5 U.S.C. § 8124(a); see *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

²⁰ 20 C.F.R. § 10.126. *M.L.*, Docket No. 09-0956 (issued April 15, 2010); see also *O.R.*, 59 ECAB 432 (2008).

²¹ See *R.C.*, *supra* note 18; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²² See *George C. Vernon*, 54 ECAB 313 (2003).

²³ See *R.C.*, *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with this decision of the Board.

Issued: September 13, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board