

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

M.B., Appellant)	
)	
and)	Docket No. 19-1830
)	Issued: April 20, 2020
DEPARTMENT OF VETERANS AFFAIRS,)	
DEPARTMENT OF DATA MANAGEMENT,)	
OIT REGIONAL 2, Houston, TX, Employer)	
)	

Appearances:
William L. Nealy, II, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 28, 2019 appellant, through counsel, filed a timely appeal from a May 22, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 21, 2017, to the filing of this appeal,

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.

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 the case.³

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).

FACTUAL HISTORY

On May 3, 2016 appellant, then a 70-year-old Information Technology (IT) specialist (customer support), filed an occupational disease claim (Form CA-2) alleging that his October 15, 2015 stroke was caused or aggravated by stress due to factors of his federal employment. He was last exposed to conditions alleged to have caused his condition on February 3, 2016.

In a May 24, 2016 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. No evidence was received.

By decision dated September 22, 2016, OWCP denied appellant's claim finding that he failed to establish a stress-related condition, as alleged.

On May 15, 2017 appellant requested reconsideration. In a letter dated April 29, 2017, he explained that his stroke was related to his left hand carpal tunnel surgery, that it took OWCP three years to approve the surgery, and that OWCP approved the surgery after his stroke occurred. Appellant also noted that the employing establishment had created a stressful and hostile work environment. In a June 2, 2017 letter, he advised that he enclosed forms to release his medical record.⁴

By decision dated August 21, 2017, OWCP denied modification of the September 22, 2016 decision.

On September 19, 2017 appellant again requested reconsideration. He indicated that he was submitting a February 2, 2016 medical report.⁵ No further evidence was received.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 22, 2019 decision, OWCP received additional evidence. 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.*

⁴ No medical release forms were of record.

⁵ A February 2, 2016 medical report was not of record.

By decision dated September 27, 2017, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

On October 31, 2017 appellant requested reconsideration of OWCP's August 21, 2017 merit decision denying modification. In support thereof, he submitted an October 24, 2017 report, from Dr. Priti Palvadi, a Board-certified psychiatrist and neurologist. Dr. Palvadi noted that appellant, a patient since March 2017, had experienced a stroke in February 2016, after his symptoms began at work. She indicated that appellant had complained of a hostile work environment which caused his symptoms, but she noted that he did have other risk factors for stroke including hypertension and diabetes.

In a letter dated April 12, 2019, appellant inquired about the status of his reconsideration request.

By decision dated May 22, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁹ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

⁶ 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).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). 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. *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(a), (b).

ANALYSIS

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

In support of his October 31, 2017 reconsideration request, appellant submitted an October 24, 2017 medical report from Dr. Palvadi. However, it was not until May 22, 2019, nearly 19 months later, that OWCP issued a decision finding that the evidence submitted with appellant's October 31, 2017 request for reconsideration was insufficient to warrant merit review.

OWCP's procedures provide a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.¹¹ As OWCP's May 22, 2019 decision was issued more than 90 days after it received appellant's request for reconsideration, the question becomes whether the delay has impacted appellant's ability to file a timely request for reconsideration of the merits of his case under 5 U.S.C. § 8128(a).¹² Had OWCP issued the reconsideration decision within its 90-day timeliness goal or January 29, 2018, appellant would have had additional time to appeal the August 21, 2017 decision to the Board and/or request reconsideration of the merits of the claim under the criteria set forth for a timely request for reconsideration with OWCP. Here, the delay has impacted appellant's ability to bring a timely request for reconsideration of OWCP's August 21, 2017 merit decision before the Board. Any further requests for reconsideration would be untimely as they would be filed more than one year following the August 21, 2017 merit decision. The standard of review for an untimely request for reconsideration requires appellant to demonstrate clear evidence of error. The Board has repeatedly held that clear evidence of error is intended to represent a difficult standard.¹³

Therefore, the Board finds that this case is not in posture for decision.¹⁴ To preserve appellant's right to file a timely appeal to the Board or request reconsideration with OWCP, the case will be remanded to OWCP for a merit review of the evidence of record followed by an appropriate decision.

CONCLUSION

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

¹¹ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.2(c) (October 2011).

¹² *See G.D.*, Docket No. 19-0815 (issued January 16, 2020); *E.I.*, Docket No. 18-0634 (issued January 23, 2019) (the Board ordered a merit review where OWCP delayed its reconsideration decision more than 90 days from the receipt of the request).

¹³ *P.L.*, Docket No. 18-0813 (issued November 20, 2018); *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

¹⁴ *See G.D.*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further action consistent with this decision.

Issued: April 20, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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