

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

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J.S., Appellant)	
)	
and)	Docket No. 19-1203
)	Issued: January 22, 2020
U.S. POSTAL SERVICE, HIGHPOINT BRANCH, Clearwater, FL, Employer)	
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Appearances:
Richard S. Webster, 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 May 9, 2019 appellant, through counsel, filed a timely appeal from a November 21, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from OWCP's last merit decision of the issue on appeal, dated July 9, 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 to review the merits of this case.³

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.*

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 October 2, 2018 request for reconsideration, finding that 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 set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On June 18, 2009 appellant, then a 52-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained an injury to his right shoulder, arm, hand, ribs, and low back when he tripped on a plastic strap while in the performance of duty. On December 9, 2010 OWCP accepted his claim for lumbar sprain and right shoulder sprain.⁵ On April 3, 2012 it expanded appellant's accepted conditions to include temporary aggravation of lumbar degenerative disc disease, right shoulder impingement, and myofascial pain.

On April 26, 2012 appellant filed a claim for wage-loss compensation (Form CA-7) for the period January 8, 2011 to March 31, 2012.

In a development letter dated May 4, 2012, OWCP advised appellant of the deficiencies of his claim and informed him of the evidence necessary to establish his claim. Appellant was afforded 30 days to submit the necessary evidence.

In a report dated May 16, 2012, Dr. Ashraf F. Hanna, Board-certified in pain medicine, reviewed appellant's history of injury and performed a physical examination. He diagnosed discogenic syndrome, lumbar spinal stenosis, facet syndrome, and thoracic or lumbosacral neuritis or radiculitis. Under a heading titled, "work status," Dr. Hanna noted temporary total disability.

By decision dated July 9, 2012, OWCP denied appellant's claim, finding that appellant had not established that he was disabled during the period commencing January 8, 2012.

Appellant continued to file wage-loss compensation claims (Form CA-7). He submitted reports dated December 7, 2012, and March 11, April 23, May 22, and September 11, 2013 from Dr. Hanna who noted that appellant was temporarily totally disabled.

On November 16, 2015 appellant, through counsel, requested reconsideration of OWCP's July 9, 2012 decision.

In a report dated January 22, 2016, Dr. Hanna reviewed appellant's history of injury and performed a physical examination. He diagnosed chronic pain syndrome, displacement of lumbar intervertebral disc without myelopathy, paresthesia, and lumbar spinal stenosis.

⁴ Docket No. 14-0558 (issued December 17, 2014).

⁵ On January 14, 2011 appellant filed a wage-loss compensation claim (Form CA-7) for leave without pay for total disability for the period August 3, 2009 to January 7, 2011. By decision dated April 6, 2015, OWCP accepted his claim for wage-loss compensation for the period August 3, 2009 to January 7, 2011 for 3,056.14 hours of leave without pay.

By decision dated February 19, 2016, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

Thereafter, appellant resubmitted reports from Dr. Hanna that had already been considered by OWCP's in its decisions dated February 26, 2010, and August 2 and October 16, 2013. He also submitted a report not previously considered by OWCP dated October 6, 2016 from Dr. Hanna in which he noted appellant's history of injury and reiterated his diagnoses.

On October 2, 2018 appellant, through counsel, again requested reconsideration of OWCP's July 9, 2012 decision.

By decision dated November 21, 2018, OWCP denied appellant's request for reconsideration 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.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.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

⁶ 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *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 *See M.E.*, *supra* note 6; *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); *M.E.*, *supra* note 6; *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (February 2016).

¹² *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *see Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Id.*; *see also Leona N. Travis*, 43 ECAB 227 (1999).

substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁸ The claimant must present evidence which, on its face, demonstrates 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.¹⁹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁰

ANALYSIS

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

OWCP's regulations²¹ and procedures²² establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. The last decision on the merits of the issue of disability for the claimed period was OWCP's July 9, 2012 decision, which had found that the evidence of record failed to establish that appellant was disabled during the period on and after January 8, 2012. Appellant had one year from the date of that decision to timely request reconsideration. As his reconsideration request was received on

¹⁴ *J.F.*, *supra* note 12; *J.D.*, *supra* note 11; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *J.F.*, *supra* note 12; *M.E.*, *supra* note 6; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁸ *See G.G.*, *supra* note 11.

¹⁹ *J.F.*, *supra* note 12; *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

²⁰ *See M.E.*, *supra* note 6; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²¹ 20 C.F.R. § 10.607(a); *see G.G.*, *supra* note 11; *Alberta Dukes*, 56 ECAB 247 (2005).

²² *Supra* note 8 at Chapter 2.1602.4 (February 2016); *see A.F.*, Docket No. 18-0645 (issued October 26, 2018); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

October 2, 2018, over six years after the July 9, 2012 merit decision, it was untimely filed. Therefore, appellant must demonstrate clear evidence of error by OWCP.²³

The Board finds that appellant failed to demonstrate clear evidence of error on the part of OWCP. On reconsideration appellant submitted medical reports from Dr. Hanna which were previously considered by OWCP, as well as a new report from Dr. Hanna that failed to opine as to the claimed disability period. He did not sufficiently explain how this evidence raised a substantial question as to the correctness of OWCP's decision.²⁴

The Board accordingly finds that the evidence submitted on reconsideration is of insufficient probative value to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP's July 9, 2012 decision.²⁵ Appellant has not raised an argument or submitted evidence that demonstrates on its face that OWCP committed an error in denying his claim, nor has he provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's July 9, 2012 decision. Thus, OWCP properly determined that his untimely request for reconsideration failed to demonstrate clear evidence of error.²⁶

CONCLUSION

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

²³ 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

²⁴ *See G.G.*, *supra* note 11; *see also A.M.*, Docket No. 10-0526 (issued November 8, 2010).

²⁵ *See G.G.*, *supra* note 11; *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

²⁶ *See S.M.*, Docket No. 18-0075 (issued April 11, 2018); *see also M.B.*, Docket No. 17-1505 (issued January 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 22, 2020
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