United States Department of Labor
Employees' Compensation Appeals Board

W.H., Appellant	)	
and	)	**Docket No. 20-0395**
	)	**Issued: October 23, 2020**
DEPARTMENT OF THE TREASURY, BUREAU OF ENGRAVING & PRINTING, Fort Worth, TX, Employer	)	

Appearances:
Sarah Toben, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 10, 2019 appellant, through counsel, filed a timely appeal from a June 17, 2019 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 15, 2018, 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 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, following the June 17, 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.*

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 January 30, 2018 appellant, then a 49-year-old plate printer, filed an occupational disease claim (Form CA-2) alleging that, due to factors of his employment, he suffered soreness and lower back pain one day after cleaning the floor at work. He noted that he first became aware of his condition on December 3, 2017 and first realized its relation to factors of his federal employment on December 4, 2017. Appellant did not stop work.

In a February 1, 2018 letter, the employing establishment controverted appellant's claim, asserting that his injury was not work related. It indicated that he had informed a human resources (HR) workers' compensation specialist on January 24, 2018 that he had awoken on December 5, 2017 with sharp back pain, which he knew was not work related. The employing establishment further noted that appellant had informed them that his physician, a Dr. Herrera, had told him that he had a herniated disc due to aging and not due to work, after he underwent a magnetic resonance imaging (MRI) scan. It also asserted that the medical evidence of record was insufficient to establish causal relationship.

In a February 2, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate letter of even date, OWCP notified the employing establishment of appellant's occupational disease claim and requested additional information from a knowledgeable supervisor. It afforded both parties 30 days to submit the necessary evidence.

On February 7, 2018 the employing establishment responded to OWCP's development letter. It noted that it was unaware of any work-related cause for appellant's back condition. The employing establishment further indicated that he called-in sick on December 4, 2017 and was off work for several weeks due to his back condition.

In a February 26, 2018 report, Dr. Marvin Van Hal, a Board-certified orthopedic surgeon, noted that appellant presented for follow up after a transforaminal epidural steroid injection administered on February 16, 2018. He opined that appellant's lumbar radicular pain appeared to be aggravated by his work activities. Dr. Van Hal diagnosed lumbar strain, disc protrusion and herniation at the L4-L5 and L5-S1 levels, and lumbar radiculopathy. He opined that the diagnoses were work related.

In an undated narrative statement received on March 13, 2018, appellant noted that on December 3, 2017 he cleaned a diamond plate floor. He indicated that he was on his hands and knees and that he was cleaning for several hours throughout the night while still operating the printing press. Appellant reported that this involved getting up and down several times. He noted that, in the following days, he experienced soreness and was unable to get out of bed because of pain in the lower back that radiated into the right hip, leg, and foot. Appellant also indicated that he had numbness in his right foot and toes.

By decision dated March 15, 2018, OWCP denied appellant's occupational disease claim, finding that the factual evidence of record was insufficient to establish specific employment factors alleged to have caused or contributed to the presence or occurrence of his condition. It noted that the employing establishment had asserted appellant informed them that Dr. Herrera opined that his herniated disc was due to aging and that he had not responded to its development questionnaire. OWCP concluded, therefore, that he had not sufficiently described specific employment factors he believed caused injury and statements from the employing establishment were inconsistent with his allegations.

On March 19, 2019 appellant requested reconsideration.[4] He stated that, while the employing establishment had controverted his claim asserting that he had told HR that his condition was not work related based on the opinion of Dr. Herrera, he denied the conversation ever occurred. Appellant described his history of medical treatment and indicated that he had been treated by four physicians who believed years of sitting, standing, climbing, kneeling, bending/stooping, twisting, pulling, and pushing for several hours a day contributed to his back condition. He submitted a December 4, 2002 job assessment for the plate printer position and a position description.

On April 25, 2019 the employing establishment responded to appellant's request for reconsideration noting that he had not submitted medical reports from his four physicians which he alleged had all reported that his condition was work related.

Appellant submitted a February 16, 2018 epidurography report, which revealed lumbar radiculopathy syndrome.

In a February 16, 2018 operative report, Dr. Van Hal diagnosed lumbar radicular syndrome of the right lower extremity and described the details of transforaminal epidural steroid injections at the L4-L5 and L5-S1 levels.

In an undated report, Dr. Mario Leza, a chiropractor, indicated that appellant's repetitive work activities could have resulted in his diagnosed herniated and bulging disc conditions.

By decision dated June 17, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim finding that it was untimely filed and failed to demonstrate clear evidence of error. It set forth the history of the claim, noted the evidence submitted into the record prior to its initial denial, and explained the initial denial was because he had failed to establish fact of injury. OWCP noted the standard of review for an untimely reconsideration request and explained its finding that appellant's claim was untimely. It then itemized each evidentiary submission from appellant in support of his reconsideration request under the heading "Discussion of Evidence" and found that while it had reviewed all of his submissions, they failed to demonstrate clear evidence of error as he never responded to its development questionnaire which had been necessary to establish fact of injury.

[4] The reconsideration request was dated March 12, 2019, but was not received into the case record until March 19, 2019.

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, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).[7]

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.[8] OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.[9]

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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.[10] The Board notes that clear evidence of error is intended to represent a difficult standard.[11] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[12] It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.[13] This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.[14] In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[15] The Board makes an independent

[5] 5 U.S.C. § 8128(a); *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *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] 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[9] *Id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

[10] *T.W.*, Docket No. 19-1821 (issued May 15, 2020).

[11] *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

[12] *U.C.*, *supra* note 5.

[13] *T.C.*, *supra* note 8.

[14] *Id.*

[15] *R.K.*, *supra* note 11.

determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.[16]

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The Board further finds, however, that appellant has established clear evidence of error in OWCP's March 15, 2018 merit decision.

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[17] As previously explained, timeliness is determined by the document receipt date, *i.e.*, the "received date" into iFECS.[18] As appellant's March 12, 2019 request for reconsideration was not received into iFECS until March 19, 2019, more than one year after the issuance of OWCP's March 15, 2018 merit decision, it was untimely filed.[19] Consequently, he must demonstrate clear evidence of error by OWCP in its March 15, 2018 merit decision.[20]

In its March 15, 2018 decision, OWCP denied appellant's claim on a factual basis, finding that he had not established employment factors which he alleged caused or contributed to his condition. It also specifically found, based upon the employing establishment's controversion of the claim, that he had informed HR that his back condition was not work related, but awoke on December 5, 2017 with back pain.

The Board finds, however, that on reconsideration appellant clearly described the event that allegedly caused his employment injury in his narrative statement received on March 13, 2018. Appellant explained that, during the night of December 3, 2017, he cleaned a diamond plate floor for several hours while on his hands and knees. He also explained that he was still operating the printing press while cleaning the floor and as a result he had to stand up and rise up and down several times to complete these duties. Appellant, therefore, submitted responsive evidence which demonstrates that OWCP erred in it March 15, 2018 merit decision.[21]

OWCP also, in part, denied appellant's claim based upon the employing establishment's controversion and allegation that appellant had informed HR that his condition was not work related based upon an alleged statement by Dr. Herrera. Appellant has denied that he had informed HR that his back condition was not work related or that he had such a discussion with Dr. Herrera.

[16] *Id.*

[17] 20 C.F.R. § 10.607(a).

[18] *Supra* note 6.

[19] The Board notes that OWCP did not retain the mailing envelope containing the postmark to establish date of mailing, nor is there any other marking to designate the date that the reconsideration request was actually received by OWCP prior to scanning into iFECS.

[20] *Supra* note 17 at § 10.607(b).

[21] *S.M.*, 18-1499 (issued February 5, 2020) (the Board found that appellant submitted factual evidence with his claim which demonstrated a visible medical condition which raised questions as to the correctness of OWCP's last merit decision which denied finding the incident had not occurred at the time, place or in the manner alleged).

The Board finds that the record does not contain medical evidence from a Dr. Herrera, rather only Dr. Van Hal. Therefore, the Board finds that this demonstrates clear evidence of error.

The Board finds that the March 15, 2018 merit decision was issued in error and, thus, OWCP abused its discretion in failing to reopen appellant's claim for further merit review. The Board will reverse OWCP's June 17, 2019 decision and remand the case for an appropriate decision on the merits of appellant's claim.

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error in the March 15, 2018 merit decision and, thus, OWCP improperly denied his request for reconsideration of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2019 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 23, 2020
Washington, DC

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

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

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