

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

L.N., Appellant)
and) Docket No. 20-0742
DEPARTMENT OF THE NAVY,) Issued: October 26, 2020
CHARLESTON NAVAL SHIPYARD,)
Charleston, SC, Employer)

)

Appearances:

Belinda A. Simmons, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 18, 2020 appellant, through his representative, filed a timely appeal from an August 16, 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 April 27, 2018, 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 over the merits of this case.

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 because it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On January 23, 1991 appellant, then a 55-year-old equipment cleaner, alleged that on January 23, 1991 he sustained a head injury when an object knocked the hard hat off his head, then when he turned to look, a light junction box hit the left side of his head while in the performance of duty. He stopped work and returned to modified duty on February 20, 1991. OWCP accepted appellant's claim for head contusion and laceration, dizziness, and lumbar strain. On March 14, 1992 appellant stopped work again and filed a notice of recurrence of disability (Form CA-2a). OWCP paid appellant wage-loss compensation and placed her on the periodic rolls, effective April 5, 1992.

On March 16, 2016 OWCP found that a conflict in medical evidence existed between Dr. Paul Mazzeo, a Board-certified neurologist and second-opinion examiner, who opined in an October 20, 2015 report that appellant no longer had residuals or disability causally related to his January 23, 1991 employment injury, and Dr. Donald T. Hanna, a Board-certified family physician and appellant's treating physician, who opined that appellant remained totally disabled due to his accepted injury. It referred appellant to Dr. Michael Taormina, a Board-certified neurologist, for an impartial medical examination in order to resolve the conflict.

In an August 3, 2016 report, Dr. Taormina provided an accurate history of the January 23, 1991 employment injury and noted appellant's accepted conditions of post-traumatic head injury, scalp laceration, lumbar sprain, and post-concussion syndrome. He reviewed appellant's medical records and related appellant's current complaints of headache, back pain, imbalance, and dizziness. On physical examination, Dr. Taormina observed no progressive neurological problems. Lumbar examination revealed pain upon palpation of the lower thoracic and lumbar paraspinals. Dr. Taormina opined that appellant no longer suffered residuals of his work-related accident and was capable of sedentary level work. He reported that appellant had no work restrictions related to his resolved work injuries, but that his restrictions were due to his other medical conditions.

On January 20, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because his January 23, 1991 work-related injury had resolved. It found that the special weight of the medical evidence rested with Dr. Taormina's August 3, 2016 impartial medical report, in which he found that appellant no longer had residuals or disability causally related to his accepted employment conditions. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

OWCP received a February 13, 2017 letter by Dr. Hanna who related that appellant was injured at work on January 23, 1991 and continued to have pain associated with his accepted conditions. Dr. Hanna reported that appellant's back pain would require maintenance and chronic pain medication. He opined that appellant remained totally disabled from work and would never be able to return to gainful employment.

By decision dated February 22, 2017, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective February 23, 2017. It found that the special weight of medical evidence rested with Dr. Taormina, the impartial medical examiner, who had determined in an August 3, 2016 report that appellant did not have residuals or disability due to a January 23, 1991 work-related injury.

On January 29, 2018 appellant requested reconsideration and submitted additional medical evidence. He indicated that he was enclosing copies of evaluations and medical procedure reports and cited from various physicians who opined that he was totally and permanently disabled. Appellant described the January 23, 1991 employment injury and asserted that he had experienced a severe financial hardship since his benefits were terminated.

In a May 1, 2017 report, Dr. Donald R. Johnson, II, a Board-certified orthopedic surgeon, related appellant's complaints of chronic back pain for years following a 1991 work injury. He noted that appellant underwent lumbar surgery in 2003, but continued to be symptomatic. On physical examination, Dr. Johnson observed a slow, antalgic gait and no evidence of atrophy. He also reported no focal strength or gross neurologic deficit. Dr. Johnson reviewed diagnostic findings and included copies of x-ray films. He diagnosed low back pain, lumbar disc displacement, and postlaminectomy syndrome.

A May 18, 2017 lumbar computerized tomography scan report revealed stable post pedicle fixation at L4-5, advanced disc space narrowing at T12-L1, prominent disc space at L1-2, advanced disc space narrowing with bulge at L2-3, disc space narrowing at L3-4, and moderately advanced disc space narrowing with bulge at L4-S1.

In a June 27, 2017 note, Courtney Moldenhauer, a certified physician assistant, related that appellant was a candidate for repeat diagnostic injections and consultation with their nonoperative partners.

Appellant submitted a series of reports dated June 29 to November 21, 2017 by Dr. German Levin, a Board-certified physical medicine and rehabilitation specialist. In a June 29, 2017 report, Dr. Levin related appellant's complaints of chronic low back pain following a work-related injury. He discussed the medical treatment that appellant had received, including lumbar surgery, medial branch blocks, and diagnostic testing. Dr. Levin diagnosed lumbar spondylosis without myelopathy or radiculopathy and low back pain. In a November 21, 2017 report, he related that it would be impossible for appellant to find any gainful employment secondary to his back condition and that appellant was permanently disabled.

OWCP also received June 21, July 3, and August 15, 2017 lumbar medial branch block procedure notes.

By decision dated April 27, 2018, OWCP denied modification of the February 22, 2017 decision.

On August 28, 2018 appellant requested reconsideration. He asserted that he had previously submitted medical reports and a letter from Dr. Hanna who noted that appellant would never be able to return to gainful employment. Appellant discussed the medical treatment that he had received and how his physicians had consistently reported that his condition remained ongoing

and was disabling. He alleged that since his benefits were terminated, it had been a severe financial hardship for him and his wife.

Appellant submitted an undated letter by Dr. Hanna who described the January 23, 1991 employment injury and related that appellant continued to have progressively worsening back pain. Dr. Hanna noted that appellant had back surgery, but continued to have back pain radiating to his left leg, which limited his ability to work. He opined that appellant remained totally and permanently disabled and would require ongoing medical treatment for relief from the pain.

In a May 23, 2018 evaluation note, Dr. Levin related appellant's complaints of persistent low back pain that significantly worsened with activities. He discussed appellant's diagnostic testing and opined that appellant's pain originated from muscles and ligaments around the lumbar spine area, degenerative changes in lumbar spine, spinal canal stenosis at L2-3, as well as possibly from fusion site at L4-5.

By a January 2, 2019 decision, OWCP denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

On May 21, 2019 appellant again requested reconsideration. He described the January 23, 1991 employment injury and asserted that the extent of this injury involved his head and back. Appellant reviewed the medical treatment that he had received and quoted numerous treating physicians who opined that he was unable to work due to his back condition. He reported that he had suffered severe financial hardship since his benefits were terminated.

With his request, appellant submitted a May 14, 2019 letter by Dr. Hanna who indicated that he had been appellant's primary care physician since the original January 23, 1991 employment injury. Dr. Hanna related that appellant suffered from pressure-type headaches, short-term memory loss, confusion, and inferior visual field defects after the injury, which left him unable to perform any of his essential work duties. He also noted that appellant continued to experience severe lower lumbar pain with radicular symptoms and had chronic pain in this area. Dr. Hanna opined that appellant's accepted injuries, including his head injury, visual field defects, and back pain certainly disabled appellant and were a direct result of his accepted employment injury.

By an August 16, 2019 decision, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal

³ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵

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.⁶ 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 demonstrates clear evidence of error on the part of OWCP.⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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 evidence of error on the part of OWCP.¹⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹¹

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹² The claimant must present evidence that 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 that, 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

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

⁵ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

⁶ 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

⁷ *Id.*; Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1602.5(a).

⁸ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁹ See *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ *B.W.*, *supra* note 8.

¹¹ *Id.*; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹² Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1602.5(b).

¹³ *G.B.*, *supra* note 9; *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

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.

OWCP received appellant's request for reconsideration on May 21, 2019, more than a year after the last merit decision dated April 27, 2018. Appellant's request was therefore untimely filed. Consequently, he must demonstrate clear evidence of error.¹⁴

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether appellant has met his burden of proof to establish continuing residuals or disability of his accepted January 23, 1991 employment injury. The Board finds that the arguments and evidence submitted by appellant in support of his request for reconsideration did not raise a substantial question as to the correctness of the denial of his claim.

On reconsideration appellant described the January 23, 1991 employment injury, discussed the medical treatment that he had received, and quoted numerous treating physicians who opined that he was permanently disabled and unable to work due to his back condition. The Board notes that this narrative statement merely reiterates the arguments previously of record.¹⁵ Accordingly, the Board finds that this letter did not raise a substantial question as to the correctness of the decision that appellant no longer had residuals or disability causally related to his accepted January 23, 1991 employment injury.¹⁶

Appellant submitted a May 14, 2019 letter by Dr. Hanna, who noted that appellant continued to experience severe lower lumbar pain with radicular symptoms and suffered pressure-type headaches, short-term memory loss, confusion, and inferior visual field defects. He opined that appellant's accepted employment injuries, including his head injury, visual field defects, and back pain disabled appellant. While Dr. Hanna's opinion addressed the issue of appellant's ongoing disability, the Board finds that this report does not demonstrate clear evidence of error, because it does not demonstrate that OWCP committed an error in finding that appellant no longer had residuals or disability of his January 23, 1991 employment injury, nor raised a substantial question as to the correctness of OWCP's April 27, 2018 decision.¹⁷ Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁸ Thus, the Board finds that the evidence and arguments submitted on reconsideration do not demonstrate clear evidence of error on the part of OWCP in its April 27, 2018 decision.¹⁹

¹⁴ *Supra* notes 6 and 7.

¹⁵ *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

¹⁶ *F.D.*, Docket No. 19-1663 (issued March 10, 2020).

¹⁷ *C.D.*, Docket No. 19-1462 (issued June 26, 2020).

¹⁸ *See id.*

¹⁹ *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

The term clear evidence of error is intended to represent a difficult standard. 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.²⁰ The Board finds that appellant's request for reconsideration did not show on its face that OWCP committed error when, in its April 27, 2018 decision, it determined that appellant no longer had residuals or disability causally related to his accepted January 23, 1991 employment injury. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's April 27, 2018 merit decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.²¹

On appeal appellant asserts that the medical reports from his treating physicians establish that he was permanently disabled. As noted, however, the Board does not have jurisdiction over the merits of the claim. As explained above, the Board finds that OWCP properly denied his reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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.

²⁰ R.K., Docket No. 19-1474 (issued March 3, 2020).

²¹ S.D., Docket No. 17-1450 (issued January 8, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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