

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

A.K., Appellant)	
)	
and)	Docket No. 20-0202
)	Issued: September 8, 2020
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Otisville, NY, Employer)	
)	

Appearances:
James D. Muirhead, Esq., for the appellant¹
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 November 4, 2019 appellant, through counsel, filed a timely appeal from an October 1, 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 February 19, 2016, 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 claim.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 issuance of the October 1, 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 of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 6, 2005 appellant, then a 38-year-old corrections officer, filed a traumatic injury claim (Form CA-1) alleging that on June 30, 2005 he slipped on a wet floor and sustained a lower back injury while in the performance of duty. He stopped work on the date of the injury. OWCP accepted the claim for acute sprain/strain of the lumbosacral spine and displacement of the lumbar intervertebral disc without myelopathy. It paid appellant wage-loss compensation on the supplemental rolls as of August 16, 2005 and on the periodic rolls as of October 2, 2005.

On April 24, 2013 OWCP referred appellant for vocational rehabilitation services.

In a letter dated September 9, 2013, OWCP advised appellant that he had not responded to OWCP's rehabilitation counselor's multiple attempts to contact him. Appellant was advised that his compensation could be reduced to zero if he failed without good cause to participate in vocational rehabilitation efforts. He was directed to contact the vocational rehabilitation counselor and specialist within 30 days or provide good cause for not participating in the vocational rehabilitation effort.

On September 9, 2013 appellant elected to receive Office of Personnel Management (OPM) retirement benefits in preference to FECA benefits, effective October 31, 2013.

By decision dated October 31, 2013, OWCP issued a suspension of FECA benefits as it found that appellant had not made a good faith effort to participate in the rehabilitation effort, had not made a good faith effort to return to gainful employment, and had not shown good cause for not complying.

On May 13, 2014 appellant, through counsel, requested reconsideration. By decision dated August 1, 2014, OWCP denied appellant's request for reconsideration.

On August 26, 2014 appellant through his representative, again requested reconsideration.

By decision dated April 21, 2015, OWCP denied modification of the October 31, 2013 decision.

On August 11, 2015 appellant through counsel, requested reconsideration. In an August 11, 2015 statement, appellant indicated that he was ready, willing, and able to undergo vocational testing and participate in vocational rehabilitation services as directed by OWCP.

In a February 19, 2016 decision, OWCP modified the April 21, 2015 decision. It found that appellant provided sufficient evidence to fully comply with vocational rehabilitation services. However, OWCP explained that it was unable to resume his compensation payments because he elected to receive benefits through the Civil Service Retirement System effective October 31, 2013, and that, in order to reinstate his benefits, he must elect to receive FECA benefits.

OWCP advised appellant that the temporary total disability (TDD) rate was only applicable prospectively from the point at which cooperation resumed, according to FECA Procedure Manual at Chapter 2.0813(18)(c) which provides: “If [appellant] later decides through a subsequent election to resume OWCP benefits, he or she returns to OWCP at the zero or reduced rate for the retroactive period and only at TTD prospectively at the point in which cooperation resumes (effective the date the injured worker indicated in writing his or her intent to comply).”

It further advised appellant to inform OPM of his election and send OWCP confirmation from OPM that he was no longer receiving benefits from OPM. OWCP advised him that his claim was reopened and compensation would resume following submission of the required documents regarding the election of benefits.

In a letter dated August 26, 2016, counsel provided an election of benefits form and noted that appellant was electing to receive FECA compensation benefits effective October 31, 2013.

In an informational letter dated March 30, 2018, OWCP notified appellant that it had received his statement dated August 11, 2015 indicating that he was ready, able, and willing to undergo vocational rehabilitation services, therefore FECA compensation would be reinstated starting on August 11, 2015 the date he promised to cooperate.

On April 5, 2018 appellant, through counsel, requested reconsideration of OWCP’s February 19, 2016 decision. Counsel argued that appellant should receive retroactive pay to October 31, 2013, the date he elected to receive FECA benefits. In a letter dated April 19, 2018, OWCP informed appellant that its March 30, 2018 letter was not a formal decision.

On September 30, 2019, appellant, through counsel, reiterated his request for reconsideration.

By decision dated October 1, 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.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ 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.⁵ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

⁴ 5 U.S.C. § 8128(a); *see T.W.*, Docket No. 19-1821 (issued May 15, 2020); *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).

⁵ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁸ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which 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 show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵

OWCP's procedures provide that the term clear evidence of error is intended to represent a difficult standard.¹⁶ The claimant must present evidence which on its face shows that OWCP made an error. The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ See *M.E.*, *supra* note 4; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); see also *supra* note 7.

¹⁰ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *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).

¹¹ *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

¹² *J.F.*, *supra* note 10; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *J.F.*, *supra* note 10; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ *Supra* note 8.

¹⁷ See *M.E.*, *supra* note 4; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

ANALYSIS

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

OWCP's regulations establish a one-year time limit for requesting reconsideration, which begins on the date of the original merit decision.¹⁸ The most recent merit decision was OWCP's February 19, 2016 decision, which modified an April 21, 2015 decision. As OWCP received counsel's request for reconsideration on April 5, 2018, more than one year after the February 19, 2016 merit decision, the Board finds that the request was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁹

In support of appellant's request for reconsideration, counsel argued that appellant should receive payment of FECA wage-loss compensation benefits retroactive to October 31, 2013. The Board finds, however, that appellant had previously elected and received OPM benefits instead of participating in vocational rehabilitation services in lieu of FECA compensation. Appellant did not elect to return to FECA compensation until August 26, 2016. Counsel therefore has not raised an argument or submitted positive, precise, and explicit evidence that demonstrates on its face that OWCP committed an error in its February 19, 2016 decision.²⁰ Thus, the Board finds that the untimely reconsideration request failed to demonstrate clear evidence of error.²¹

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.

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ *Supra* note 9.

²⁰ *See J.V.*, Docket No. 18-0963 (issued February 13, 2020); *S.P.*, Docket No. 17-1708 (issued February 23, 2018).

²¹ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *M.P.*, Docket No. 19-0674 (issued December 16, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 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