United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 20-0367**
	)	**Issued: September 22, 2020**
U.S. POSTAL SERVICE, MONTEREY PARK POST OFFICE, Monterey Park, CA, Employer	)	

Appearances:
Aykanush H. Galadzhyan, Esq., for the appellant[1]
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 December 5, 2019 appellant filed a timely appeal from a June 11, 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 May 18, 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 the claim.

[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 of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 15, 2017 appellant, then a 37-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on August 6, 2017, he injured his hands, back, and neck when the long-life vehicle (LLV) he was operating was struck by another vehicle while in the performance of duty. He stopped work on that same day.

In an August 6, 2017 statement, appellant indicated that after he delivered his parcels and while turning his LLV, his vehicle broke down, leaving him stuck in the middle of the road. He noted that, while he was stuck in the middle of the road, another vehicle struck the side of his LLV, which sprung across the street into a parked vehicle. Appellant explained that he called his coworker and saw police and paramedics arriving at the scene. He further noted that the paramedics had to use a tool to open his door and told him not to move while checking his vitals. Appellant was told that he would be transported to a medical facility.

In a witness statement of even date, S.C., appellant's supervisor, noted that she received a call from her postmaster on that day notifying her that appellant was in a motor vehicle accident. She indicated that when she arrived at the scene of the accident, she took pictures and spoke to appellant's coworker and a police officer who informed her that appellant had been transported to a hospital emergency room. She noted that she then made several telephone calls, including to the emergency room, to check on appellant, who notified her that he was okay, but felt a little dizzy and in pain. S.C. further noted that, at approximately 3:45 p.m. that day, appellant walked into her office. She noticed blood on the left side of his shirt towards the bottom and bandages on two or three fingers on each hand. S.C. asked appellant to write a statement of what happened. She indicated that she had to help him finish his statement due to his injuries and noticed that he could barely get out of the chair he was sitting in. Appellant informed her that the hospital gave him a pain medication prescription and indicated that he could drive home.

In an August 7, 2017 report, Dr. Nathan Hashimoto, Board-certified in hospice care and palliative medicine, noted that appellant was involved in a motor vehicle accident and diagnosed strains and contusions of neck, left shoulder, left wrist, and left finger.

In a medical report of even date, Dr. Mark M. Kosker, a chiropractor, noted that appellant sustained injuries to his neck, back, shoulders, left knee, and left wrist due to the motor vehicle accident on August 6, 2017. He advised that appellant should remain off work until August 21, 2017 or after his reexamination.

In an August 21, 2017 development letter, OWCP informed appellant of the deficiencies of his claim. It specifically noted that it had received evidence from a chiropractor, but that under FECA a "physician" included a chiropractor only if there was a diagnosed spinal subluxation and it was demonstrated by x-ray evidence to exist. OWCP afforded him 30 days to submit the necessary medical evidence.

In August 21 and September 6, 2017 medical reports, Dr. Kosker advised appellant to remain off work until September 21, 2017.

Appellant also submitted a continuation of pay nurse report dated August 22, 2017, indicating that he was to remain off work because of cervical and lumbar conditions.

In a September 20, 2017 work status report, Dr. Stepan Kasimian, a Board-certified orthopedic surgeon, noted that appellant was under his care and placed him on temporary total disability status until October 4, 2017.

By decision dated September 29, 2017, OWCP denied appellant's claim finding that, although appellant had established that the August 6, 2017 incident occurred in the performance of duty, as alleged, he had not established a medical diagnosis in connection with the accepted August 6, 2017 employment incident. Consequently, it found that the requirements had not been met to establish an injury as defined by FECA.

On October 27, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Counsel asserted that, while appellant had received the September 29, 2017 decision, he had not received the August 21, 2017 development letter referenced in the decision. Counsel also noted that further documentation would be provided.

In a November 3, 2017 form report, Dr. Kosker noted that appellant suffered from frequent spasm, stiffness, and decreased muscle strength resulting from the automobile collision that occurred on August 6, 2017. He indicated that appellant was unable to perform any of his job functions due to his conditions.

In work status reports dated October 16, 2017 through January 8, 2018, Dr. Kasimian placed appellant on temporary total disability status until April 8, 2018.

During the hearing, held on March 7, 2018, counsel again asserted that appellant never received the August 21, 2017 development letter. She noted that they would forward an October 12, 2017 x-rays report showing a spinal subluxation. Appellant also denied prior injury to his neck, hands, or back before the accepted August 6, 2017 employment incident. The hearing representative held the record open for 30 days for the submission of additional evidence.

A September 5, 2017 lumbar spine magnetic resonance imaging (MRI) scan, interpreted by Dr. Hosam Moustafa, a Board-certified radiologist, revealed bilateral osteoarthritis of the apophyseal joints at the L4-5 and L5-S1 levels and lumbar degenerative changes. A cervical spine MRI scan of even date revealed no remarkable findings.

In an October 12, 2017 x-ray report, Dr. Kosker diagnosed cervical subluxations at C1, C2, C4, C5, C7, T1, and T2 and lumbar subluxations at L2, L3, L4, and L5.

In medical reports dated September 20, 2017 through January 8, 2018, Dr. Kasimian noted his findings on examination and the treatments provided. He described appellant's multiple pain complaints. Dr. Kasimian noted that he was injured during the accepted August 6, 2017 employment incident. He diagnosed cervicalgia, lumbago, and right wrist internal derangement.

Dr. Kasimian indicated that appellant was going through chiropractic therapy for neck and low back conditions.

In an April 7, 2018 work status report, Dr. Kasimian placed appellant on temporary total disability status until June 7, 2018.

By decision dated May 18, 2018, the hearing representative affirmed OWCP's September 29, 2017 decision, as modified, finding that appellant had established diagnoses of cervicalgia, lumbago, and internal derangement of the right wrist. However, the claim remained denied because the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted August 6, 2017 employment incident.

OWCP subsequently received additional medical evidence. In work status reports dated June 27 through September 8, 2018, Dr. Kasimian placed appellant on temporary total disability status until December 1, 2018.

In work status reports dated January 5 and April 6, 2019, Dr. Lawrence Miller, Board-certified in physical medicine and rehabilitation, noted that appellant was under his care and placed him on temporary total disability status until June 6, 2019.

On May 21, 2019 appellant, through counsel, requested reconsideration of the May 18, 2018 decision.

In an April 29, 2019 medical report, Dr. Kasimian noted that appellant was first evaluated on September 20, 2017 for an orthopedic spine evaluation following the accepted August 6, 2017 employment incident. He noted appellant's complaints of pain in his neck with occasional numbness and tingling radiating down his shoulder blade, trapezial region, arm, hand, and fingers on the left side, as well as low back pain and tingling radiating down his buttocks, left hamstring, and left leg. Dr. Kasimian diagnosed cervicalgia, lumbago, and right wrist internal derangement and opined that to a reasonable degree of medical certainty, on a more probable than not basis, that there was a direct causal relationship between appellant's body movement in the August 6, 2017 collision and his current clinical presentation and symptoms. He concluded that the mechanism of injury was consistent with the multiple impacts appellant sustained in the August 6, 2017 collision.

By decision dated June 11, 2019, 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.[3] 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.[4] The one-year period for requesting reconsideration begins

[3] 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[4] 20 C.F.R. § 10.607(a).

on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.[5] Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.[7]

OWCP may not deny a request for reconsideration solely because the request was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.[8] OWCP 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.[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] The Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[14] The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.[15]

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

[6] *Id*. at Chapter 2.1602.4(b) (February 2016).

[7] *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

[8] *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

[9] *Id*. at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

[10] *G.G.*, *supra* note 8.

[11] *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 7.

[12] *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

[13] *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

[14] *P.L.*, Docket No. 18-0813 (issued November 20, 2018); *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

[15] *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

OWCP's procedures provide that a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[16] The last merit decision was OWCP's May 18, 2018 decision. Appellant had one year from the date of that decision, *i.e.*, Saturday, May 18, 2019, to request reconsideration. If the last day of the one-year time period falls on a Saturday, Sunday, or a legal holiday, OWCP will consider a request to be timely filed if it is received on the next business day.[17] Appellant, therefore, had until Monday, May 20, 2019 to timely request reconsideration. As his request for reconsideration was not received in iFECS until May 21, 2019, more than one year after the issuance of the May 18, 2018 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its May 18, 2018 decision.[18]

The Board further finds, however, that the evidence submitted in support of appellant's untimely request for reconsideration raises a substantial question as to the correctness of OWCP's May 18, 2018 merit decision and is sufficient to demonstrate clear evidence of error.

In his November 1, 2017 request for reconsideration, counsel argued that although appellant had received a copy of the September 29, 2019 decision, OWCP failed to send a copy of the September 29, 2017 decision and the August 21, 2017 development letter to him. OWCP's regulations and Board case law require OWCP to send a copy of its decisions to the employee's last known address and to the authorized representative.[19] The Board has held that decisions under FECA[20] are not properly issued unless both appellant and the authorized representative have been sent copies of the decision.[21] As OWCP did not send a copy of its September 29, 2017 decision or August 21, 2017 development letter to appellant's authorized representative, the Board

[16] *Supra* note 8 at § 10.607(b).

[17] *See supra* note 5 at Chapter 2.1602.4 (February 2016); *see also C.W.*, Docket No. 17-0836 (issued August 7, 2017).

[18] *Supra* note 8; *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

[19] 20 C.F.R. § 10.127 provides: A copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before OWCP, a copy of the decision will also be mailed to the representative. *See M.R., Order Remanding Case*, Docket No. 11-0632 (issued September 28, 2011) (the Board found that OWCP did not properly issue its decision where it did not send a copy of that decision to appellant's authorized representative); *George R. Bryant*, Docket No. 03-2241 (issued April 19, 2005) (the Board found that OWCP did not properly issue its June 18, 2003 decision when it did not send a copy of that decision to the authorized representative on that date. The Director of OWCP conceded a procedural error and advised that a merit review would be conducted on remand to preserve the claimant s appeal rights). *Cf. R.W.*, Docket No. 15-1886 (issued February 4, 2016) (where the Board set aside OWCP's hearing abandonment decision and remanded the case as it did not serve the notice of hearing on appellant s authorized representative).

[20] *Supra* note 2.

[21] *M.B.*, Docket No. 16-1302 (issued March 7, 2017).

concludes that neither the initial development letter nor the initial decision were properly issued. Therefore, the Board finds that appellant has demonstrated clear evidence of error.

Accordingly, the Board finds that OWCP improperly denied appellant's request for reconsideration as he has demonstrated clear evidence of error in this case. The Board will set aside the decision and remand the case for an appropriate decision on the merits of his claim.[22]

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error in OWCP's May 18, 2018 merit decision and thus, it improperly denied his request for reconsideration of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 22, 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

[22] On remand OWCP should consider whether the evidence supports that appellant sustained visible hand injuries causally related to the accepted August 6, 2017 employment incident in accordance with the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.6(a) (June 2011).