

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

P.S., Appellant

and

**U.S. POSTAL SERVICE, POINT BREEZE
STATION, Philadelphia, PA, Employer**

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**Docket No. 20-1192
Issued: July 20, 2021**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 19, 2020 appellant filed a timely appeal from a November 21, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated April 17, 2018 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that OWCP received additional evidence following the November 21, 2019 decision. 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 as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 8, 2014 appellant, then a 39-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 7, 2014 he sustained an emotional condition after hearing multiple gunshots nearby when he was delivering mail while in the performance of duty. He stopped work on August 7, 2014. OWCP accepted the claim for post-traumatic stress disorder (PTSD). It paid appellant wage-loss compensation on the supplemental rolls from September 23, 2014 through April 29, 2017, on the periodic rolls from April 30 through June 24, 2017, and on the supplemental rolls again thereafter.

On May 24, 2017 appellant accepted a limited-duty full-time job as a city carrier/lobby assistant.

On June 29, 2017 appellant filed claims for wage-loss compensation (Form CA-7) for disability from work for the period May 27 through June 23, 2017.

In a development letter dated July 3, 2017, OWCP informed appellant that he had been paid wage-loss compensation on the periodic rolls for the period May 27 through June 24, 2017.³ Thus, it informed him that it was unclear why he was claiming additional compensation for the same period of time. In addition, OWCP noted that appellant had accepted a modified job offer and returned to work on May 27, 2017.

Appellant subsequently filed additional claims for wage-loss compensation for disability from work beginning June 24, 2017 and continuing.

By decision dated October 19, 2017, OWCP denied appellant's claim for wage-loss compensation for disability from work for the period June 1, 2017 and continuing. It noted that he returned to a modified job on May 27, 2017, stopped on June 1, 2017, and worked sporadically afterwards. OWCP found that the medical evidence appellant submitted was insufficient to establish that he was disabled due to the accepted August 7, 2014 employment injury.

On October 26, 2017 appellant, through his then counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on March 8, 2018.

By decision dated April 10, 2018, an OWCP hearing representative affirmed in part and modified in part the October 19, 2017 decision. He found that the evidence of record supported

³ On July 3, 2017 OWCP issued a preliminary notice informing appellant that he had been overpaid in the amount of \$2,861.84 because he returned to full-time work on May 27, 2017 and received wage-loss compensation for total disability on the periodic rolls for the period May 27 through June 24, 2017. In a letter dated August 4, 2017, it informed him that the identified overpayment had been administratively terminated as the overpayment collection action would exceed the expected recovery.

entitlement to 32 hours of wage-loss compensation for time missed from work to attend medical appointments during the period June 1, 2017 through February 8, 2018. The hearing representative affirmed the denial for the remaining claims for wage-loss compensation for time lost from work.

By decision dated April 17, 2018, OWCP found that appellant was entitled to four hours of wage-loss compensation on June 1 and 6, 2017 and four hours claimed for September 6, 14, and 20 and November 14, 2017, and January 17, and February 5, 2018.

In a letter dated May 2, 2018, appellant related that in direct response to the decision dated April 17, 2018 he was submitting a May 1, 2018 letter from Dr. Anne W. Tax, a clinical psychologist, regarding the 30 plus appointments for treatment that OWCP had overlooked. He requested payment for all of the documented dates of medical treatment.

In a letter dated May 1, 2018, Dr. Tax related that appellant had been seen in her office for psychotherapy for symptoms of PTSD caused by an on-the-job injury in 2017 on June 22 and 29, July 6, 13, and 20, August 3, 10, 17, and 24, September 7, 19, and 28, October 12, 18, and 25, November 1, 15, and 30, and December 7, 21, and 28, 2017, January 4 and 18, February 1, 8, and 22, March 8 and 24, April 12 and 25, and May 1, 2018.

In reports dated April 25, May 16, and June 12, 2018, Dr. Burton Weiss, a Board-certified psychiatrist, related that appellant was working close to full time, but that since appellant's claim was denied his symptoms of PTSD, with anxiety and depression, had increased. He related that all of appellant's absences were consistent with this diagnosis of PTSD from the August 7, 2014 incident.

On May 17, 2018 OWCP advised appellant that it had received his May 2, 2018 letter and that if he disagreed with the April 17, 2018 decision he could request reconsideration or an appeal of that decision.

In a letter dated May 21, 2018, appellant again related that he was directly responding to the April 17, 2018 decision. He again referred to Dr. Tax's May 1, 2018 letter and unpaid medical appointments claims from CA-7 claims previously filed.

In a letter dated July 19, 2018 Dr. Tax again related that appellant had been her patient since August 13, 2014 for psychotherapy due to his August 7, 2014 employment injury. She related that the dates he was seen for treatment in 2017 and through May 1, 2018, and added that he was also seen on May 14 and 31, June 14, 21, and 28, and July 5, 12, and 19, 2018.

In a letter to OWCP dated July 27, 2018, appellant again addressed his CA-7 claims for wage-loss compensation for medical appointments from May 27, 2017 through March 30, 2018.

By decision dated August 1, 2018, OWCP accepted appellant's claim for recurrence of disability, effective July 9, 2018 as the limited-duty/modified work assignment offered by the employing establishment had been withdrawn.

In a letter dated August 2, 2018, OWCP informed appellant that it was responding to his letter dated July 27, 2018 wherein he requested compensation for medical appointments from June 22, 2017 to March 24, 2018. It advised him that the decision dated April 10, 2018 partially

affirmed in part and partially reversed the prior decision dated October 19, 2017. OWCP related that if appellant did not agree with that decision he could appeal the decision.

OWCP continued to receive reports from Dr. Weiss and Dr. Tax relating to appellant's treatment following July 9, 2018.

In a March 5, 2019 report, Dr. Weiss noted that he was responding to OWCP's April 10, 2018 decision and he addressed appellant's disability status due to his accepted PTSD for the period denied.

Dr. Tax, in a March 14, 2019 report, indicated that appellant's psychiatric symptoms were well documented in her prior reports and that she was responding to the April 10, 2018 OWCP decision. She agreed with Dr. Weiss' opinion that appellant was totally disabled on and after June 1, 2017.

In a letter dated July 24, 2019, appellant requested the status of his reconsideration request for an April 10, 2018 decision. He asserted that the request had been submitted on March 11, 2019 as verified by an attached postage receipt and that the request had been accompanied by medical evidence.

In a letter dated October 24, 2019, appellant stated that in a letter dated March 11, 2019 he had requested reconsideration. He stated that he submitted medical documentation and argument in support of his March 11, 2019 request. Appellant attached a receipt from the U.S. Postal Service dated March 11, 2019 for a flat rate envelope mailed to London, KY with a tracking number, the March 11, 2019 letter requesting reconsideration of the April 10, 2018 decision, and a March 5, 2019 report from Dr. Weiss.

OWCP also received additional reports from Dr. Weiss and Dr. Tax related to appellant's medical treatment in 2019.

By decision dated November 21, 2019, OWCP denied appellant's request for reconsideration, finding that it was untimely and failed to demonstrate clear evidence of error. It noted that it was unable to determine what documents were mailed to OWCP by the March 11, 2019 receipt, but acknowledged that medical documentation had been received around that date.

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 (*i.e.*,

⁴ 5 U.S.C. § 8128(a); *A.M.*, Docket No. 20-0143 (issued October 28, 2020); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP’s most recent merit decision was in error.⁸ Its procedures provide that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant’s request for reconsideration demonstrates “clear evidence of error” on the part of OWCP.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that OWCP improperly determined that appellant’s request for reconsideration was untimely filed.

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

⁷ *S.M.*, Docket No. 19-1166 (issued October 16, 2020); *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *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); *A.M.*, *supra* note 4; *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ See *S.M.*, *supra* note 7; *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also *id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

¹⁰ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹² *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *George C. Vernon*, 54 ECAB 319 (2003).

The case record contains appellant's letters dated May 2 and 21 and July 27, 2018 and received by OWCP on May 8 and 29 and July 27, 2018, respectively, in which he specifically addressed the April 17, 2018 decision which paid wage-loss compensation for certain dates, but denied payment for other dates for which he claimed wage-loss during medical appointments. In these letters, he explicitly stated that he was addressing the April 17, 2018 decision. Appellant also submitted May 1, 2018 medical evidence from Dr. Tax in support of his request. No special form is required as long as the request is made in writing, identifies the decision and specific issues to be considered, and is accompanied by relevant and pertinent new evidence or argument not previously considered.¹³ Accordingly, the Board finds that his letters received by OWCP on May 8 and 29 and July 27, 2018 constituted requests for reconsideration of OWCP's April 17, 2018 merit decision.¹⁴

As appellant's requests for reconsideration were received within one year of OWCP's April 17, 2018 decision,¹⁵ they were timely filed.¹⁶ Therefore, OWCP should have applied the standard applicable to timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3), rather than the more stringent clear evidence of error standard for untimely reconsideration requests set forth in 20 C.F.R. § 10.607(a). Because it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard which applies to untimely filed reconsideration requests, the Board will remand the case for review of this evidence under the proper standard of review for timely reconsideration requests, to be followed by an appropriate decision.¹⁷

CONCLUSION

The Board finds that the case is not in posture for decision.

¹³ *Jack D. Johnson*, 57 ECAB 593 (2006); *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

¹⁴ *T.L.*, Docket No. 19-1110 (issued August 11, 2020); *R.D.*, Docket No. 14-0896 (issued August 1, 2014); *C.M.*, Docket No. 11-1988 (issued June 6, 2012).

¹⁵ *R.T.*, Docket No. 20-0298 (issued August 6, 2020); *supra* note 6 at Chapter 2.1602.4(a) (February 2016).

¹⁶ *J.H.*, Docket No. 18-1367 (issued July 17, 2019); *R.M.*, Docket No. 17-0473 (issued June 6, 2017); *C.B.*, Docket No. 13-1732 (issued January 28, 2014).

¹⁷ *L.N.*, Docket No. 19-0170 (issued August 21, 2019).

ORDER

IT IS HEREBY ORDERED THAT November 21, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 20, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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