United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 21-0264**
	)	**Issued: June 22, 2021**
DEPARTMENT OF THE NAVY, COMMANDER, NAVY INSTALLATIONS COMMAND, San Diego, CA, Employer	)	

Appearances:
Robert Taylor, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 17, 2020 appellant, through counsel, filed a timely appeal from a June 11, 2020 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 10, 2019, to the filing of

[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.

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]

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 October 25, 2018 appellant, then a 54-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that during training on October 23, 2018 he injured his head, neck, back, and hip area when he fell backward while performing mechanical advantage control holds in the performance of duty. He indicated that he was unable to break his fall and fell onto hardwood floors, hitting the back of his head. Appellant stopped work the same day. On the reverse side of the claim form, appellant's supervisor indicated by checking a box marked "Yes" that appellant was injured in the performance of duty.

In an October 23, 2018 witness statement, B.F., a deputy chief, noted that while he was conducting training he observed appellant fall and strike his head on the floor. He explained that appellant was standing by a window and waiting on the next training evolution when he abruptly turned around and appeared to trip. Appellant then stumbled to the floor and struck his head. When he sat up, he alleged that he was experiencing a tingling sensation throughout his arms and finger tips. B.F. noted that emergency services were called and appellant was then transported to the hospital.

In a diagnostic report of even date, Dr. Bolivia Davis, a Board-certified diagnostic radiologist, performed a computerized tomography (CT) scan of appellant's cervical spine, observing a straightening of the cervical lordosis which may have been secondary to muscle spasms, as well as mild-to-moderate degenerative disc disease, uncovertebral joint hypertrophy and spondylosis from C3-4 to C6-7 producing multilevel neural foraminal narrowing. A CT scan of the head revealed no acute brain parenchymal abnormalities. In an October 23, 2018 x-ray scan of appellant's right hip, Dr. Davis noted no acute fracture or dislocation.

In a separate October 23, 2018 diagnostic report, Dr. Wei Han Fang, a Board-certified diagnostic radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's cervical spine, observing no obvious fractures or dislocations as well as multilevel degenerative changes.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the June 11, 2020 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.*

Appellant also submitted October 23, 2018 treatment instructions in which Dr. Jennifer Rice, Board-certified in emergency medicine, offered care instructions related to cervical disc herniation.

In a development letter dated October 30, 2018, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion to provide further details regarding the circumstances of his claimed injury. OWCP also requested a narrative medical report from appellant's treating physician, which contained a detailed description of findings and diagnoses, explaining how the alleged employment incident caused, contributed to, or aggravated his medical conditions. In a separate development letter of even date, it requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, regarding appellant's traumatic injury. OWCP afforded both parties 30 days to respond.

In an October 30, 2018 medical report, Dr. Steven Spitz, a Board-certified neurosurgeon, reviewed the events of the alleged October 23, 2018 employment incident in which appellant fell straight onto his back while training. Appellant noted the immediate onset of bilateral arm numbness, tingling and weakness as well as neck pain. He claimed that on evaluation at the hospital he was diagnosed with severe stenosis and myelomalacia that would require surgery. On examination and review of diagnostic studies, Dr. Spitz diagnosed a spinal cord contusion with subsequent myelopathy secondary to the stenosis at C3-6. He recommended that appellant undergo surgery to treat his conditions. In a medical note of even date, Dr. Spitz explained that appellant suffered a cervical spinal cord injury and diagnosed severe cervical spinal stenosis. He advised that appellant would be undergoing surgery and would be unable to return to work until he was cleared following surgery.

In an October 30, 2018 duty status report (Form CA-17), Dr. Spitz diagnosed a cervical spinal cord injury, cervical spondylosis with myelopathy, and cervical spinal stenosis due to the October 23, 2018 employment incident. He checked a box marked "No" to indicate his opinion that appellant was unable to perform his regular work duties at the time.

In work capacity evaluations (OWCP-5c forms) dated October 30 and November 7, 2018, Dr. Spitz diagnosed a cervical spinal cord injury and cervical spinal stenosis with myelopathy. He checked a box marked "No" to indicate his opinion that appellant was not capable of performing his usual job duties without restriction. Dr. Spitz advised that he would be unable to work for approximately 8 to 12 weeks after he undergoes surgery.

In a November 7, 2018 attending physician's report (Form CA-20) Dr. Spitz diagnosed a cervical cord injury, cervical spondylosis with myelopathy and cervical stenosis due to the October 23, 2018 employment incident. He advised that appellant would be incapacitated until further notice.

By decision dated December 4, 2018, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish causal relationship between his cervical spine conditions and the accepted October 23, 2018 employment incident.

On December 26, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

Appellant submitted an October 23, 2018 medical form with an illegible signature which recounted the events of the October 23, 2018 employment incident where he tripped, fell backwards and hit his head while performing police drills.

In a December 21, 2018 medical report, Dr. Spitz reviewed the history of the October 23, 2018 employment incident and his subsequent evaluation of appellant's cervical spine. He opined that appellant "clearly suffered" an acute cord injury at work on October 23, 2018, and found that although he had preexisting cervical spinal stenosis, the injury he suffered that day was clearly the cause of his current symptoms. Dr. Spitz diagnosed a spinal cord contusion with subsequent myelopathy secondary to appellant's employment injury. He recommended that appellant undergo surgery to avoid further injury in the future. In a medical note of even date, Dr. Spitz repeated his findings and diagnosed severe cervical spinal stenosis. He advised that appellant was unable to return to work as of October 30, 2018.

By decision dated April 10, 2019, OWCP's hearing representative affirmed the December 4, 2018 decision, as modified, finding that the factual component of fact of injury had not been established because the evidence of record was unclear on how appellant's injury actually occurred and that there were discrepancies concerning the facts of the alleged injury.

On June 17, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated July 19, 2019, OWCP denied appellant's request for an oral hearing, finding that, since he had already received a review of the written record, he was not entitled to a second hearing as a matter of right, "whether it is an oral hearing or a review of the written record, on the same issue." It exercised its discretion and further denied the request, finding that the issue could equally be addressed with a request for reconsideration and the submission of additional evidence.

In a January 27, 2020 statement, counsel argued that because the employing establishment responded to neither OWCP nor his personal request for a statement on what happened during the October 23, 2018 employment incident, appellant's account of the events should have been accepted. He also argued that it was impossible to find that appellant's fall was idiopathic in nature because there were statements in the evidence that stated that he tripped and that he did not "just simply drop to the ground without explanation." Counsel attached a July 23, 2019 statement wherein he requested that OWCP obtain a statement from appellant's supervisor in order to understand his account of the October 23, 2018 employment incident.

On May 29, 2020 appellant, through counsel, requested reconsideration of OWCP's April 10, 2019 merit decision. He contended that OWCP's hearing representative clearly demonstrated clear and convincing evidence of error when he confused appellant's inadequately explained fall as an idiopathic fall. Counsel asserted that, because the employing establishment did not respond to OWCP's request for more information, appellant's account of the events should have been accepted.

By decision dated June 11, 2020, 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.[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] The one-year period for requesting reconsideration begins 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.[6] Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).[7] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted to OWCP under section 8128(a) of FECA.[8]

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, OWCP must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.[9] OWCP's regulations and 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(a), if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.[10]

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.[11] The Board notes that clear evidence of error is intended to represent a difficult standard.[12] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[13] It is not enough merely to establish that the evidence could

[4] 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).

[5] 20 C.F.R. § 10.607(a).

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

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

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

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

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

[11] *G.G.*, *supra* note 9.

[12] *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *supra* note 8.

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

be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.[17]

ANALYSIS

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

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[18] As appellant did not request reconsideration until May 29, 2020, more than one year after the issuance of OWCP's April 10, 2019 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its April 10, 2019 decision.[19]

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 April 10, 2019 merit decision and is sufficient to demonstrate clear evidence of error.[20]

In its April 10, 2019 decision, OWCP found that the factual evidence was insufficient to establish that the October 23, 2018 employment incident occurred as alleged, noting that the record was unclear as to how appellant's injury actually occurred. On reconsideration, counsel argued that the evidence of record was sufficient to establish the factual component of fact of injury, reasoning that appellant's Form CA-1 and accompanying medical records consistently note that he was performing police drills when he stumbled and fell backwards. Counsel asserted that, because the employing establishment did not respond to OWCP's request for more information, appellant's account of the events should have been accepted.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[21] While the claimant has the responsibility to establish entitlement to compensation,

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

[15] *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

[16] *A.F.*, 59 ECAB 714 (2008); *D.G.*, 59 ECAB 455 (2008).

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

[18] 20 C.F.R. § 10.607(a).

[19] *Id*. at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

[20] *See S.M.*, Docket No. 18-1499 (issued February 5, 2020) (OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's request for reconsideration shows clear evidence of error on the part of OWCP).

[21] *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[22] The Board has further held that an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[23] As appellant's Form CA-1 and accompanying medical records consistently described the alleged incident and the employing establishment did not respond to OWCP's October 30, 2018 development letter, the April 10, 2019 decision's finding that appellant had not established the factual component of fact of injury was in error.

The Board thus finds that appellant has raised a substantial question as to the correctness of the April 10, 2019 merit decision. As such, OWCP abused its discretion in failing to reopen his claim for further merit review.[24] The Board will reverse OWCP's June 11, 2020 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 OWCP's April 10, 2019 merit decision and, thus, OWCP improperly denied his request for reconsideration of the merits of his claim.

[22] *See C.T.*, Docket No. 20-0043 (issued April 30, 2021); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[23] *A.B.*, Docket No. 20-1597 (issued April 30, 2021); *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

[24] *See, e.g., A.B.*, Docket No. 10-1070 (issued March 8, 2011).

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2020 decision of the Office of Workers' Compensation Programs is reversed and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 22, 2021
Washington, DC

Alec J. Koromilas, 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