

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

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| J.C., Appellant |) | |
| |) | |
| and |) | Docket No. 20-1250 |
| |) | Issued: May 24, 2021 |
| U.S. POSTAL SERVICE, HOUSTON |) | |
| PROCESSING & DISTRIBUTION CENTER, |) | |
| Houston, TX, Employer |) | |
| _____ |) | |

Appearances:
Sarah Toben, Esq., for the appellant¹
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 June 1, 2020 appellant, through counsel, filed a timely appeal from a December 5, 2019 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated January 29, 2014, to the filing of this appeal,

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.

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 the claim.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 November 23, 2011 appellant, then a 67-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 22, 2011 he strained his lower back when pulling a dolly loaded with empty tubs with residual circulars while in the performance of duty. He stopped work November 24, 2011. OWCP initially accepted the claim for a lumbar back sprain. It paid appellant intermittent wage-loss compensation on the supplemental rolls from November 23, 2011 to June 4, 2013.

On July 25, 2012 appellant filed a Form CA-7 claim for wage-loss compensation during the period November 30, 2011 through July 25, 2012. He noted on an accompanying time analysis form (Form CA-7a) that he was off work for eight hours each day pursuant to a physician's order. The evidence of record consisted of the following: medical reports from Dr. James A. Ghadially, an orthopedic surgeon; chiropractic reports; July 25, 2011 lumbar and cervical spine x-rays; and a February 13, 2012 magnetic resonance imaging scan of the lumbar spine.

In an August 1, 2012 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It requested rationalized medical evidence from a qualified physician based upon objective findings to support disability for the period claimed. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant submitted additional reports from Dr. Ghadially along with chiropractic reports.

By decision dated October 31, 2012, OWCP denied the claim for disability for the period November 30, 2011 through July 25, 2012. It found that the medical evidence failed to provide a well-reasoned explanation from a qualified physician to support that appellant was totally disabled from work during the claimed period due to the accepted November 22, 2011 employment injury.

On October 31, 2013 appellant requested reconsideration. He resubmitted evidence previously considered. New evidence dated July 25, 2011 through January 28, 2014 was also

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the December 5, 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.*

received. The evidence pertinent to appellant's period of disability during the period November 30, 2011 through July 25, 2012 consisted of chiropractic reports.

By decision dated January 29, 2014, OWCP denied modification of the October 31, 2012 decision. It found that the medical reports submitted lacked objective medical evidence to support the disability claim during the claimed compensation period.⁴

On May 29, 2015 OWCP expanded acceptance of the claim to include brachial neuritis or radiculitis, thoracic or lumbosacral neuritis or radiculitis, and displacement of lumbar intervertebral disc without myelopathy.

On October 1, 2019 appellant, through counsel, requested reconsideration. Counsel argued that a newly submitted August 20, 2019 report from Dr. Dominic Sreshta, Board-certified in internal medicine, established that appellant was disabled from work as a result of his work-related lumbar sprain/strain, lumbar facet pain, lumbar disc derangement and lumbar radiculopathy superimposed on preexisting lumbar instability, facet hypertrophy, and disc disease during the compensation period in question.

OWCP also received medical reports, progress notes, and duty status reports (Form CA-17) from Dr. Sreshta dated January 14, 2014 through September 24, 2019. In his progress reports, Dr. Sreshta noted his physical examination findings and provided impressions of lumbar radiculopathy, cervicalgia, and cervical radiculopathy. In his CA-17 form reports dated February 25, 2014 through October 22, 2019, he opined that appellant was off or disabled from work. In a December 30, 2014 report, Dr. Sreshta reported that he had been treating appellant since July 24, 2012, following appellant's November 22, 2011 employment injury to the lumbar spine. He provided a detailed history of the employment injury and noted appellant's medical progress, including the results of diagnostic testing. Dr. Sreshta explained that appellant's employment injury extended to and included the lumbar sprain strain, lumbar facet pain, lumbar disc derangement and lumbar radiculopathy superimposed on preexisting lumbar instability, facet hypertrophy, and disc disease. In December 23, 2016 and August 20, 2019 reports, he added that appellant was not able to perform the required job tasks for appellant's letter carrier position subsequent to his compensable injury and that he was disabled.

Medical reports from Dr. Marvin Chang, a Board-certified anesthesiologist, dated April 7, 2014 through September 5, 2018 were received relating appellant's current physical examination findings.

In June 25, August 20, and September 24, 2019 reports, Dr. Emmanuel Opara, Board-certified in geriatric medicine, related appellant's current examination findings.

⁴ By decision dated January 30, 2014, OWCP found that appellant was not entitled to continuation of pay during the period November 23, 2011 through January 6, 2012. It found that the medical evidence of record failed to contain a medical report from a qualified physician, which explained with objective findings why appellant was disabled from work during the stated period.

OWCP also continued to receive chiropractic reports, diagnostic studies, operative notes, and functional capacity evaluations, which pertained to appellant's status following the time period in question.

By decision dated December 5, 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.⁵ This discretionary authority, however, is subject to certain restrictions.⁶ OWCP's regulations establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision.⁷ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁸ Timeliness is determined by the document receipt date, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

When a reconsideration request is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's final merit decision was in error.¹¹ Its 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, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

⁵ 5 U.S.C. § 8128(a); *see B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

⁷ *T.T.*, Docket No. 19-1624 (issued October 28, 2020); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); *Alberta Dukes*, 56 ECAB 247 (2005).

⁸ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁰ *A.M.*, Docket No. 20-0143 (issued October 28 2020); *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *L.N.*, Docket No. 20-0742 (issued October 26, 2020); *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹³ *V.G.*, *supra* note 7; *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁶ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

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 properly determined that appellant's request for reconsideration was untimely filed. In this case, the most recent merit decision pertaining to his claim for wage-loss compensation during the period November 30, 2011 through July 25, 2012 was dated January 29, 2014. OWCP received appellant's request for reconsideration on October 15, 2019, which was beyond the one-year time limit for requesting reconsideration.²¹ Since the reconsideration request was untimely, he has the burden of proof to demonstrate clear evidence of error by OWCP in denying his claim for disability for the period November 30, 2011 through July 25, 2012.²²

¹⁴ *W.H.*, Docket No. 20-0395 (issued October 23, 2020); *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁵ *S.T.*, *supra* note 10; *Pasquale C. D Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 7; *Leon J. Modrowski*, *supra* note 11.

¹⁷ *W.H.*, *supra* note 14; *V.G.*, *supra* note 7

¹⁸ *L.B.*, *supra* note 16; *V.G.*, *supra* note 7.

¹⁹ *D.G.*, *supra* note 12.

²⁰ *See P.A.*, Docket No. 20-0061 (issued January 29, 2021); *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

²¹ *Supra* note 15.

²² *See P.A.*, Docket No. 20-0061 (issued January 29, 2021); *B.C.*, Docket No. 20-0465 (issued November 19, 2020); *see also Debra McDavid*, 57 ECAB 149 (2005).

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP.

On reconsideration appellant submitted evidence which was previously of record and considered by OWCP. As such, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and thus, these reports are insufficient to discharge his burden of proof.²³

Appellant submitted medical evidence from Dr. Sreshta, Dr. Chang, and Dr. Opara pertaining to appellant's back condition. With the exception of Dr. Sreshta's December 23, 2016 and August 20, 2019 reports, this medical evidence is not relevant to the underlying issue of appellant's entitlement to wage-loss compensation due to the accepted employment injury during the claimed period, November 30, 2011 through July 25, 2012, as these physicians did not discuss his disability status during the claimed period. While Dr. Sreshta, in his December 23, 2016 and August 20, 2019 reports, indicated that appellant was not able to perform the required job tasks for his letter carrier position subsequent to his compensable injury and that he was, therefore, disabled, Dr. Sreshta failed to provide a discussion which explained how or why appellant was disabled for work during the claimed period November 30, 2011 through July 25, 2012. To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁴ The term clear evidence of error is intended to represent a difficult standard.²⁵ Dr. Sreshta's reports do not manifest on its face that OWCP committed an error in denying appellant's claim or is of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, this evidence is insufficient to demonstrate clear evidence of error.

OWCP continued to receive evidence regarding appellant's medical status through the years, following July 25, 2012. None of the evidence manifests on its face that OWCP committed an error in denying appellant's disability claim during the claimed period. Appellant has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.²⁶

Consequently, OWCP properly found that appellant's October 1, 2019 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

²³ See *D.L.*, Docket No. 18-1112 (issued January 17, 2020).

²⁴ See *L.B.*, Docket No. 17-0760 (issued September 5, 2017).

²⁵ See *James R. Mirra*, 56 ECAB 738 (2005).

²⁶ *W.D.*, Docket No. 19-0062 (issued April 15, 2019).

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.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 24, 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