United States Department of Labor
Employees' Compensation Appeals Board

E.L., Appellant	)	
and	)	**Docket No. 21-1071**
	)	**Issued: July 6, 2022**
U.S. POSTAL SERVICE, CHURCH STREET POST OFFICE, New York, NY, Employer	)	

Appearances:
James D. Muirhead, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 8, 2021 appellant, through counsel, filed a timely appeal from a June 7, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated August 28, 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 to review the merits of this case.[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 June 7, 2021 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 as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On January 30, 2017 appellant, then a 35-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained an injury to his left wrist, elbow, shoulder, and chest when he pulled a box pallet off of a truck while in the performance of duty. He stopped work on that date. OWCP initially accepted appellant's claim for cervical strain and later expanded the acceptance of his claim to include left arm biceps strain.

In a December 14, 2017 report, Dr. Timothy Henderson, a Board-certified orthopedic surgeon, serving as a second opinion physician, advised that appellant was capable of returning to light-duty work with restrictions of working no more than six hours per day, pushing, pulling, and lifting no more than 20 pounds.

On January 5, 2018 OWCP referred appellant to a certified vocational rehabilitation counselor based on Dr. Henderson's work restrictions. It noted that this referral was limited to placement services with the previous employer only. In a letter dated January 9, 2018, the vocational rehabilitation counselor requested that appellant contact her in order to schedule an initial telephonic interview, as her attempts to contact him by telephone had been unsuccessful. She advised him that failure to contact her may jeopardize his entitlement to benefits. On January 19, 2018 the vocational rehabilitation counselor noted in a rehabilitation action report (Form OWCP-44) that appellant had not responded to her letter.

In a letter dated January 23, 2018, OWCP advised appellant of the specific penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It noted that he had not responded to his vocational rehabilitation counselor's letter. OWCP advised appellant that the initial stages of vocational rehabilitation included interviews, testing, counseling, guidance, and work evaluations. It further advised him that, if he failed or refused to participate in vocational rehabilitation without good cause, his compensation benefits would be reduced to zero and that this reduction would continue until he complied with OWCP's directions concerning rehabilitation. OWCP afforded appellant 30 days to contact it and his rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort designed to return him to gainful employment. It informed him that, if he believed that he had a good reason for not participating in the rehabilitation effort, he should respond within 30 days, with reasons for noncompliance, and submit evidence in support of his position. OWCP noted that, if appellant did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

Appellant contacted OWCP's representative by telephone on January 30, 2018 regarding the January 23, 2018 letter. An OWCP representative advised him that, if he wished to cooperate with vocational rehabilitation, he should contact the rehabilitation counselor, and provided her telephone number.

In an initial report dated January 30, 2018, the rehabilitation counselor noted that she had contacted the employing establishment in order to obtain a modified job offer. She further noted that appellant had left a message for her late in the afternoon of January 19, 2018.

In a rehabilitation action report (Form OWCP-44) dated February 1, 2018, the rehabilitation counselor noted that she had conducted an initial interview with appellant on February 1, 2018.

In an injured worker's rehabilitation status report (Form OWCP-3) dated May 22, 2018, the rehabilitation counselor noted that the employing establishment had not responded to her requests for a suitable job offer and that, therefore, the case would move to a plan development status in order to obtain medically suitable employment with a new employer.

In a letter dated June 1, 2018, the rehabilitator counselor notified appellant that his file had been moved to plan development, as there was no work available at the employing establishment. She noted that she had left messages for him on May 30 and 31, 2018 to discuss the rehabilitation plan, but had received no response. The rehabilitation counselor requested that appellant contact her by June 8, 2018 to discuss the plan. She advised that failure to contact her may jeopardize his entitlement to benefits.

In a Form OWCP-44 dated June 1, 2018, the rehabilitation counselor noted that she had left messages for appellant on May 30 and 31, 2018 to discuss plan development, but that he had not responded to the request, and that she had sent a letter to him requesting that he contact her. In a Form OWCP-44 dated June 11, 2018, she noted that she had sent him a letter requesting that he contact her by June 8, 2018 in order to discuss the rehabilitation plan. The rehabilitation counselor also left messages for him on May 30 and 31, 2018, but appellant had not responded to her attempts to contact him.

In a letter dated June 27, 2018, OWCP notified appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It noted that he had not responded to his vocational rehabilitation counselor's attempts to contact him on May 30 and 31, 2018. OWCP noted that, if appellant did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

In a Form OWCP-44 dated June 27, 2018, the rehabilitation counselor noted that appellant had not responded to her multiple messages or letters.

In a Form OWCP-44 dated August 3, 2018, the rehabilitation counselor noted that a 30-day letter for noncooperation was sent on June 27, 2018, but that appellant had not been in contact with her.

By decision dated August 28, 2018, OWCP reduced appellant's compensation to zero, effective August 24, 2018, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for his failure to cooperate with vocational rehabilitation without good cause. The decision was sent to appellant's last known address of record in New Jersey.

In a memorandum of a telephone call (Form CA-110) dated September 5, 2018, appellant stated that he had received a notification that his compensation had been terminated. An OWCP representative advised that a letter was mailed to him in "June," advising him of his noncooperation, and that he had not returned the rehabilitation counselor's telephone calls. Appellant stated that he did not receive any calls from the rehabilitation counselor, but that he had contacted her in "July." OWCP noted that no mail had been returned after the "June" notice. Appellant stated that he had received a plan dated June 13, 2018 from the rehabilitation counselor, but that he did not live in New Jersey, and that it was too much for him to travel from the Bronx. OWCP's representative advised that OWCP's record had his mailing address in Plainfield, New Jersey, and that the rehabilitation counselor's plan was based on his residential address. Appellant replied that he had not received compensation and had moved out of his New Jersey address, but that he still received mail at that address. OWCP's representative stated that OWCP did not have his new mailing address. Appellant stated that he still had the New Jersey address as his mailing address and that he had not provided an updated mailing address to OWCP. He advised that he would cooperate with vocational rehabilitation.

In a letter dated June 14, 2019, appellant indicated that, in 2018, he had received a letter telling him to go to New Jersey for training. He noted that he had never worked in New Jersey. Appellant stated that he had lived in New Jersey, but had moved to the Bronx, New York. He noted that, when he received letters in 2018, he called someone and received no answer. Appellant left a voice mail stating that he wanted to return to work, but that it needed to be in Manhattan or the Bronx, because he was unable to get to the New Jersey address as he did not have a car and he had never worked in New Jersey before.

On September 24, 2019 OWCP sent appellant a copy of the August 28, 2018 decision to his address in the Bronx.

In a letter dated February 2021, appellant wrote to OWCP requesting vocational rehabilitation and receipt of compensation benefits.

In a Form CA-110 dated March 11, 2021, appellant informed an OWCP representative that he had never received the most recent merit decision of record, but confirmed that the address in his case file was correct. OWCP's representative noted that there was no returned mail, so all indications were that he received the decision in question. Appellant stated that the decision was not correct and OWCP's representative advised him to exercise his appeal rights.

On March 11, 2021 OWCP sent appellant another copy of the August 28, 2018 decision to his last known address in New Jersey.

By letter dated March 18, 2021, appellant, through counsel, requested reconsideration of the August 28, 2018 decision. Counsel argued that it was issued in clear error, as appellant was employed as a mail handler at the employing establishment in New York, but the rehabilitation counselor was offering him work in New Jersey.

By decision dated June 7, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a). By a second decision also dated June 7, 2021, it rescinded the first June 7, 2021 nonmerit decision, noting that it had superseded the prior decision. OWCP analyzed the case under the clear evidence of error standard, finding that

appellant's reconsideration request was untimely filed and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right. OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.[4] One such limitation is that the request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.[5] OWCP will consider an untimely application only if the application demonstrates clear evidence on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[6] Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[7]

The term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.[8] To demonstrate clear evidence of error a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that it committed an error.[9]

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's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.[10] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[11] Appellant has alleged that

[4] *Supra* note 2.

[5] 20 C.F.R. § 10.607. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id*. at Chapter 2.1602.4b.

[6] *Id*. at. § 10.607.

[7] *Id*. at § 10.608.

[8] *Supra* note 5 at Chapter 2.1602.5(a) (September 2020).

[9] *A.K.*, Docket No. 17-1254 (issued May 23, 2018); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[10] 20 C.F.R. § 10.607(a).

[11] *Supra* note 9.

he did not receive the decision dated August 28, 2018. Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.[12] The August 28, 2018 decision was sent to appellant's last known address and is presumed to have been received by him absent any notice of nondelivery. Appellant has not submitted evidence to rebut this presumption. As his request for reconsideration was received on March 28, 2021 more than one year after the August 28, 2018 decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the suspension of his compensation.[13]

The underlying issue in this case is whether appellant had shown a good faith effort to cooperate with vocational rehabilitation prior to August 28, 2018. On reconsideration counsel asserted that the August 28, 2018 decision was issued in error, as appellant was employed as a mail handler at the employing establishment in New York, but the rehabilitation counselor was offering him work in New Jersey. However, there is no evidence of record indicating that appellant was instructed to take a position in New Jersey. In his June 14, 2019 letter, appellant indicated that he was told to attend vocational rehabilitation training in New Jersey. The evidence of record substantiates that appellant's last known address was in New Jersey. The evidence of record also substantiates that, prior to the August 28, 2018 decision, OWCP's vocational rehabilitation counselor had attempted to contact appellant by telephone and letter to discuss a vocational training plan, but that appellant did not appropriately respond to the counselor's requests. Appellant was required to cooperate with vocational rehabilitation, and section 8113(b) of FECA provides penalties for claimants who fail to cooperate with vocational rehabilitation.[14] He has not submitted any evidence to establish that he agreed to cooperate with vocational rehabilitation or that he had provided good cause for refusal after receiving the June 27, 2018 letter from OWCP informing him of the consequences for failing to participate. Therefore, appellant has not demonstrated clear evidence of error.

The term clear evidence of error is intended to represent a difficult standard.[15] None of the evidence submitted by appellant manifests on its face that OWCP committed an error in reducing his compensation based on his failure to cooperate with vocational rehabilitation. Appellant has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.[16] Thus, the evidence is insufficient to demonstrate clear evidence of error.

[12] *R.D.*, Docket No. 20-1551 (issued November 8, 2021); *see also see James A. Gray*, 54 ECAB 277 (2002).

[13] 20 C.F.R. § 10.607(b); *see A.K.*, *supra* note 9.

[14] Section 8113(b) of FECA provides that, if an individual fails to undergo vocational rehabilitation as directed by OWCP, it may reduce her compensation to what would have been her wage-earning capacity had she cooperated. 5 U.S.C. § 8113 (b).

[15] *See A.K.*, *supra* note 9.

[16] *Id*.

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 June 7, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2022
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