United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 22-0547**
	)	**Issued: October 14, 2022**
DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT EMERGENCY FIREFIGHTERS, Susanville, CA, Employer	)	

Appearances:
Stephanie N. Leet, 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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 2, 2022 appellant, through counsel, filed a timely appeal from a January 7, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 14, 2004, 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 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 January 7, 2022 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, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 23, 2001 appellant, then a 33-year-old hotshot crewman, filed a traumatic injury claim (Form CA-1) alleging that on May 22, 2001 he was struck by a large tree limb and knocked to the ground while in the performance of duty. He returned to work in a limited-duty capacity. OWCP accepted the claim for thoracic sprain, lumbar sprain, back contusion, sprain of the left hip and thigh, and post-traumatic stress disorder. Effective June 16, 2002, OWCP paid wage-loss compensation on its periodic compensation rolls at the weekly rate of $643.06 and the net 28-day rate of $1,714.84.

Personnel action forms Standard Form 50 (SF-50) dated from June 21, 1998 to October 14, 2000 indicate that appellant was employed by the Forest Service as a full-time seasonal forestry technician. An SF-50 form dated May 6, 2001 indicates that appellant was employed by the Bureau of Land Management as a range technician hotshot crewmember.

By decision dated August 7, 2003, OWCP adjusted appellant's compensation rate to reflect a weekly rate of $356.54 as that of a temporary seasonal worker based on appellant's SF-50 forms for the current and previous year. It noted that 5 U.S.C. § 8114(d)(1) and (2) did not apply as appellant had not been employed in the position for substantially the whole year preceding injury, and that the position was not one which would have afforded employment for substantially the whole year. OWCP, therefore, found that the compensation pay rate would be calculated under section 5 U.S.C. § 8114(d)(3), which required that the pay rate be no less than 150 times the average daily wage.[4] It found that appellant was not entitled to overtime pay or to inclusion of his earnings in the year prior to the injury as a tree trimmer as it was not similar to his federal employment as a casual firefighter. OWCP noted that the earnings of a fellow crew member on appellant's hotshot crew would be identical to appellant's actual earnings during the preceding year. Using the "150 Formula," OWCP calculated that appellant's current weekly pay was $356.54 and was higher than that of most similarly situated employees as it was calculated with 25 percent hazard pay and 10 percent night differential pay. Based on appellant's pay records, it found that appellant worked 10 weeks and earned $7,728.20, excluding overtime in 2001. The pay records from the year prior to his date of disability revealed that he earned $6,018.57 for the period July 16 through October 14, 2000. Thus, during the one-year period prior to the date of disability, appellant earned a total of $13,746.77 excluding overtime. It included other premium pay, such as hazard pay, night pay, Sunday premium pay, etc. OWCP noted that appellant's base hourly pay was $11.32, plus $2.83 per hour representing 25 percent hazard pay, $1.33 per hour representing 10 percent night differential pay, which would equate to $15.45 per hour pay. It then multiplied $15.45 per hour by 8 hours, then by 150, and then divided by 52 to determine appellant's average weekly earnings of $356.54.

[4] Under sections 5 U.S.C. § 8114(d)(1) and (2) it found that appellant was not employed for "substantially the whole year" and his past seasonal employment did not suggest that he would have been afforded employment for "substantially the whole year."

On August 19, 2003 OWCP issued a preliminary determination that appellant had been overpaid $20,106.43 for the period July 19, 2001 through August 9, 2003 because his pay rate and compensation rate were incorrect. It noted that his pay rate had been computed as if he was a Department of Defense firefighter working 172 hours every two weeks, when in fact he was a wild lands firefighter who only worked during the fire season. OWCP found that appellant's SF-50 demonstrated that he was not a career seasonal employee.

On September 4, 2003 appellant disagreed with both the August 7, 2003 decision and the August 19, 2003 preliminary determination and requested a hearing before an OWCP hearing representative. A hearing was held on May 26, 2004, during which appellant testified. He noted that he had worked for the Forest Service as a tree trimmer from 1998 to the year 2000, and for the Bureau of Land Management since 2001. Appellant related that as of the date of injury he was a seasonal firefighter and that he had been offered a permanent position a month later, which he could not accept because of his injury.

By decision dated September 14, 2004, an OWCP hearing representative finalized OWCP's August 7, 2003 decision. The hearing representative found that appellant's argument that he was a career seasonal employee for which compensation rate would be considered differently was not supported by the employing establishment's personnel records or Form SF-50s, which indicated that he was a summer seasonal employee who served under a temporary agreement subject to termination at any time. The hearing representative also found that the issue of overtime inclusive in pay calculations was moot as appellant's date of injury was after October 11, 1998, the effective date under 5 U.S.C. § 8114(e) which bars inclusion of overtime pay in pay rates for compensation purposes. The hearing representative additionally determined that OWCP properly found that appellant did not fit the criteria to compute the pay rate based on the daily pay rate as appellant submitted no evidence supportive of his testimony that his tree trimmer employment was similar to his federal firefighter duties. However, the hearing representative found that the evidence of record established that a similarly situated hotshot employee earned the same $13,746.77 in the prior year as appellant had earned during the prior year and during his weeks of work in 2001 as a hotshot crew member. The hearing representative also found that appellant's pay rate was properly based on the "150 times formula" finding that it yielded the highest rate over the pay rate of a similar employee on the hotshot crew, and was greater than appellant's actual earnings divided by 52 weeks per year.[5]

On October 12, 2021 appellant, through counsel, requested reconsideration of OWCP's August 7, 2003 decision. Counsel contended that the evidence supported that appellant was a career seasonal employee, not a temporary seasonal employee, and that the pay rate for a full-time permanent employee should be used. In support of her contention, counsel argued that the SF-50s used to determine appellant's pay rate did not clearly establish that he was a temporary seasonal employee, noting that appellant's SF-50s from 1999, 2000 and 2001 listed appellant as an intermittent seasonal, full-time seasonal or full-time employee, respectively. She also argued that an August 9, 2001 Form CA-7 and May 7, 2001 information sheet from Diamond Mountain I.H.C., indicated that appellant's tour of duty was a fixed 40-hour week schedule and the position was for the "regular season." Also, a memo to the file listed appellant's weekly base pay rate at $908.96, which she argued was not used in determining appellant's pay rate. Counsel further argued that

[5] By decision dated July 2, 2007, OWCP finalized its preliminary overpayment determination that appellant was without fault in the overpayment of compensation for the period July 19, 2001 through August 9, 2003 in the amount of $20,106.43.

the pay rate for a similarly employed worker was not properly developed prior to OWCP's determination that the 150 formula was the most advantageous rate of pay as the pay stubs appellant had provided for other employees on his hotshot crew from 2001 were never evaluated to determine the average weekly wage.

In support of his request, appellant submitted time and attendance records and leave earning statements from K.M. and A.P.; an August 21, 2001 memo to the file, noting appellant's weekly base pay rate was $908.96 and total weekly pay rate was $643.06; appellant's leave and earning statements in 2001; back pages of Form CA-7s dated January 2, 2001, July 1, 2003, and July 3, 2001; OWCP's August 17, 2001 letter to the employing establishment requesting pay rate information; a page discussion from the employment and benefits handbook , and memos to the file.

The May 7, 2001 general information sheet from Diamond Mountain I.H.C. contained information such as report time, reporting location, tour of duty (for training and regular season), GS-Grade, contact numbers, and where to park.

In a September 18, 2001 letter, the employing establishment indicated that appellant was employed as a temporary range technician and discussed overtime and hazard pay.

SF-50 forms were also provided. A June 4, 2000 SF-50 form indicates that appellant was a forestry technician full time seasonal temporary employee, with the Forest Service, which did not convert to a career conditional appointment. A May 6, 2001 SF-50 form indicates that appellant was a range technician hotshot crew member at the Bureau of Land Management, with a full time temporary summer seasonal appointment. A July 20, 2001 SF-50 form indicates that appellant was a full-time employee.

By decision dated January 7, 2022, OWCP denied appellant's reconsideration request finding that it was untimely filed and failed to demonstrate that OWCP's September 14, 2004 decision was issued in error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[6] Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).[7] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted 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, it must nevertheless undertake a limited

[6] 20 C.F.R. § 10.607(a).

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

[8] *D.R.*, Docket No. 21-0061 (issued May 24, 2021); *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

review to determine whether the request demonstrates clear evidence of error.[9] OWCP's 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 claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.[10]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.[11] Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] The Board makes an independent determination as to 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.[15]

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.[16] The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP received appellant's request for reconsideration on October 12, 2021, more than one year after the last merit decision dated September 14, 2004. Appellant's request was, therefore, untimely filed. Consequently, he must demonstrate clear evidence of error.[17]

The Board further finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP properly determined appellant's pay rate as that of a temporary seasonal employee and properly based appellant's pay rate on the "150 times formula."

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[9] 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] *Supra* note 9; *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

[11] 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[12] *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

[13] *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

[14] *Id.*

[15] *Id.*

[16] *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

[17] *Supra* notes 9 and 10.

On reconsideration appellant's counsel argued that the SF-50s used to determine appellant's status as a temporary seasonal employee listed him as a full-time seasonal employee and/or a full-time employee. However, the SF-50's submitted by counsel indicate that he was not a permanent employee as evidenced by the "0" in Box 24 (Tenure). Therefore, this documentation indicates that the appellant was employed as a temporary seasonal employee. As well, the additional evidence submitted with the untimely request for reconsideration does not address career/employment status, only the hours of work.

None of the arguments or evidence submitted manifest on its face that OWCP committed an error in finding that appellant was a temporary seasonal employee or are of sufficient probative value to raise a substantial question as to the correctness of OWCP's pay rate decision.

Accordingly, the Board finds that OWCP properly denied his reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board