

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

L.W., Appellant

and

U.S. POSTAL SERVICE, WAYNE POST
OFFICE, Newark, NJ, Employer

)
)
)
)
)
)
)
)
)
)
)

Docket No. 23-0941
Issued: November 3, 2023

Appearances:
Stephen Barszcz, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 29, 2023 appellant, through counsel, filed a timely appeal from a June 1, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated January 14, 2022, to the filing of this appeal, 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 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 issuance of the June 1, 2023 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 June 1, 2020 appellant, then a 44-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 28, 2020 she experienced lower back pain when lifting a heavy package while in the performance of duty. She stopped work on May 28, 2020. OWCP accepted the claim for lumbar strain and lumbar radiculopathy.⁴ It paid appellant on its supplemental rolls effective July 12, 2020 and on its periodic rolls effective November 8, 2020. On February 9, 2021 appellant underwent an L5-S1 microdiscectomy, L5 hemilaminectomy, and L5-S1 foraminotomy.

In a July 29, 2021 report, Dr. Frank J. Corrigan, a Board-certified orthopedic surgeon serving as OWCP's second opinion physician, reviewed the statement of accepted facts (SOAF) and the medical record. He noted examination findings, including a positive straight leg raise on the right side which correlated with appellant's described symptoms of right lower extremity radiating pain. Dr. Corrigan also noted that it seemed that her prior surgery was unsuccessful and additional surgery had been recommended by her treating physician. He opined that the work-related conditions had not resolved, and appellant was not capable of returning to her date-of-injury employment; however, she could perform a sedentary position. In a corresponding July 29, 2021 work capacity evaluation (Form OWCP-5c), Dr. Corrigan indicated that appellant could work full time in a sedentary position with pushing, pulling, lifting, squatting limited to 10 pounds. He noted that he was unable to determine how long the restrictions would apply.

On August 27, 2021 the employing establishment offered appellant a modified assignment as modified city carrier to begin no later than September 3, 2021. The duties of the position included answering telephones two to five hours a day, delivery express as needed one to two hours a day, deliver cluster boxes as needed one to two hours a day, and deliver curblines (mounted) two to five hours a day. The position was noted to be a sedentary position with pushing, pulling, and lifting limited to 10 pounds.

In a letter dated September 3, 2021, the employing establishment advised that appellant had declined the job offer that day. It indicated that the job offer remained available to her and would be available indefinitely as long as medically required and the restrictions did not change.

In a September 16, 2021 report, Dr. Giorgio Rotoli, a neurosurgeon, extended appellant's total disability status for a month due to her current conditions and job demands.

On September 22, 2021 the employing establishment clarified the work hours of the August 27, 2021 modified city carrier position. It indicated that the job offer remained available to appellant.

⁴ Appellant has prior claims pertaining to her back. Under OWCP File No. xxxxx963, she alleged that a January 12, 2014 lifting injury injured her lumbar spine. Under OWCP File No. xxxxx058, OWCP accepted a cervical sprain and a lumbar sprain due to a July 28, 2017 motor vehicle accident.

In a notice of proposed reduction of wage-loss compensation dated September 30, 2021, OWCP proposed to reduce appellant's wage-loss compensation in accordance with 20 C.F.R. § 10.500(a), based on her refusal of the temporary, light-duty position of modified city carrier. It advised her that it had reviewed the work restrictions provided by Dr. Corrigan and found that his opinion represented the weight of the medical evidence. OWCP further found that the position offered was within appellant's restrictions and was temporary in nature. It informed her of the provisions of 20 C.F.R. § 10.500(a) and advised her that a claimant who declined a temporary, light-duty assignment deemed appropriate by OWCP, was not entitled to compensation for total wage loss. OWCP noted that the offered pay rate of \$1,079.69 per week for 40 hours met or exceeded her date-of-injury pay, and she would not be entitled to ongoing wage-loss compensation. It afforded appellant 30 days to accept the assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment.

On October 6, 2021 OWCP referred appellant, along with a SOAF and the medical record, to Dr. Jack Stern, a Board-certified neurosurgeon, for a second opinion as to whether additional back surgery was necessary. In an October 27, 2021 report, Dr. Stern noted his review of the history of injury, and her medical course and treatment. He provided appellant's physician examination finding and opined that appellant's lumbar radiculopathy with disc herniation at L5-S1 on the right did not require fusion, but a simple revision microdiscectomy. In an addendum dated December 15, 2021, Dr. Stern opined that she could work full-time light duty pending surgery, noting that she should avoid any heavy lifting and/or anything strenuous due to her current diagnosis.

On November 2, 2021 the employing establishment indicated that appellant had accepted the job offer but never reported to duty. It indicated that the job offer remained available to her.

By decision dated January 14, 2022, OWCP finalized the September 30, 2021 proposed reduction of appellant's wage-loss compensation, effective that date, because she failed to accept the August 27, 2021 temporary, modified-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that the weight of the medical evidence rested with Dr. Corrigan who provided temporary work restrictions and that the duties and physical requirements of the August 27, 2021 temporary, modified-duty assignment appropriately accommodated Dr. Corrigan's restrictions. OWCP also noted that Dr. Stern had opined that she could work in a sedentary full-time, limited-duty position if there was no heavy lifting and/or anything strenuous, prior to surgery. It found that although appellant was a permanent employee at the time of injury, the restrictions provided by Drs. Corrigan and Stern were temporary in nature and its procedures provide that a temporary, light-duty assignment may be provided to an employee during a period of recovery. OWCP also determined that appellant would have sustained no wage loss had she accepted the temporary, modified-duty assignment and determined that she was not entitled to wage-loss compensation. However, appellant remained eligible for medical benefits.

On April 22, 2022 appellant requested reconsideration.

OWCP received reports dated January 26 and March 29, 2022, wherein Dr. Rotoli recommended lumbar interbody fusion; a request for authorization for surgery, surgical booking sheet for a procedure to be performed on June 17, 2022, and diagnostic testing, including April 11 and June 18, 2022 magnetic resonance imaging (MRI) scans of the lumbar spine. None of the evidence discussed appellant's disability status.

By decision dated July 5, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). It found that the evidence submitted was irrelevant or immaterial as it did not address the refusal of the limited-duty position or offered any argument in support of her total disability from work.

OWCP continued to receive medical evidence.

Hospital records document that on June 17, 2022 appellant underwent L5-S1 revision transforaminal lumbar interbody fusion, L5-S1 revision laminectomy, L5-S1 discectomy, L5-S1 right-sided facetectomy, placement of hardware, and posterior lumbar instrumental fusion.

On May 9, 2023 appellant, through counsel, requested reconsideration. Counsel contended legal error in OWCP's decision as appellant was not provided 15 additional days to accept the offered position without penalty. He provided exhibits including, appeal request form, copy of 20 C.F.R. § 10.516 and a copy of OWCP's procedure manual regarding job offer refusal.

By decision dated June 1, 2023, OWCP denied appellant's May 9, 2023 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of 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.⁵ 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).⁶ 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.⁷

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 review to determine whether the request demonstrates clear evidence of error.⁸ 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 the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁹

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

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁷ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

⁸ 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).

⁹ *Supra* note 5. *See also supra* note 6 at Chapter 2.1602.5a (September 2020).

on its face that OWCP committed an error.¹⁰ Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁵ The claimant must present evidence that on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is insufficient to demonstrate clear evidence of error.¹⁶

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.

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.¹⁷ As appellant's request for reconsideration was received by OWCP on May 9, 2023, more than one year after OWCP's January 14, 2022 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP.¹⁸

On reconsideration, counsel argued that OWCP committed legal error by not providing appellant with 15 additional days to accept the offered position without penalty. Counsel's argument is misplaced as 15 additional days are not required under 20 C.F.R. § 10.500. Counsel also submitted four exhibits including, appeal request form, copy of 20 C.F.R. § 10.516 and a copy of OWCP's procedure manual 2.0814 (5) job offer refusal. However, evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear

¹⁰ 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).

¹¹ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *see also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (September 2020).

¹⁶ *R.P.*, Docket No. 22-0686 (issued September 30, 2022); *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹⁷ *Supra* note 5.

¹⁸ *See supra* note 8.

evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰

Therefore, the Board finds that the evidence and argument submitted by appellant does not demonstrate on its face that OWCP committed an error when it proposed reduction of appellant's wage-loss compensation in its January 14, 2022 decision.²¹

As appellant's request for reconsideration does not demonstrate on its face that OWCP committed error in its January 14, 2022 decision, the Board finds that OWCP properly determined that she did not 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 June 1, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁹ See *supra* note 11.

²⁰ See *supra* note 12.

²¹ *J.M.*, Docket No. 22-0630 (issued February 10, 2023); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).