

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

_____)	
G.R., Appellant)	
)	
and)	Docket No. 19-1886
)	Issued: February 22, 2021
U.S. POSTAL SERVICE, JOHN FITZGERALD)	
KENNEDY AIR MAIL FACILITY, Jamaica, NY,)	
Employer)	
_____)	

Appearances:
James D. Muirhead, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On September 12, 2019 appellant, through counsel, filed a timely appeal from a March 18, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated June 6, 2016,² to the filing of this

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 The Board has previously held that an OWCP merit decision dated December 2, 2016 was null and void. *Order Dismissing Appeal*, Docket No. 17-1047 (issued December 17, 2018).

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's December 19, 2018 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has been previously before the Board.⁵ The facts and circumstances as set forth in the Board's prior orders are incorporated herein by reference. The relevant facts are as follows.

On January 7, 2014 appellant, then a 57-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 7, 2014 he injured his lower back when lifting a parcel to place it on a scale while in the performance of duty. He indicated that he turned and felt a sharp pain in his lower back. Appellant did not stop work. On February 27, 2014 OWCP accepted his claim for a lumbar sprain. It paid appellant wage-loss compensation on the supplemental rolls commencing March 18, 2014.

On October 2, 2014 OWCP referred appellant, the medical record, and a statement of accepted facts (SOAF), noting the accepted January 7, 2014 lumbar sprain to Dr. Julio V. Westerband, a Board-certified orthopedic surgeon, for a second opinion on the nature and extent of the injury-related condition. Dr. Westerband provided an October 29, 2014 report in which he reviewed the medical record and SOAF. He noted that appellant underwent bilateral knee arthroscopies in 2005 and 2007. On examination Dr. Westerband observed mild right-sided paraspinal spasm, restricted lumbar extension, and a positive right straight leg raising test. He diagnosed a resolving lumbar spine sprain with indications of right-sided radiculopathy. In a February 17, 2015 supplemental report, Dr. Westerband indicated that, while a February 3, 2015 lumbar magnetic resonance imaging scan report demonstrated right S1 nerve root sleeve impingement, additional testing was needed to diagnose lumbar radiculopathy. In a second supplemental report dated March 18, 2015, he noted that a March 6, 2015 electromyography and nerve conduction velocity (EMG/NCV) study had demonstrated right L5 radiculopathy with mild underlying neuropathy. On that basis Dr. Westerband opined that appellant required a one-level discectomy. In a work capacity evaluation (Form OWCP5-c) dated March 18, 2015, he limited walking to two hours a day, standing to four hours a day, twisting to one hour, no bending or

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the March 18, 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.*

⁵ *Order Dismissing Appeal*, Docket No. 17-1047 (issued December 17, 2018); *Order Dismissing Appeal*, Docket No. 17-0329 (issued March 20, 2017).

stooping, two hours driving while at work, pushing, pulling, and lifting limited to 35 pounds for up to two hours a day, and no climbing.

The employing establishment offered appellant a modified position as a limited-duty mail processing clerk, effective May 8, 2015. The duties included “flat prep/letter tray,” standing, and sitting. The physical requirements included two hours of walking, four hours of standing, and two hours of pushing and lifting no greater than 35 pounds, no climbing stairs, bending, or stooping, and two hours of operating a motor vehicle to and from work.

On May 15, 2015 OWCP advised appellant that the offered position was suitable, and afforded him 30 days to accept and report for duty or provide a written explanation of his reasons for refusal.

On June 23, 2015 OWCP advised appellant that his refusal was not deemed justified and afforded him an additional 15 days to accept the job. Appellant did not accept the job or return to work within the 15-day time period.

By decision dated July 10, 2015, OWCP terminated appellant’s wage-loss compensation, effective July 9, 2015, pursuant to 5 U.S.C. § 8106(c)(2), due to his refusal of suitable work.

On July 28, 2015 appellant’s then-representative requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review, held on March 21, 2016.

By decision dated June 6, 2016, OWCP’s hearing representative affirmed the July 10, 2015 termination decision.

On December 19, 2018 appellant, through counsel, requested reconsideration. Counsel contended that OWCP erred in terminating appellant’s compensation as it failed to consider all relevant conditions prior to determining that the offered position was suitable work. He noted that appellant had been performing a limited-duty job provided to him under OWCP File No. xxxxxx233, accepted for bilateral knee contusions sustained in the performance of duty on May 19, 2012. Counsel contended that the May 8, 2015 job offer did not comply with the restrictions provided for appellant’s May 19, 2012 bilateral knee injury. He also argued that Dr. Westerband did not review treatment records under OWCP File No. xxxxxx233 or examine appellant’s knees. Additionally, counsel contended that Dr. Westerband diagnosed new lumbar conditions in his supplemental reports, but did not alter the work restrictions accordingly.

OWCP subsequently received medical evidence dated November 7, 2018 through February 17, 2019 in the form of physical therapy notes and progress reports from Dr. Michael J. Katz, a Board-certified orthopedic surgeon, who continued to diagnose lumbar radiculopathy with L5-S1 disc herniation.

By decision dated March 18, 2019, OWCP denied appellant’s December 19, 2018 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.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 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 reconsideration request solely because it was untimely filed. When a claimant's reconsideration request is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁹ If a request demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹¹ is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.¹² The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which reconsideration is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹³

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016). OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provides that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP. *See* 20 C.F.R. § 10.607 (2011); *see also* *C.B.*, Docket No. 13-1732 (issued January 28, 2014) (where the Board held that, for OWCP decisions issued on or after August 29, 2011, the date of the request for reconsideration is the "received date" as recorded in iFECS).

⁸ 5 U.S.C. § 8128(a); *J.D.*, Docket No. 18-1765 (issued June 11, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ 20 C.F.R. § 10.607(b); *B.C.*, Docket No. 18-1496 (issued May 22, 2019).

¹⁰ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

¹¹ *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Id.*

¹³ *Id.*

ANALYSIS

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

OWCP's procedures provide that a request for reconsideration must be received within one year of the date of OWCP's decisions for which review is sought.¹⁴ The last merit decision was dated June 6, 2016. Appellant had one year from the date of that decision, *i.e.*, Tuesday, June 6, 2017, to request reconsideration. As his request for reconsideration was not received in iFECS until December 19, 2018, more than one year after the issuance of the June 6, 2017 decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in its June 6, 2016 decision.

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 June 6, 2016 decision and is sufficient to demonstrate clear evidence of error.

In his December 19, 2018 request for reconsideration, counsel argued that the offered May 8, 2015 modified processing clerk position was not suitable work as it did not comply with work restrictions prescribed for bilateral knee contusions accepted under OWCP File No. xxxxxx233. He noted that OWCP's referral physician did not review the medical record under OWCP File No. xxxxxx233 or otherwise consider the accepted knee injuries when formulating the work restrictions relied upon in formulating the May 8, 2015 modified position. The Board has held that all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁵ As OWCP did not consider the bilateral knee injuries accepted under OWCP File No. xxxxxx233 in determining whether the offered position was suitable work, the Board finds that appellant has demonstrated clear evidence of error.

Accordingly, the Board finds that OWCP improperly denied appellant's request for reconsideration as he has demonstrated clear evidence of error in this case. The Board will set aside the decision. On remand OWCP shall administratively combine the present claim with OWCP File No. xxxxxx233 and consider all relevant conditions and work restrictions to determine whether the May 8, 2015 job offer was suitable work. Following this and other such further development, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's December 19, 2018 request for reconsideration of the merits of his claim as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁴ *Supra* note 11 at § 10.607(b).

¹⁵ *P.C.*, Docket No. 19-1912 (issued October 19, 2020); *Mary E. Woodward*, 47 ECAB 211 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.¹⁶

Issued: February 22, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.