

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

_____)	
W.B., Appellant)	
)	
and)	Docket No. 20-1197
)	Issued: February 3, 2021
DEPARTMENT OF THE ARMY, ABERDEEN)	
PROVING GROUND, Aberdeen, MD, Employer)	
_____)	

Appearances:
Analese B. Dunn, 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, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 22, 2020 appellant filed a timely appeal from a December 13, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from OWCP's last merit decision, dated June 14, 2007,² 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.

² *See* 20 C.F.R. § 501.3(d)(2) (2008). For final adverse decisions issued by OWCP on and after November 19, 2008, the Board's review authority is limited to appeals which are filed within 180 days from the date of issuance of OWCP's decision. *See* 20 C.F.R. § 501.3(e) (2009).

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 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 26, 2007 appellant, then a 28-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that on October 5, 2006 he developed pneumonia, which led to cardiac issues and a pacemaker installation after receiving an influenza vaccine while in the performance of duty. He stopped work on October 7, 2006 and returned on March 12, 2007.

OWCP received medical evidence in support of appellant's claim including hospital records and letters from his treating physicians.

By decision dated June 13, 2007, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a causal relationship between his diagnosed conditions and the accepted October 5, 2006 employment incident.

On December 4, 2019 appellant, through counsel, requested reconsideration. Counsel contended that there was clear evidence of error in OWCP's June 13, 2007 decision as it failed to consider medical evidence submitted prior to the issuance of the decision. She further asserted that the decision did not issue a clear basis for denial.

In support of his request for reconsideration, appellant submitted an undated affidavit from Dr. Alan R. Maniet, a Board-certified osteopath specializing in internal medicine. Dr. Maniet noted that appellant received an influenza vaccine on October 5, 2006 from his employing establishment. He reviewed the medical record and described appellant's treatment. Dr. Maniet diagnosed hypersensitivity myocarditis. He noted that vaccines had been implicated as causing hypersensitive or allergic myocarditis. Dr. Maniet indicated that appellant had an extensive infectious disease workup, which ruled out infectious etiology for his myocarditis. He also noted that appellant had no history of inflammatory or immune disorders and had no exposure to protozoal or metazoal diseases, toxic agents, or physical agents. Dr. Maniet reported that appellant received an influenza vaccine within 24 hours of the development of his symptoms and noted that his bloodwork suggested an allergic-type hypersensitive reaction. He, therefore, concluded that appellant's influenza vaccine caused his myocarditis. Dr. Maniet cited to medical literature that indicated that vaccines had been implicated as a cause of hypersensitivity myocarditis.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. 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.*

Also submitted was a March 8, 2019 affidavit, wherein appellant described the employment incident and related his medical history.

By decision dated December 13, 2019, OWCP denied appellant's reconsideration request, 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 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 on its face that OWCP committed an error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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 evidence of error on the part of OWCP.¹² The Board makes an independent determination of whether a claimant has

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

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

⁸ 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

⁹ *Id.*; *supra* note 5 at Chapter 2.1602.5(a).

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

¹² *B.W.*, *supra* note 9.

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.¹³

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁴ The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). 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 not clear evidence of error.¹⁵

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁶ Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons.¹⁷ The Board has held that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁸

ANALYSIS

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

OWCP received appellant's request for reconsideration on December 4, 2019, which was more than one year after the last merit decision, dated June 13, 2007. The Board thus finds that the request for reconsideration was untimely filed.¹⁹ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.²⁰

The Board further finds that this case is not in posture for decision with regard to whether appellant's untimely request for reconsideration demonstrates clear evidence of error.

In its December 13, 2019 decision, simply noted: "[T]he medical evidence provided is insufficient to establish that [OWCP's June 13, 2007] decision was improperly decided. The

¹³ *Id.*; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁴ *Supra* note 5 at Chapter 2.1602.5(b).

¹⁵ *G.B.*, *supra* note 10; *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹⁶ 5 U.S.C. § 8124(a).

¹⁷ 20 C.F.R. § 10.126.

¹⁸ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *supra* note 5 at Chapter 2.1400.5 (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

¹⁹ 20 C.F.R. § 10.607(a).

²⁰ 20 C.F.R. § 10.607(b); *see R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

reason for this finding is because there is no clear and precise medical evidence to establish that your alleged condition was caused by factors of your employment.” OWCP did not address the arguments or evidence submitted by appellant in support of his December 4, 2019 reconsideration request. Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.²¹ Its regulations at 20 C.F.R. § 10.126 further provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.²² As well, OWCP’s procedures provide that the reasoning behind OWCP’s evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²³ The Board thus finds that OWCP did not comply with the review requirements of FECA and its implementing regulations when it summarily denied appellant’s request for reconsideration.²⁴ Appellant, therefore, could not understand the precise defect of the claim and the kind of evidence which would overcome it.²⁵

This case must therefore be remanded for an appropriate decision which describes the evidence submitted on reconsideration and provides detailed reasons for finding that appellant’s untimely reconsideration request did or did not demonstrate clear evidence of error.²⁶ Following this and other such further development as deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant’s request for reconsideration was untimely filed. The Board further finds, however, that this case is not in posture for decision with regard to whether his untimely reconsideration request demonstrates clear evidence of error.

²¹ 5 U.S.C. § 8124(a).

²² 20 C.F.R. § 10.126.

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²⁴ See *M.M.*, Docket No. 20-0537 (issued September 24, 2020); *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

²⁵ *Supra* note 23.

²⁶ 5 U.S.C. § 8124(a).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 3, 2021
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board