United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 10-1672**
	)	**Issued: June 6, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2010 appellant filed a timely appeal from the March 11, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his request for reconsideration as untimely. He also timely appealed OWCP's April 19, 2010 merit decision denying authorization for physical therapy. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these decisions.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's February 26, 2010 request for reconsideration; and (2) whether OWCP properly denied authorization for physical therapy.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In a prior appeal,[2] the Board noted that appellant, a mail handler, sustained an injury in the performance of duty on May 27, 1987 when he pulled a tub and felt a sharp pain in the left side of his back. OWCP accepted his claim for low back strain, chronic pain syndrome and aggravation of arachnoiditis radiating into the lower extremities.[3]

Appellant filed a claim alleging that his cervical and lumbar stenosis with radiculopathy was a result of his federal employment. OWCP accepted this claim for aggravation of cervical and lumbar stenosis. It approved an anterior cervical discectomy and fusion. OWCP also approved a decompressive laminectomy at L3-5.[4]

Appellant claimed a recurrence of disability from April 26 to June 16, 2002. In decisions dated July 3, 2002, January 10, March 26 and October 14, 2003 and March 31, 2004, OWCP reviewed the merits of appellant's recurrence claim and found that the submitted medical evidence did not establish disability causally related to the accepted conditions.[5] OWCP's March 31, 2004 decision remains the most recent merit decision on appellant's recurrence claim.

In another appeal,[6] the Board noted that in 1992 OWCP issued a schedule award for a six percent impairment of each lower extremity. In 1999, OWCP issued a schedule award for a 41 percent impairment of the left upper extremity. Appellant filed a claim for an increased schedule award, which OWCP denied after merit reviews on July 30 and October 14, 2003, March 31, 2004 and March 30, 2005. On July 20, 2006 the Board found that he had not met his burden of proof to establish that he had more than a 6 percent impairment of either lower extremity or more than a 41 percent impairment of his left upper extremity. The Board's July 20, 2006 decision remains the most recent merit decision on appellant's claim for an increased schedule award. The facts of this case as set out in prior Board decisions are hereby incorporated by reference.

On February 26, 2010 appellant requested reconsideration of OWCP's September 17, 2009 nonmerit decision denying an untimely request for reconsideration.[7] He made numerous complaints about the way OWCP handled his claim. One of appellant's main arguments, well described in his addendum, was that the statement of accepted facts was incorrect, not just in identifying him as a distribution clerk, but in showing injuries that occurred prior to his postal

[2] Docket No. 07-2042 (issued June 3, 2008).

[3] OWCP File No. xxxxxx584.

[4] OWCP File No. xxxxxx451. OWCP combined these cases under File No. xxxxxx584.

[5] In his January 10, 2003 decision, OWCP hearing representative found that the medical evidence supported that appellant was capable of working in his permanent rehabilitation job for the period claimed.

[6] Docket No. 05-1125 (issued July 20, 2006).

[7] The only appeal right attached to OWCP's September 17, 2009 nonmerit decision was the right to appeal to the Board within 180 days. Appellant had no right to request reconsideration of that decision.

employment.[8] He felt that this was misleading, as OWCP did not instruct the physician that prior injuries were not to be factored into his decision. This, in turn, deceived the physician into writing a report that favored the agency. Appellant further argued that the issuance of an amended statement of accepted facts was an acknowledgement of error in the previous statements dating back to 2002 and therefore was conclusive proof of error in all decisions from April 26, 2002 to October 19, 2009. He alleged that the Board based its June 3, 2008 decision[9] on an incorrect statement of accepted facts and therefore needed to revisit its decision to address the errors.[10]

Appellant objected to OWCP's statement that his claim was not accepted for hip pain, as the graft for his cervical surgery was harvested from his hip. He noted that OWCP's September 17, 2009 reconsideration decision erroneously stated that he underwent surgery in March 1981. Appellant stated that it was March 2000. He argued that OWCP did not request a supplemental report from any treating physician, while the rules governing the adjudication of claims stated that the claims examiner "must always" write a treating physician for a supplemental report if his or her report lacks needed detail or opinion. Appellant argued that the rejected evidence was positive, precise and explicit and manifested on its face that OWCP committed errors: "[Appellant] has concern over the correctness of the agency decision." He added that OWCP's failure to request a supplemental report was a basis for reversal of all decisions dating back to 2002.

Appellant argued that OWCP ignored his request for a copy of the statement of accepted facts prior to an OWCP referral examination in June 2003, adding that OWCP's response that he did not request a copy was nothing but an excuse to further obstruct his claim. He directed OWCP's attention to pages 364, 367 and 397 of the record and argued that his so-called limited-duty job required a weight scale, which was not supplied until 2003, almost 14 years after he was assigned to limited duty, which was a direct violation of his medical restrictions and which in turn was a contributing factor to his recurrence of disability from April 26 through June 16, 2002. Appellant added: "Once the claims examiner take the time to read the reference document she/he will see the relationship to above reference injury dates."

Appellant blamed OWCP for his missing statutory deadlines, as he could not find a Board-certified physician who would take on a patient with an OWCP injury claim. He argued that OWCP had accepted a permanent aggravation of a degenerative disease, which by definition will worsen over time and cause disability. Appellant argued that diagnostic testing in June 2009 showed a bulging disc and multiple tears and should be examined by an OWCP medical adviser. He spent a good deal of time repeating many of his arguments and demanding that OWCP answer numerous questions to his satisfaction, such as: "how can claims examiners accept and

[8] At one point, appellant stated that the reason for his request "is based on incorrect SOAFs that misled all OWCP contract physicians that claimant was mandated to undergo an examination dating back to 2000."

[9] Docket No. 07-2042 (issued June 3, 2008) (without reviewing the merits of appellant's case, the Board found that OWCP properly denied his May 23, 2007 request for reconsideration, as it was untimely and failed to establish clear evidence of error).

[10] Appellant had 30 days to file a petition for reconsideration with the Board if he felt the Board's decision contained any error of fact or law. 20 C.F.R. § 501.7.

acknowledge that claimant has residuals from the accepted injury/disease and then state that claimant medical evidence is insufficient in all decisions from 2002 to September 2009?" Appellant compared his cervical and thoracic spine motion to normal ranges of motion. He asked why OWCP did not inform its referral physician about the permanent aggravation, which the referral physician ruled out and why OWCP did not request a supplemental report.

Appellant further argued that Dr. Cooper did not use the Combined Values Chart in his October 27, 2004 report. He argued that OWCP's medical adviser found a 26 percent left upper extremity impairment, yet the claims examiner did not accept the calculation.

In a decision dated March 11, 2010, OWCP denied appellant's February 26, 2010 request for reconsideration. It found that his request was untimely and did not present clear evidence of error.

On or about February 11, 2010 OWCP received a request for physical therapy to treat bilateral low back and hip pain. The request indicated that the therapy was not related to postoperative treatment. On February 22, 2010 OWCP wrote to the physician for a definitive diagnosis. Noting that it had not accepted appellant's claim for a hip condition, OWCP asked for additional information, including the following: "Please submit a report explaining the necessity of hip treatment as it relates to the accepted work injury."

In a decision dated April 19, 2010, OWCP denied authorization for the requested physical therapy. OWCP explained that appellant's physician did not respond to its request for additional information.

On appeal, appellant submitted a brief of more than 80 pages largely repeating the arguments he raised in his February 26, 2010 request for reconsideration. He alleges fundamental errors in all previous OWCP decisions from 2002 through 2010. Appellant requested that the Board review and issue a *de novo* decision on all previous OWCP decisions. He stated that OWCP would clear up everything by scheduling a second-opinion evaluation with a correct statement of accepted facts. Appellant attached a May 14, 2008 medical report and diagnostic tests from December 2006.

LEGAL PRECEDENT -- ISSUE 1

FECA section 8128(a) vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[11]

[11] 5 U.S.C. § 8128(a).

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[12]

The term "clear evidence of error" is intended to represent a difficult standard.[13] If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[14]

ANALYSIS -- ISSUE 1

The Board may not, as appellant requests, review and issue a *de novo* decision on all previous OWCP decisions as it lacks the jurisdiction or legal authority to do so. The Board has jurisdiction to review only those final decisions of OWCP issued within 180 days prior to the filing of the appeal.[15] Appellant filed the present appeal on June 4, 2010. The only final decisions of OWCP issued within the prior 180 days were the March 11, 2010 nonmerit decision denying reconsideration and the April 19, 2010 merit decision denying authorization for physical therapy. So the only issues that are properly before this Board are limited. First, the Board will review whether OWCP properly denied appellant's February 26, 2010 request for reconsideration. The Board will then review whether OWCP properly denied authorization for physical therapy. The Board has no jurisdiction to review the merits of appellant's recurrence claim or his claim for an increased schedule award.

The Board finds that appellant's February 26, 2010 request for reconsideration is untimely. The most recent merit decision on his recurrence claim was OWCP's March 21, 2004 decision. Appellant had one year or until March 21, 2005, to request reconsideration of his claim that he sustained a recurrence of disability from April 26 to June 16, 2002. The most recent merit decision on appellant's claim for an increased schedule award was the Board's July 20, 2006 decision. Appellant had one year or until July 20, 2007, to request reconsideration of his claim that he had more than 6 percent impairment of each lower extremity or more than 41 percent impairment of his left upper extremity.[16]

Appellant's February 26, 2010 request for reconsideration is untimely on both counts by a measure of years. For this reason, OWCP will review the merits of his case only if his request demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.

[12] 20 C.F.R. § 10.607.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

[14] *Id*., Chapter 2.1602.3.d(1).

[15] 20 C.F.R. § 501.3.

[16] Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.1602.3.b(1).

Clear evidence of error is intended to represent a difficult standard. The request must show on its face that the most recent merit decision was erroneous. The error alleged cannot be trivial or immaterial. It must be significant and it must bear directly on the particular issue decided. Moreover, the request must make the error abundantly clear to the adjudicator, such as a mathematical miscalculation in a schedule award. It cannot be a matter of reasonable opinion or judgment or interpretation. The error cannot be speculative or possible or even probable. It must be definite and significant to the grounds upon which OWCP decided the issue. The purpose of such a difficult standard is one of limitations, to bring an effective end to matters that have been adjudicated.

OWCP denied wage-loss compensation from April 26 to June 16, 2002 on the grounds that appellant failed to satisfy his burden of proof to establish that he suffered a recurrence of total disability. Indeed, it appeared that the medical opinion evidence supported that he was capable of working his permanent rehabilitation job for the period claimed. OWCP decided the matter based on the probative value of the medical opinion evidence submitted. Evaluating the probative value of the medical evidence is a matter of adjudicatory judgment. Appellant may disagree with OWCP's assessment, but if OWCP found that, the weight of the medical opinion evidence did not support his claim for benefits, his opinion to the contrary will not show clear evidence of error nor will subsequent medical opinion evidence that could create a conflict on the issue.

Appellant makes numerous arguments about process, about how OWCP handled his claim. One of the themes that run through his request is that OWCP provided physicians with an incorrect statement of accepted facts. Appellant points to two errors: the misidentification of his early position and his history of injury prior to federal employment. The Board has reviewed various statements of accepted facts and it does appear that OWCP misidentified appellant as a distribution clerk prior to October 1991. Appellant identified his occupation as a mail handler on his initial claim form. An amended statement of accepted facts showed that he worked as a mail handler since 1981.

Although this is an error, not every error will meet the difficult standard that appellant must meet to obtain a merit review of his case. Although the difference in the two positions is apparent, appellant has not shown how the misidentification led directly to the denial of his claim that he sustained a recurrence of disability from April 26 to June 16, 2002 or to the denial of his claim for an increased schedule award. The medical opinion evidence upon which OWCP relied to deny those claims did not depend on the title of his position at the time of injury. The early statements of accepted facts correctly described the mechanisms of injury, what appellant was doing when he sustained a traumatic back injury in 1987 and an occupational back injury in 1996. The title of his position in 1987 was immaterial to the issues decided and does not show clear evidence of error in OWCP's most recent merit decisions.

Prior medical history is an optional element in the statement of accepted facts. It may be included and in occupational disease claims should be included.[17] In the case of a schedule award, all medical conditions or impairments to the scheduled member should be listed and the

[17] Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.809.6.

instructions to the medical examiner should state that all impairments (preexisting, nonemployment related and subsequently developed impairments) must be considered in calculating the award.[18] The Board finds no error in describing injuries that occurred prior to appellant's federal employment.

Another theme that runs through appellant's request is the complaint that OWCP did not request a supplemental report from any treating physician and that this was a violation of OWCP procedures, which stated that the claims examiner "must always" write for a supplemental report. This is a mischaracterization of the applicable procedure. The procedure actually stated:

> "The quality of attending physicians' reports will vary greatly. Sometimes reports are lacking in detail because the physician is unaware of the type of information required to meet our needs in a given case. If reports from the claimant's physician lack needed details and opinion, the [claims examiner] should always write back to the [physician], clearly state what is needed and request a supplemental report."[19]

The wording "should always" is not mandatory; it is strongly suggestive. Moreover, the purpose of the procedure was to ensure that the treating physician understands the type of information required. If OWCP has already sent appellant or the physician a development letter outlining what the physician should address[20] and the physician's response lacks needed details and opinion, OWCP need not continue to notify the physician and requesting additional reports until the physician finally provides the information required. OWCP may instead issue a final decision explaining the deficiencies so that appellant may obtain additional evidence addressing those deficiencies. Appellant must keep in mind that he carries the ultimate burden of proof to submit the evidence necessary to establish his entitlement to benefits.

The Board finds that appellant has not shown clear evidence of error in this matter. The procedure did not state what appellant claimed it stated, he did not show the absence of a development letter and he did not prove that a supplemental report would have changed the outcome of the merit decisions in question.

Appellant argued that OWCP ignored his request for a copy of the statement of accepted facts prior to an OWCP referral examination in June 2003. The Board cannot find such a request. The record does contain a letter dated June 10, 2003 and received by OWCP on July 16, 2003 regarding an outdated statement of accepted facts sent to the physician in question. The letter was clearly written after the June 20, 2003 examination: it refers to the third paragraph on page three of the physician's June 23, 2003 report. Appellant has not further identified his preexamination request for the statement of accepted facts and, the Board finds, has not shown clear evidence of error in this matter.

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[18] *Id*. at Chapter 2.809.4.b(1).

[19] *Id*. at Chapter 2.810.5(b). In 2009, OWCP clarified this language by stating that to "can."

[20] *See id*. at Chapter 2.800.2.g (once a claimant has established a *prima facie* claim, OWCP has the responsibility to take the next step, either of notifying the claimant what additional evidence is needed to fully establish his claim, or of developing evidence in order to reach a decision).

Searching for the alleged request for a copy of the statement of accepted facts, the Board noted the employing establishment's May 20, 2003 letter to appellant reiterating that there were many scales available throughout the Indianapolis facilities and that if a parcel appeared too large or when it appeared heavy when he attempted to move it or if the postage was of a great amount, he could have a coworker without a weight restriction lift the parcel or he could ask a supervisor to weigh the parcel. This sheds a different light on appellant's complaint that he was not supplied a weight scale until 2003, which he claimed was a direct violation of his medical restrictions. In the final analysis, whether this was a contributing factor to his recurrence of disability from April 26 to June 16, 2002 was a medical question to be determined by the probative medical opinion evidence. The Board finds that appellant has not shown clear evidence of error in this matter.

It may be that a permanent aggravation of a degenerative disease will worsen over time and cause disability. It is not clear from the record that OWCP accepted a "permanent" aggravation. Regardless, a permanent aggravation does not necessarily mean that appellant was totally disabled for work from April 26 to June 16, 2002 as a result of his accepted employment injury. That was a medical issue. Such arguments cannot supply the medical rationale that must come from a qualified physician. There is no doubt that appellant believes his disability for the period claimed was causally related to his accepted employment injuries, but his is not the opinion that decides the matter.

OWCP's statement that appellant continues to suffer residuals from the accepted injury or occupational disease does not mean the residuals were such that he was totally disabled for work during the period claimed, nor does it mean that he is entitled to an increased schedule award. Those are entirely different issues. Appellant took the time to compare his cervical and thoracic spine motion to normal ranges of motion, but this is irrelevant. No claimant may receive a schedule award for impairment to the back or spine.[21]

Appellant argued that Dr. Cooper did not use the Combined Values Chart in his October 27, 2004 report, but he did not explain the significance of this observation. The OWCP medical adviser reviewed the physician's findings and determined that they indicated a 26 percent total left upper extremity impairment and a 28 percent left lower extremity impairment. The medical adviser would explain, however, that Dr. Cooper did not document what muscle groups were weak and did not identify the grade of weakness. He found that there was insufficient evidence and documentation of appellant's physical examination: "What is required is a detailed physical examination on neurological status. Dermatomal sensory distributions, grades 1-5 muscle testing for nerve root groups. These are not present in the chart at this time." The OWCP medical adviser added that the date of maximum medical improvement was unknown. So the fact that the claims examiner did not accept Dr. Cooper's findings does not show clear evidence of error in OWCP's most recent schedule award decision.

The Board has read the entirety of appellant's February 26, 2010 request for reconsideration and the entirety of his even lengthier appellate brief. Although practicalities prevent a recitation of everything he has argued, the Board has given due consideration to those

[21] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

arguments. It is the Board's finding that appellant's February 26, 2010 request for reconsideration fails to establish clear evidence of error in OWCP's most recent merit decisions. The standard of review, as the Board has explained, is intended to be difficult to meet. In the final analysis, appellant's untimely request simply does not show on its face that OWCP merit decisions in question are clearly erroneous. Because his untimely request does not meet the standard for obtaining a merit review of his case, the Board will affirm OWCP's March 11, 2010 decision to deny that request.[22]

LEGAL PRECEDENT -- ISSUE 2

FECA section 8103(a) provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.[23] OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to effect the purposes specified in FECA.[24] The only limitation on OWCP's authority is that of reasonableness.[25]

ANALYSIS -- ISSUE 2

Appellant objected to OWCP's statement that his claim was not accepted for hip pain, as the graft for his cervical surgery was harvested from his hip. OWCP has not accepted his claim for hip pain, but if a bone graft was harvested from his hip as part of an authorized procedure on his cervical spine, any resulting injury from that harvesting would be considered a consequential injury. Disability resulting from surgery or treatment authorized by OWCP is compensable.[26]

The question before the Board is whether OWCP abused its discretion in denying Dr. Frick's request for physical therapy. OWCP wrote to Dr. Frick on February 22, 2010 to acknowledge his request for physical therapy and to ask for a supplemental report. It asked him to provide a more definitive diagnosis than "hip pain" and "back pain." OWCP correctly explained that it had not accepted a hip condition as part of appellant's claim, so Dr. Frick should explain "the necessity of hip treatment as it relates to the accepted work injury." It is important to note that OWCP was not denying a relationship between appellant's hip and his cervical

[22] The May 14, 2008 medical report and the December 2006 diagnostic tests that appellant attached to his brief on appeal were previously submitted to the record, but they do not address the issues decided by OWCP's most recent merit decisions. They do not discuss his disability status for the period in question, nor do they discuss the impairment rating of his lower extremities or his left upper extremity. This evidence does not show clear evidence of error.

[23] 5 U.S.C. § 8103(a).

[24] *See Marjorie S. Geer*, 39 ECAB 1099 (1988) (OWCP has broad discretionary authority in the administration of FECA and must exercise that discretion to achieve the objectives of section 8103).

[25] *Daniel J. Perea*, 42 ECAB 214 (1990).

[26] *Carmen Dickerson*, 36 ECAB 409 (1985) (this is so even though the surgery or treatment was not for an employment-related condition).

surgery; it was allowing Dr. Frick an opportunity to explain that relationship. This was a fair request, as OWCP had to determine whether the requested physical therapy would likely, in the words of FECA, to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.

The problem was that about two months passed and Dr. Frick did not respond. So on April 19, 2010 OWCP issued a decision denying authorization on the grounds that it received no response to its request for additional information. The case record confirms that OWCP had received no response when it issued its decision. Appellant argues on appeal that Dr. Frick complied with OWCP's request for additional information to secure authorization for physical therapy, but the Board notes that Dr. Frick did not respond until April 22, 2010 and OWCP did not receive that response until April 26, 2010. As this was after OWCP's April 19, 2010 decision, the Board has no jurisdiction to review that evidence.[27]

The Board must therefore base its decision on the evidence that was before OWCP when it issued its April 19, 2010 decision. As OWCP had asked Dr. Frick to provide additional information necessary to determine whether the requested physical therapy should be authorized and as OWCP waited a reasonable period of time with no response, the Board finds that OWCP acted reasonably and within its broad discretion to deny authorization. The Board will therefore affirm OWCP's April 19, 2010 merit decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision on denying approve of physical therapy, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607. For the purpose of requesting reconsideration by OWCP on the issue of authorization for physical therapy, Dr. Frick's April 22, 2010 report would be considered new evidence.

CONCLUSION

The Board finds that OWCP properly denied appellant's February 26, 2010 request for reconsideration. It was untimely and failed to show clear evidence of error in OWCP's most recent merit decisions. The Board also finds that OWCP properly denied authorization for physical therapy.

[27] The Board's jurisdiction is limited to reviewing the evidence that was before the OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the April 19 and March 11, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 6, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board