

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

N.S., Appellant)	
)	
and)	Docket No. 17-1420
)	Issued: January 23, 2018
U.S. POSTAL SERVICE, BAY STATION POST OFFICE, Brooklyn, NY, Employer)	
)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 15, 2017 appellant filed a timely appeal from a January 5, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated December 17, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

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.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal after OWCP's January 5, 2017 decision was issued. The Board's jurisdiction, however, is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board may not consider this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on June 13, 1989 appellant, then a 46-year-old letter carrier, sustained lumbosacral strain and tendinitis/contusion of his left little finger when he was run over by a steel cart while sorting parcels. Appellant stopped work on the date of injury.

Appellant received medical benefits and OWCP initially paid appellant wage-loss compensation on the supplemental rolls. OWCP paid appellant wage-loss compensation on the periodic rolls, effective January 31, 1991. On January 12, 1992 appellant returned to work in a modified position working four hours per day, and on March 11, 1992 began working eight hours per day.

By decision dated October 27, 2004, OWCP accepted appellant's claim for a recurrence of disability (Form CA-2a) beginning October 2, 2004. On September 19, 2005 appellant returned to a modified job working four hours per day.

The employing establishment offered appellant a modified carrier position on December 1, 2009. An employing establishment memorandum dated December 3, 2009 related that appellant had refused the December 1, 2009 modified job offer.

The employing establishment offered appellant another modified letter carrier position on January 28, 2010.⁴ OWCP advised appellant on January 28, 2010 that the offered position was deemed suitable, based upon the restrictions provided by his treating physician, Dr. Raghava R. Polavarapu, a Board-certified orthopedic surgeon. Appellant was advised that he had 30 days to accept the position or provide a written explanation as to why refusal was justified. He was also advised that his compensation could be terminated if he did not accept the position or respond to the offer.

On January 30, 2010 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning December 1, 2009. On the reverse side of the form, the employing establishment noted that appellant had been instructed not to return to work because he had refused a January 28, 2010 modified job, which OWCP had found suitable.

By decision dated April 28, 2010, OWCP denied appellant's claim for a recurrence of disability beginning December 1, 2009 as it found that the medical evidence of record failed to establish disability due to the accepted employment injury.

³ Docket No. 10-1766 (issued May 25, 2011).

⁴ The hours of the offered modified position were 12:50 p.m. to 4:50 p.m. Monday, Tuesday, Thursday, and Friday and 9:00 a.m. to 11:00 a.m. on Saturday with Sunday and Wednesday designated as days off. The physical requirements of the position were up to 10 pounds of intermittent lifting one to four hours per day and up to two hours of intermittent walking, standing, and sitting. The job duties included up to one hour of street delivery of Express Mail, one to four hours of assisting customers with all-purpose container (APC); and one to four hours of lobby customer assistance.

Appellant subsequently appealed to the Board. By decision dated May 25, 2011, the Board set aside OWCP's April 28, 2010 decision, finding that the record was unclear as to whether appellant's disability following the January 28, 2010 modified job offer was employment related.⁵ The Board instructed OWCP to undertake additional development of the claim to ascertain whether the additional restrictions that appellant noted were due to the accepted employment injuries.

By decision dated June 3, 2011, OWCP accepted appellant's claim for a recurrence of disability beginning December 1, 2009 based on the employing establishment's withdrawal of a limited-duty job. It informed appellant that, as instructed by the Board, it was undertaking development of the evidence to determine whether his disability following the January 28, 2010 modified job offer was employment related.

OWCP wrote to Dr. Polavarapu on June 3, 2011 and asked him to provide an opinion as to whether appellant could perform the modified-duty position as of January 28, 2010. If appellant could not perform the duties of the position, Dr. Polavarapu was asked to provide objective findings and explain with medical rationale whether appellant's restrictions were due to his work-related conditions.

On June 20, 2011 Dr. Polavarapu provided responses to questions posed by OWCP regarding appellant's disability on and after January 28, 2010. He opined that appellant was disabled from performing the offered modified job due to his work-related conditions.

In reports dated June 20 and October 7, 2011, Dr. Polavarapu noted that appellant injured his back at work on June 13, 1989 and that on December 1, 2009 he developed back pain after twisting his left foot while stepping from a bus. Physical examination findings were provided and x-ray interpretations were reviewed. Diagnoses included herniated lumbar disc, lumbosacral pain, lumbosacral radiculopathy, and degenerative lumbosacral disc disease. Dr. Polavarapu opined that appellant was totally disabled from work due to his accepted December 1, 2009 recurrence of disability.

By decision dated November 29, 2011, OWCP denied appellant's claim for a recurrence of disability commencing January 28, 2010 as the medical evidence of record failed to establish that the disability was causally related to the accepted June 13, 1989 employment injury.

On December 30, 2011 OWCP received appellant's request for review of the written record by an OWCP hearing representative. Appellant subsequently submitted reports from Dr. Polavarapu and Dr. David M. Rizzo, an osteopath. In a December 23, 2011 report, Dr. Polavarapu indicated that his findings were unchanged from his prior reports of June 20 and October 7, 2011. Dr. Rizzo related in a report dated December 23, 2011 that appellant was being treated for high blood pressure, diabetes, anxiety, and low back pain which began in December 2009. He opined that appellant's anxiety had worsened and he was unable to perform his regular work.

⁵ *Supra* note 2.

By decision dated April 11, 2012, an OWCP hearing representative affirmed the November 29, 2011 decision denying appellant's claim for a recurrence of disability commencing January 28, 2010.

In a letter dated and received April 8, 2013, appellant's then representative requested reconsideration.

In an April 9, 2013 report, Dr. Polavarapu summarized the events of December 1, 2009 when appellant twisted his left foot when stepping off a bus. Diagnoses included L1, L2-5, and S1 Schmorl's nodes, lumbar stenosis, lumbar strain/sprain, lumbar root degeneration, lumbar spondylosis, lumbar intervertebral disc degeneration, aggravation of preexisting lower back injury and radiculopathy, a history of gout, and aggravation of preexisting diabetes and hypertension. Dr. Polavarapu opined that appellant's being ordered to return to work and his refusal of a modified job offer on December 1, 2009 directly led to the incident of twisting appellant's ankle while getting off of a bus, which aggravated his lower back condition and rendered him disabled from work.

By decision dated June 28, 2013, OWCP denied modification of its prior decision as the evidence submitted was insufficient to establish appellant's recurrence claim.

On June 26, 2014 appellant's then representative requested reconsideration and submitted a June 20, 2014 report from Dr. Edward Novick, a Board-certified anesthesiologist. In his June 20, 2014 report, Dr. Novick diagnosed post-traumatic lumbago, lumbar disc herniations, and lumbar radiculopathy. He provided a history of injury, noting that appellant had a slip and fall at work on December 1, 2009. Dr. Novick opined that appellant's accepted 1989 work injury was aggravated by the accepted December 1, 2009 recurrence of disability.

By decision dated September 22, 2014, OWCP denied modification of its prior decision, finding that the evidence of record failed to establish disability beginning January 28, 2010 causally related to the accepted June 13, 1989 employment injury. Rather, it was due to an intervening, nonwork-related injury.

By letter dated and received September 18, 2015, appellant's then representative requested reconsideration. He contended that the medical evidence of record established a recurrence of disability.

By decision dated December 17, 2015, OWCP denied modification of its prior decision, finding that appellant failed to establish a recurrence of disability causally related to the accepted June 13, 1989 work injury.

On December 20, 2016 appellant again requested reconsideration. In an undated statement, also received on December 20, 2016, he requested reconsideration. Appellant framed the relevant issue as to whether his manager was correct in sending him home for his refusal to sign a job offer he believed was outside of his work restrictions.

By decision dated January 5, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant's reconsideration request was received on December 20, 2016, more than one year after OWCP's last merit decision dated December 17, 2015. OWCP found that clear evidence of

error had not been demonstrated as the only evidence submitted on reconsideration was appellant's statement. No additional medical evidence was submitted.

LEGAL PRECEDENT

OWCP, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁶ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁷ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System).⁸ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁹

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.¹⁰ OWCP's procedures state 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, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.¹¹ In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹²

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹³ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to

⁶ 5 U.S.C. § 8101 *et seq.* The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. *See J.S.*, Docket No. 10-0385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

⁷ 20 C.F.R. § 10.607; *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.(b) (February 2016).

⁹ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹⁰ *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007) *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *See Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

demonstrate clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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 error on the part of OWCP.¹⁷ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁹

ANALYSIS

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

The last merit decision of record was OWCP's December 17, 2015 decision. Appellant had one year from that decision, *i.e.*, Saturday, December 17, 2016, to request reconsideration. If the last day of the one-year time period falls on a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.²⁰ Appellant, therefore, had until Monday, December 19, 2016 to timely request reconsideration. Timeliness is determined by the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS). As appellant's request for reconsideration was received in iFECS on December 20, 2016, the Board finds that OWCP properly found that appellant's request for reconsideration was untimely filed.²¹

On appeal appellant contends that OWCP used the wrong dates to calculate the time limit as his request for reconsideration was delivered on December 19, 2016 while OWCP noted the date of receipt as December 20, 2016. He contended the delay in receipt of his request was the fault of the U.S. Postal Service as his reconsideration request had been mailed on December 14, 2016 *via* Priority Mail and that it should have been delivered within two days and not the five days that it actually took. However, as previously noted, OWCP's procedures provide that the timeliness if a reconsideration request is determined by the received date as recorded in iFECS.²²

¹⁵ See *Leon J. Modrowski*, *supra* note 10; *Jesus D. Sanchez*, *supra* note 10.

¹⁶ See *Leona N. Travis*, *supra* note 14.

¹⁷ See *supra* note 12.

¹⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁹ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

²⁰ *Supra* note 8 at Chapter 2.1602.4 (February 2016); see also *C.W.*, Docket No. 17-0836 (issued August 7, 2017).

²¹ 20 C.F.R. § 10.607(a).

²² *Supra* note 8.

As the date recorded in iFECS was December 20, 2016, more than one year after OWCP's December 17, 2015 merit decision, appellant's reconsideration request was untimely filed.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP. In support of his reconsideration request appellant submitted his own statement. Appellant explained that the recurrence occurred because he was sent home for refusing a job offer he had deemed unsuitable. The underlying issue in this case, however, was whether his recurrence of disability was causally related to the accepted June 13, 1989 work injury. The issue is medical in nature. Appellant's general contention did not demonstrate clear evidence of error as it did not raise a substantial question as to the correctness of OWCP's decision which denied his recurrence claim.²³ The standard for clear evidence of error is whether the evidence submitted is sufficient to demonstrate clearly that OWCP erred in denying appellant's recurrence claim due to his accepted June 13, 1989 work injury. The evidence submitted must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.²⁴ Appellant's statement submitted on reconsideration was not medical evidence establishing a recurrence of disability as of January 28, 2010 causally related to the June 13, 1989 employment injury. It is, therefore, insufficient to demonstrate clear evidence of error. For these reasons, OWCP properly found that appellant failed to demonstrate clear evidence of error by OWCP in its denial of his recurrence claim.

CONCLUSION

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

²³ See *D.W.*, Docket No. 16-0945 (issued July 27, 2016).

²⁴ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 5, 2017 is affirmed.

Issued: January 23, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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