

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

R.C., Appellant)	
)	
and)	Docket No. 17-0198
)	Issued: January 28, 2019
U.S. POSTAL SERVICE, CUSTOMER CARE)	
CENTER, Detroit, MI, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 7, 2016 appellant filed a timely appeal from a May 25, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from OWCP's last merit decision, dated January 7, 2013, 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.

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 Appellant timely requested oral argument before the Board. By order dated May 5, 2017, the Board, after exercising its discretion, denied his request as the case could be adjudicated based on the case record. *Order Denying Request for Oral Argument*, Docket No. 17-0198 (issued May 5, 2017).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

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

Appellant, then a 41-year-old mail processing clerk, has an accepted occupational disease claim (Form CA-2) for aggravation of lumbar radiculopathy at L5, which arose on or about June 13, 2011.⁴ At that time, he was working in a limited-duty capacity as a call center agent.⁵ Appellant stopped work on June 15, 2011. OWCP paid appellant wage-loss compensation for temporary total disability, and subsequently placed him on the periodic compensation rolls.

Effective August 9, 2012, OWCP terminated appellant's wage-loss compensation based on the June 1, 2012 report of Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon and OWCP referral physician. Dr. Obianwu found no evidence of an ongoing lumbar contusion, lumbar radiculopathy, or L4-5 disc herniation. He also reported that there were no residuals of the June 2011 aggravation of lumbar radiculopathy at the L5 level. The only unresolved condition was appellant's L5-S1 disc herniation. Although appellant was unable to return to his date-of-injury position, Dr. Obianwu found that the residuals of the L5-S1 disc herniation did not preclude him from resuming work as a call center agent.

Appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, held on October 23, 2012. By decision dated January 7, 2013 the hearing representative affirmed OWCP's August 9, 2012 decision.

OWCP subsequently received additional medical evidence, which included treatment records and reports from Dr. Thomas C. Schuler, a Board-certified orthopedic surgeon, who initially examined appellant on January 8, 2013 and diagnosed lumbar radiculitis.

It also received a January 25, 2013 electromyography and nerve conduction velocity (EMG/NCV) study that evinced left-sided radiculopathy at L5-S1.

³ Docket No. 15-0097 (issued August 21, 2015).

⁴ OWCP assigned the claim File No. xxxxxx086. Appellant had previously injured his lower back in a December 14, 2001 work-related fall, which OWCP accepted under File No. xxxxxx459 for a back contusion, lumbar radiculopathy, L4-5 disc protrusion, and L5-S1 disc herniation. The present claim, File No. xxxxxx086 was initially filed as a claim for a recurrence of the December 14, 2001 injury under File No. xxxxxx459. OWCP, however, determined that appellant was claiming a new injury and adjudicated the claim as a new occupational disease claim. OWCP File Nos. xxxxxx086 and xxxxxx459 have been administratively combined with OWCP File No. xxxxxx459 designated as the master file.

⁵ The limited-duty job was designed to meet appellant's work restrictions with regard to his accepted December 14, 2001 employment injury. Appellant's restrictions included sedentary work that did not involve repetitive bending or lifting greater than 20 pounds. He was also limited to no more than two hours per day of lifting and bending/stooping. Upon resuming work on June 13, 2011 appellant was expected to participate in a five-day call center agent training program. His return to work was short-lived, lasting only two days.

Additionally, Dr. Warren D. Yu, a Board-certified orthopedic surgeon, examined appellant on March 1, 2013, and diagnosed work-related L5-S1 left-sided radiculopathy. He recommended a microdiscectomy at L5-S1.

Appellant also submitted follow-up treatment records and reports from Dr. Schuler dated April 9, May 16 and 30, and October 8, 2013.

In a letter dated December 23, 2013, received on January 21, 2014, appellant requested reconsideration. He challenged OWCP's reliance on Dr. Obianwu's June 1, 2012 opinion, and highlighted Dr. Schuler's treatment records covering the period January through October 2013. Appellant also noted the latest EMG/NCV study results showed left-sided L5-S1 radiculopathy.

OWCP subsequently received February 2014 treatment notes from Dr. Schuler, which included a recent x-ray report. When he last saw appellant on February 27, 2014, Dr. Schuler noted that OWCP approved the requested surgery, but a new magnetic resonance imaging (MRI) scan was necessary before proceeding with surgery.

By decision dated March 31, 2014, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated August 21, 2015, the Board affirmed the March 31, 2014 decision in part and set aside the decision in part. The Board found that as OWCP received appellant's request for reconsideration on January 21, 2014, more than one year after the January 7, 2013 merit decision terminating wage-loss compensation, it was untimely filed. However, the Board found that OWCP's March 31, 2014 decision was not in posture with regard to whether appellant demonstrated clear evidence of error as it did not properly explain its findings in accordance with 20 C.F.R. § 10.126. The Board remanded the case for a proper review of the evidence and issuance of an appropriate final decision on the issue of whether appellant presented clear evidence of error.⁶

While the case was pending before the Board, appellant continued to submit additional evidence, including physical therapy notes dated August 29, September 2, 9, 14, 16, 18, 25, and October 2, 7, 10, 13, and 30, 2014.

Dr. Schuler provided progress notes and diagnostic studies dated January 8, February 9 and 27, April 9, May 16 and 30, and October 8, 2013.

OWCP received MRI scan reports dated March 2, 2011, September 7, 2012, and November 25, 2015. Also received were EMG reports dated March 30 and August 3, 2011, January 25, 2013, March 14, 2014, and June 26, 2015.

In a June 4, 2015 report, Dr. Schuler noted appellant's complaints of low back pain and examined appellant. He diagnosed lumbar segmental instability, lumbar spinal stenosis, lumbar radiculitis, and foot drop. Dr. Schuler recommended additional treatment to include surgical

⁶ *Supra* note 3.

intervention. He also provided a diagnostic addendum and described the lumbar x-rays, which he noted confirmed the lumbar segmental instability consistent with L3-4, L4-5, and L5-S1.

In a September 1, 2015 report, Dr. Schuler diagnosed lumbar disc herniation, lumbar stenosis, lumbar spondylosis, sciatica, and segmental instability. He recommended therapy to mobilize the sacroiliac joint and to proceed with microdermabrasion to alleviate the ongoing nerve compression. Dr. Schuler noted that appellant was working in the information technology (IT) field, not engaged in heavy labor. He indicated that this was tolerable, but he had ongoing daily persistent pain down the left lower extremity.

In a September 1, 2015 addendum, Dr. Schuler noted that x-rays showed marked disc collapse at the L5-S1 and at L4-5 with foraminal stenosis in addition to the midline stenosis from the herniation seen on the 2012 MRI scan.

In a December 17, 2015 report, Dr. Schuler diagnosed: radiculopathy, lumbar region; spinal instabilities; myositis, unspecified; other spondylosis with radiculopathy, lumbar region; osseous and subluxation stenosis of intervertebral foramina of lumbar region; connective tissue and disc stenosis of intervertebral foramina of lumbar region; connective tissue stenosis of neural canal of lumbar region; low back pain; and spondylolisthesis, lumbar region. He indicated that they were scheduling a two-level anterior lumbar interbody fusion at L4-5 as well as L5-S1 with posterior instrumental fusion. Dr. Schuler also provided an addendum of the same date.

In a report dated January 28, 2016, he explained that appellant was injured on June 13, 2011 while at work. Dr. Schuler noted that appellant's claim was accepted for aggravation of radiculopathy at L5. He advised that appellant had ongoing back problems since that time, and they had progressively worsened and persisted. Dr. Schuler explained that as a result, appellant was in need of surgical treatment to include stabilization, decompression, instrumentation and fusion. He advised that they had exhausted nonsurgical means. Dr. Schuler reiterated that it was a persistent problem stemming from the injury of June 13, 2011, and was the basis for appellant to undergo anterior decompression, interbody fusion followed by posterior instrumentation and fusion at levels L4-5 and L5-S1. He explained that the discography revealed marked disruption at L4-5 and L5-S1 with pain provocation and onset at the adjacent levels, which would allow him to decompress the spine, nerves and stabilize the instability. Dr. Schuler repeated the request for surgery, which included a two-level anterior approach, followed by two-level posterior with decompression. He opined that he was optimistic that they would be able to permanently solve appellant's problem and return him to full gainful employment.

In a May 25, 2016 decision, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁷ OWCP has discretionary authority in this regard and has imposed certain

⁷ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

limitations in exercising its authority.⁸ One such limitation is that for merit decisions issued on or after August 29, 2011, the request for reconsideration must be “received” by OWCP within one year of the date of the decision for which review is sought.⁹ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the integrated Federal Employees’ Compensation System (iFECS).¹⁰

OWCP will consider an untimely request for reconsideration only if the request demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit decision.”¹¹ To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.¹² The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. It is not enough to merely show that the evidence could be construed to produce a contrary conclusion.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.¹⁴ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.¹⁵ Where a request is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant’s January 21, 2014 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

As held in the prior Board decision, appellant’s January 21, 2014 request for reconsideration was untimely filed as it was received more than one year after the January 7, 2013 merit decision. With respect to findings made in the Board’s prior decision, those matters are *res*

⁸ 20 C.F.R. § 10.607.

⁹ *Id.* at § 10.607(a). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹⁰ *Id.* at Chapter 2.1602.4b.

¹¹ 20 C.F.R. § 10.607(b).

¹² *Id.*

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁶ 20 C.F.R. § 10.608(b).

judicata absent any further review by OWCP under section 8128 of FECA.¹⁷ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying his claim.

In a letter dated December 23, 2013, appellant requested reconsideration and challenged OWCP's reliance on Dr. Obianwu's June 1, 2012 opinion. In support of this contention, he submitted treatment records from Dr. Schuler dated from January through October 2013, noting that the latest EMG/NCV study results showed left-sided L5-S1 radiculopathy. Appellant's argument regarding OWCP's reliance on Dr. Obianwu lacks probative value as Dr. Obianwu acknowledged that appellant had an unresolved condition related to his L5-S1 disc herniation, however, he also opined that this condition did not preclude appellant from resuming work as a call center agent. The Board further notes that the issue in the present case is medical in nature and appellant did not explain how the medical evidence from Dr. Schuler raised a substantial question as to the correctness of OWCP's January 7, 2013 decision. Therefore, the Board finds that appellant's argument does not establish clear evidence of error on the part of OWCP.

OWCP also received progress notes, reports, and diagnostic studies from Dr. Schuler, dated from January 2013 through January 2016, where he continued to note appellant's ongoing complaints of lower back pain and the need for additional treatment, including surgical intervention, related to appellant's January 13, 2011 work injury. In a September 1, 2015 report, Dr. Schuler diagnosed lumbar disc herniation, lumbar stenosis, lumbar spondylosis, sciatica, and segmental instability. However, with the exception of lumbar disc herniation, these conditions have not been accepted by OWCP. Additionally, Dr. Schuler noted that, despite his diagnoses and appellant's ongoing complaints of back and lower extremity pain, appellant continued to tolerate light-duty work in the IT field. He further opined in a January 28, 2016 report that he was optimistic that additional surgery would permanently solve appellant's problem and return him to full gainful employment.

The Board finds that this evidence does not raise a substantial question as to the correctness of OWCP's merit decision, as it is not positive, precise, and explicit in manifesting on its face that OWCP committed an error in terminating his wage-loss compensation.¹⁸

Likewise, reports from Dr. Yu dated March 1, 2013 which recommended a microdiscectomy at L5-S1, and progress notes from Dr. Momtaz which diagnosed an array of medical conditions that have not been accepted by OWCP, do not raise a substantial question as to the correctness of OWCP's merit decision.

Clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed, well-rationalized medical report which, if submitted before the merit denial decision was issued, would have created a conflict in medical opinion requiring further development, is

¹⁷ See *H.G.*, Docket No. 16-1191 (issued November 25, 2016); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁸ See *A.S.*, Docket No. 16-0902 (issued September 28, 2016).

insufficient to demonstrate clear evidence of error.¹⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.²⁰

The Board finds that this evidence does not raise a substantial question as to the correctness of OWCP's January 7, 2013 merit decision.

Appellant also submitted physical therapy notes dated August 29, September 2, 9, 14, 16, 18, 25, and October 2, 7, 10, 13, and 30, 2014. These notes are immaterial as physical therapists are not considered physicians under FECA.²¹ Their reports and opinions do not constitute probative medical evidence sufficient to demonstrate clear error by OWCP.²²

On appeal appellant argues that OWCP did not review the evidence submitted on reconsideration, that OWCP reviewed the evidence with a negative bias upon consideration, and that OWCP considered the evidence repetitious when it should have been treated as new evidence. However, as explained above, OWCP reviewed the evidence submitted and properly denied appellant's untimely request for reconsideration as it failed to demonstrate clear evidence of error.

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.

¹⁹ *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016).

²⁰ *Nancy Marciano*, 50 ECAB 110 (1998).

²¹ *R.S.*, Docket No. 15-0988 (issued August 12, 2015).

²² 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (2007); *Jérre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 2019
Washington, DC

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

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

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