

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

_____)	
J.M., Appellant)	
)	
and)	Docket No. 18-0729
)	Issued: October 17, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Manchester, NH, Employer)	
_____)	

Appearances:
Bradley M. Lown, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
 CHRISTOPHER J. GODFREY, Chief Judge
 JANICE B. ASKIN, Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

On February 20, 2018 appellant, through counsel, filed a timely appeal from a February 1, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 18-0729.

On May 9, 2011 appellant, then a 63-year-old former sewing machine operator, filed an occupational disease claim (Form CA-2) alleging that her federal employment duties, including pulling linen carts which weighed up to 600 pounds, caused her to develop left hip pain and a disc herniation. She explained that she first became aware of her disease or illness on November 8,

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.

2000 and realized it had been caused or aggravated by her employment on March 9, 2011. Appellant was separated from employment on June 30, 2006.²

In an August 15, 2011 claim development letter, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. In a September 13, 2011 statement, appellant responded and explained her belief that she had timely filed her claim, asserting that the evidence of record established that her claim had been filed within three years of the date she first became aware of the relationship between her conditions and employment duties.

By decision dated September 21, 2011, OWCP denied her claim finding that it had not been filed in a timely manner as required under 5 U.S.C. § 8122. It indicated that the date of injury was November 8, 2000, but the claim had not been filed until May 9, 2011.

On September 26, 2011 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on January 11, 2012. She testified at the hearing.

By decision dated March 30, 2012, the hearing representative affirmed the September 21, 2011 OWCP decision finding that the evidence of record did not establish the claim was timely filed under FECA. She concluded that appellant reported awareness of a hip condition and pain as early as 1999, and had related the hip condition to her work activity of pushing heavy linen carts, but she had not filed her claim until "August 2011."

In a letter dated June 11, 2012, received by OWCP on June 14, 2012, counsel noted his representation of appellant and requested reconsideration on her behalf. In a letter dated June 17, 2013, received on June 23, 2013, he inquired as to the status of the reconsideration request and enclosed a copy of his June 11, 2012 letter.

On July 8, 2013 OWCP acknowledged receipt of counsel's June 17, 2013 letter and noted that it could not communicate with him until it received a written authorization by the employee. Appellant's copy of this letter was returned to OWCP as undeliverable on July 15, 2013.³

By decision dated July 31, 2013, OWCP denied appellant's reconsideration request finding that it was untimely filed and failed to demonstrate clear evidence of error. The decision explained that it was based upon appellant's "June 21, 2013 reconsideration request" which was untimely as it was filed more than one year following the most recent merit decision. It noted that the only right on appeal was an appeal to the Board within 180 days.

On August 5, 2013 the July 31, 2013 decision was returned to OWCP as undeliverable.

² On September 9, 2002 appellant filed a claim for a shoulder condition to which OWCP assigned OWCP File No. xxxxx684. That claim is not presently before the Board.

³ The postal notification indicates that the forwarding time had expired/return to sender.

In an August 9, 2013 letter, received by OWCP on August 15, 2013, counsel noted his representation of appellant and provided a signed authorization for representation dated July 30, 2013.

In letters containing identical language, dated June 23 and 27, 2014, counsel inquired as to the status of appellant's reconsideration request, noting it had been two years since reconsideration had first been requested and noting that a copy was also addressed to his United States Senator "in hopes that she could assist in resolution of the matter." He attached a copy of the June 11, 2012 request for reconsideration along with evidence already of record.

On July 11, 2014 OWCP responded to counsel and indicated that the last decision was rendered on July 31, 2013 and had been sent to appellant's address of record at the time of issuance. It informed counsel that he had not received a copy of the decision because it had not received appellant's written authorization for his representation. OWCP noted that a decision would be sent to her new address and that he would also receive a copy.⁴

In a letter dated July 22, 2014, counsel indicated that OWCP's July 11, 2014 letter was in error. He indicated that the July 31, 2013 decision noted the request for reconsideration was received on June 21, 2013. Counsel asserted that his request for reconsideration was mailed on June 11, 2012 and must have been received in 2012. He noted the request for reconsideration had been timely filed. In a December 30, 2014 letter, counsel referenced letters dated June 11, 2012 and July 22, 2014 and reiterated that OWCP made a mistake with regard to the timeliness of appellant's reconsideration request.

In letters dated February 10, 2015 to April 22, 2016, counsel requested a status of appellant's claims in OWCP File No. xxxxxx639 and File No. xxxxxx684. Appellant submitted two senatorial inquiries dated March 23 and June 29, 2016.

In correspondence dated November 3, 2017, OWCP indicated that counsel's prior letters were not in the case file at that time the claims examiner reviewed the case. It noted that the last formal decision was July 31, 2013 and the file had been closed.

On November 13, 2017 and January 11, 2018 counsel indicated that OWCP erred as they could not close a case which had a pending request for reconsideration. He noted that OWCP's decision dated July 31, 2013 was incorrect and he asserted that the request for reconsideration was timely filed as it had been mailed on June 11, 2012.

By decision dated February 1, 2018, OWCP denied appellant's request for reconsideration finding that the evidence of record was insufficient to warrant a merit review of the July 31, 2013 decision.

The Board finds that the case is not in posture for decision.

⁴ There is no evidence of record that a copy was sent to appellant or counsel.

20 C.F.R. § 10.607(a) of the implementing regulations provides that an application for reconsideration must be received within one year of the date of OWCP's last merit decision for which review is sought.⁵ 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).⁶

The Board has duly considered the matter and finds that this case is not in posture for a decision. Section 8124(a) of the Federal Employees' Compensation Act provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.⁷ Its regulations also provide that the decision shall contain findings of fact and a statement of reasons.⁸ The reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim.⁹

The Board finds that OWCP, in its February 1, 2018 decision, did not discharge its responsibility to set forth findings of fact and a clear statement of reasons to explain the disposition so that appellant could understand the basis for denial of her claim. The decision does not set forth which arguments had been made by counsel on reconsideration, as the letter of correspondence utilized as the reconsideration request was merely a status inquiry. The Board notes that counsel had asserted that the incorrect standard of review had been utilized as the reconsideration request was timely filed on or about June 11, 2012 from the last merit decision dated September 21, 2011. The February 1, 2018 decision does not address this argument. Therefore, the Board finds that the February 1, 2018 decision does not comply with 20 C.F.R. § 10.126 and must be set aside and the case remanded.¹⁰ On return of the case file OWCP should determine whether the July 31, 2013 was properly served on appellant and address all timely assertions of appellant and counsel.

Accordingly, the case shall be remanded for issuance of a *de novo* decision that contains "findings of facts and a statement of reasons" as to all pending issues in the claim.

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 5 U.S.C. § 8124(a); see *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

⁸ 20 C.F.R. § 10.126. See also *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *O.R.*, 59 ECAB 432 (2008); *Teresa A. Ripley*, 56 ECAB 528 (2005).

⁹ *Supra* note 6 at Chapter 2.1400.5(c) (February 2013).

¹⁰ The Board is unable to determine whether the July 31, 2013 was ever properly served on appellant

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: October 17, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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