

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

M.D., Appellant)	
)	
and)	Docket No. 22-0364
)	Issued: June 12, 2024
U.S. POSTAL SERVICE, POST OFFICE,)	
Calexico, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On January 13, 2022 appellant, through counsel, filed a timely appeal from an October 29, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from the last merit decision, dated November 30, 2000, to the filing of

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 a 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.

this appeal,² 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 August 16, 1994 appellant, then a 40-year-old postal carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained left central disc protrusion at C5-6 causally related to factors of his federal employment. He noted that he became aware of his condition and its relationship to his federal employment on September 3, 1993. Appellant stopped work on May 23, 1994. OWCP accepted the claim for lumbar strain, lumbar and cervical disc displacement without myelopathy, and prolonged depressive reaction. Appellant underwent OWCP-authorized anterior cervical discectomy and interbody fusion on June 6, 1995, and an additional cervical fusion in October 1996. OWCP paid appellant appropriate wage-loss compensation commencing May 23, 1994.

In a May 11, 1998 work capacity evaluation (Form OWCP-5c), Dr. John M. Seelig, an attending Board-certified neurosurgeon, advised that appellant could return to work eight hours per day with restrictions.

On May 18, 1998 the employing establishment offered appellant a full-time, limited-duty position based on physical restrictions set forth in a February 12, 1998 medical report of Dr. John Cleary, a Board-certified neurosurgeon serving as an impartial medical examiner.

On July 27, 1998 OWCP found that the offered position was medically suitable in accordance with the medical limitations provided by Dr. Seelig and that the position remained available. It advised him that, under the provisions of 5 U.S.C. § 8106(c)(2) a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation. OWCP afforded appellant 30 days to either accept the assignment and report to duty or submit evidence that the assignment was no longer available or no longer accommodated his medical work restrictions as provided by Dr. Seelig. Appellant did not respond.

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).

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the issuance of the March 8, 2022 decision, OWCP received additional evidence. 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.*

By letter dated August 31, 1998, OWCP advised appellant that he had not provided any valid reasons for refusing the offered light-duty position. It afforded him 15 days to accept.

On September 11, 1998 appellant, through then-counsel, advised that he had accepted the offered position. He returned to work on September 24, 1998.

Appellant stopped working on a full-time basis on October 26, 1998 and began working four hours per day. On November 20, 1998 he filed a claim for compensation (Form CA-7) for partial disability from work for the period October 26 through November 6, 1998. In support of his claim, appellant submitted medical evidence.

In a development letter dated January 27, 1999, OWCP informed appellant that it had received his Form CA-2a, notice of recurrence of disability. It advised him regarding the type of evidence necessary to establish his recurrence claim and afforded him 30 days to submit the necessary evidence. OWCP again advised appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2).

On March 1, 1999 the employing establishment confirmed to OWCP that the offered full-time position remained available.

By decision also dated March 1, 1999, OWCP denied appellant's claim for a recurrence of disability, commencing October 26, 1998, as the medical evidence of record was insufficient to establish that his current back condition and resultant disability were due to the accepted employment injury. It noted that his claimed disability was due to a nonindustrial condition.

On March 9, 1999 appellant, through then-counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On March 23, 1999 the employing establishment informed OWCP that appellant continued to work four hours per day and that full-time work remained available.

In a decision dated March 23, 1999, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective October 26, 1998, based on his abandonment of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It explained that Dr. Cleary provided a well-reasoned opinion as to appellant's current work limitations and the employing establishment had offered him a job within those restrictions. OWCP also indicated that on March 1, 1999, "after confirming it in telephone call with the employing agency, the [OWCP] also informed [appellant] and his attorney that the previously offered position with the [employing establishment] remained available. He was informed that no further reasons for refusal of full-time work would be considered. The claimant was permitted 15 days to accept the position and to return to work full time. The claimant was reminded that pursuant to the provisions of 5 U.S.C. § 8106(c), a partially disabled employee who refuses to or neglects to work after suitable work is offered to, or procured by, or secured for him, is not entitled to compensation." OWCP also indicated that it had reviewed the medical evidence submitted in response to the March 1, 1999 letter.

Following a December 6, 1999 hearing, by decision dated May 23, 2000, an OWCP hearing representative affirmed the March 1, 1999 recurrence decision, finding that appellant had

not submitted rationalized medical evidence establishing a recurrence of disability due to a material change of his accepted work-related conditions.

On August 22, 2000 appellant, through then-counsel, requested reconsideration and submitted additional medical evidence.

OWCP, by decision dated November 30, 2000, denied modification of the March 1 and 23, 1999, and May 23, 2000 decisions. It found that the medical evidence submitted was insufficient to establish that appellant sustained an employment-related recurrence of disability. OWCP also found that he had not submitted any evidence justifying his refusal of suitable work.⁵

On September 21, 2001 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated October 31, 2001, OWCP's Branch of Hearings and Review denied appellant's September 21, 2001 request for an oral hearing, noting that he had previously requested reconsideration and that OWCP had issued a decision on November 30, 2000.

Appellant again requested an oral hearing before an OWCP hearing representative.

By decision dated June 12, 2002, OWCP's Branch of Hearings and Review noted that appellant's prior hearing request was denied by decision issued on October 31, 2001, and that decision remained in effect. It advised him to follow the appeal rights contained in the October 31, 2001 decision.

On October 15, 2021 appellant, through current counsel, requested reconsideration of the March 23, 1999 termination decision. Counsel contended that OWCP failed to provide appellant with a 30-day notice of its preliminary finding that he had abandoned suitable work and intent to invoke the penalty provision of 5 U.S.C. § 8106(c)(2). He further contended that contrary to OWCP's allegation that it issued a letter to appellant advising him that he had 15 days to provide reasons justifying his refusal of the offered position, the record did not contain such letter. No additional evidence was received by OWCP.

OWCP, by decision dated October 29, 2021, denied appellant's October 15, 2021 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁶ This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of OWCP's decision for which

⁵ A Notification of Personnel Action (PS Form 50) dated March 14, 2001 indicated that appellant's last day in active pay status was June 3, 2000.

⁶ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

review is sought.⁷ Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS)).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP’s most recent merit decision was in error.¹⁰ OWCP’s procedures provide that it 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 request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹¹ In this regard, OWCP 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. Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

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

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁹ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also id.* at § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (September 2020).

¹² *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 8 at Chapter 2.1602.5a (September 2020).

¹⁴ *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

In the October 15, 2021 request for reconsideration, counsel, on behalf of appellant, contended that OWCP had failed to follow its procedures in determining whether appellant had abandoned suitable work. He asserted that OWCP failed to provide appellant with 30-day notice of its preliminary finding that he had abandoned suitable work and intent to invoke the penalty provision of 5 U.S.C. § 8106(c)(2). Counsel also asserted that contrary to OWCP's allegation that it issued a letter to appellant advising him that he had 15 days to provide reasons justifying his refusal of the offered position, the record did not contain such letter.

The Board has held that due process and elementary fairness require that OWCP observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of FECA.¹⁵ Section 10.516 of OWCP's regulations state that OWCP will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter OWCP's finding of suitability.¹⁶ Before terminating compensation, OWCP must review the employee's proffered reasons for refusing or neglecting to work.¹⁷ If the employee presents such reasons and OWCP finds them unreasonable, OWCP will offer the employee an additional 15 days to accept the job without penalty.¹⁸

In a January 27, 1999 development letter regarding appellant's recurrence claim, OWCP advised appellant that he had 30 days to submit additional evidence to establish his recurrence claim. It also noted thereafter that "You should also be aware that 5 U.S.C. § 8106(c)(2) states that 'A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.' Therefore, anyone who stops working a suitable job without good cause is not entitled to further compensation for wage loss or schedule award." This January 27, 1999 letter did not specifically advise appellant that he had 30 days to return to full-time employment.

In the March 23, 1999 decision, terminating appellant's wage-loss compensation for abandonment of suitable work, OWCP specifically indicated that on March 1, 1999 it had informed appellant and his counsel that the previously offered position remained open and appellant was permitted 15 days to accept the position and return to work. It indicated that in response appellant submitted additional medical evidence.¹⁹ However, the Board finds that the current record does not contain the referenced March 1, 1999 letter allowing appellant 15 days to return to work.

¹⁵ 5 U.S.C. § 8106(c)(2); *see also* *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁶ 20 C.F.R. § 10.516.

¹⁷ *See Maggie L. Moore*, *supra* note 15.

¹⁸ 20 C.F.R. § 10.516; *see Sandra K. Cummings*, 54 ECAB 493 (2003).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10(1) (July 1996).

Because the record as transmitted to the Board is incomplete and would not permit an informed adjudication of the case,²⁰ the Board is unable to properly consider and decide appellant's claim. The case, therefore, is remanded to OWCP for reconstruction and proper assemblage of the record.²¹ After such further development as deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2021 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 12, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁰ See *Order Remanding Case, G.B.*, Docket No. 20-0236; *H.C.*, Docket No. 19-1976 (issued May 26, 2020); *D.H.*, Docket No. 17-0224 (issued August 16, 2018).

²¹ *Id.*