

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. See 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that his request was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

This case was previously before the Board. By decision dated May 7, 2010, the Board affirmed nonmerit OWCP decisions dated July 11 and November 3, 2008 and March 3, 2009, denying appellant's reconsideration requests on the grounds that they were not timely filed and failed to establish clear evidence of error.³ The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. The facts and the history relevant to the present appeal are set forth.

OWCP accepted that on September 18, 1987 appellant sustained a lumbar strain and lacerations to the left elbow and right leg due to a dog attack. Appellant was released to regular duty on October 7, 1987. In an August 17, 1993 decision, OWCP denied appellant's claim of recurrence beginning September 6, 1988 finding that the medical evidence did not establish that his disability was due to the accepted injury. The record reflects that on September 5, 1988 appellant was at home and had severe low back pain when bending to retrieve a rake from under the edge of the house. On September 13, 1988 appellant underwent back surgery for a herniated disc.

On October 11, 2010 appellant, through counsel, requested reconsideration and submitted a September 23, 2010 report from Dr. Louis P. Clark, Jr., a Board-certified orthopedic surgeon, who reviewed appellant's x-rays and medical records. Dr. Clark noted that it was possible for appellant's disc to rupture while bending over to pick up a rake, but only if there was already an onset of degenerative disc disease. Appellant's x-rays revealed degenerative disc disease on September 25, 1987 and the medical records revealed he was seen several times between October 7, 1987 and September 1988 for low back pains after he returned to regular duty delivering mail. Dr. Clark opined that the source of appellant's chronic back pain between 1987 and 1988 came from his degenerative disease or bulging discs. He opined that it was probable that the 1987 trauma to appellant's lumbar spine, when he fell and then was kicking very vigorously to try to fend off a large dog, resulted in significant trauma to the discs in the lumbar spine from which he did not recover quickly because of his age. Appellant continued to have pain as the disc material could not return to its healthy space. Dr. Clark stated that the continued heavy work of carrying a heavy mailbag over the intervening year contributed to the disc remaining out of shape and being more susceptible to injury. When appellant bent over in September 1988, that event triggered the overt herniation and the acute onset of pain. Dr. Clark advised it was reasonable that the 1987 trauma was a significant contributing factor in the acute onset of pain which occurred in September 1988. He further stated that if his office or Dr. C. Cooley, appellant's family physician's office had ordered a computerized tomography (CT) scan and, if the x-rays were correctly reported in September 1987, appellant should not

³ Docket No. 09-1588 (issued May 7, 2010).

have been allowed to return to his regular work duties. Dr. Clark opined that the job activities increased the risk of his herniated disc. He indicated that no nonwork-related activities were reported by appellant or his wife except bending to pick up a tool.

By decision dated January 25, 2011, OWCP denied appellant's reconsideration request on the grounds it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁴ 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.⁵

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To require it to reopen a case for merit review under section 8128(a) of FECA,⁶ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁷ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.⁹

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.¹⁰

⁴ 20 C.F.R. § 10.607(a).

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

⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.608(b).

⁹ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. The most recent merit decision in this claim is dated August 17, 1993 denying a recurrence of disability. Appellant's request for reconsideration was dated October 11, 2010, more than one year after the August 17, 1993 decision. The Board finds that the reconsideration request was not timely filed.

The Board also finds that appellant has not established clear evidence of error on the part of OWCP. The underlying issue in this case, whether appellant established a recurrence of disability beginning September 6, 1988 causally related to the September 18, 1987 work injury, is medical in nature. Appellant, however, did not submit sufficient evidence to shift the weight of the medical evidence in his favor or establish that OWCP erred in denying his claim.

In support of his reconsideration request, appellant submitted Dr. Clark's September 23, 2010 medical report. Dr. Clark stated it was probable that the 1987 trauma to appellant's lumbar spine, when he fell and was kicking to fend off a large dog, resulted in significant trauma to the discs in the lumbar spine, from which appellant did not recover, and that the continued heavy work of carrying a heavy mailbag over the intervening year contributed to the disc remaining out of shape and being more susceptible to injury. When appellant bent over in September 1988, that event triggered the overt herniation and the acute onset of pain. Dr. Clark, therefore, opined that it was reasonable that the 1987 trauma was a significant contributing factor in the acute onset of pain which occurred in September 1988. He further asserted that if a CT scan had been ordered or if x-rays were reported correctly and appellant should not have been allowed to return to his regular duties, which increased the risk of having a herniated disc.¹⁵ While Dr. Clark's opinion contains some support for appellant's underlying claim, the Board notes that 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 denial was issued, would have created a conflict in medical opinion requiring further development is not clear evidence of error and

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ *Id.*

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ Dr. Clark did not specifically distinguish his October 7, 1987 treatment note which released appellant to work without noting any restriction and advised that spine motion was good and that appellant had no tenderness over the sacroiliac joints or the lumbar spine.

would not require reopening the case.¹⁶ The Board finds that Dr. Clark's report is not the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error.¹⁷ Thus, OWCP properly determined appellant's untimely reconsideration request did not demonstrate clear evidence of error in its August 17, 1993 decision.

On appeal, appellant's attorney argues that Dr. Clark support that the mere act of bending over to pick up a rake in September 1988 would not, by itself, be enough to trigger the kind of back pain appellant suffered following that incident, without there being preexisting degenerative disc disease. Counsel contends that OWCP never considered the effect of the September 1987 incident in aggravating the preexisting disc disease or its residuals. As discussed, however, when an application for review of a merit decision is not timely filed, OWCP will consider the application only if it demonstrates clear evidence of error. To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁸ The evidence appellant submitted on reconsideration fails to meet this standard.

Appellant's attorney further argues on appeal that previously OWCP and the Board essentially ignored Dr. Christopher T. Aul, a Board-certified family practitioner's opinion, that the injury suffered in 1987 was a significant contributing factor in the follow-up surgery and period of disability. Evidence from Dr. Aul was considered by the Board in the previous appeal and was found insufficient to establish clear evidence of error.¹⁹

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁶ See *Joseph R. Santos*, 57 ECAB 554 (2006); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

¹⁷ See *D.D.*, 58 ECAB 206 (2006).

¹⁸ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004).

¹⁹ A decision of the Board is final upon expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d). Appellant did not file a petition for reconsideration of the Board's May 7, 2010 decision pursuant to 20 C.F.R. § 501.7(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 25, 2011 is affirmed.

Issued: November 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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