

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

On appeal, appellant contends that the medical evidence of record is sufficient to establish that he sustained lumbar and cervical injuries causally related to his federal employment.

FACTUAL HISTORY

On April 7, 2009 appellant, then a 51-year-old transportation security screener, filed an occupational disease claim alleging that on April 1, 2009 he sustained bilateral shoulder, back and neck injuries as a result of lifting bags at work.³ He stopped work on April 6, 2009.

In a June 8, 2009 decision, OWCP denied appellant's claim, finding that the medical evidence was insufficient to establish that the claimed conditions were causally related to the accepted employment factors.

On February 3, 2010 appellant requested a telephone hearing. He submitted medical reports and diagnostic test results which addressed his neck, back and urine conditions, disability for work and medical treatment and the causal relationship between his conditions and the established work duties. In a February 1, 2010 report, Dr. Orhan Ilercil, an attending Board-certified neurologist, noted appellant's continued cervical and lumbar complaints. He reviewed diagnostic studies and recommended a cervical fusion due to neurological involvement. Regarding appellant's back condition, Dr. Ilercil stated that surgery was not necessary. Instead, he recommended pain management. Dr. Ilercil advised that appellant was temporarily totally disabled for work due to his cervical and lumbar conditions.

In a June 11, 2010 decision, OWCP's Branch of Hearings and Review denied appellant's request for a hearing on the grounds that it was not timely filed. It found that his request for a hearing was postmarked on February 3, 2010, more than 30 days after issuance of the June 8, 2009 decision. OWCP additionally denied appellant's request for a hearing on the grounds that the issue involved could be addressed equally well by requesting reconsideration and submitting evidence not previously considered which established that he sustained a condition causally related to the accepted factors of his federal employment.

By letter dated January 7, 2011, appellant requested reconsideration. He argued that he continued to suffer from his conditions without medical treatment. Appellant also argued that he continued to be disabled for work.

Appellant submitted a duplicate copy of Dr. Ilercil's February 1, 2010 report. In reports dated June 3 through November 22, 2010, Dr. Ilercil listed findings on physical examination. He

³ The record indicates that appellant filed a separate claim for compensation for another injury, but this claim was not addressed by OWCP in its February 11, 2011 decision. The Board, therefore, will not address this claim in this decision. *See* 20 C.F.R. § 501.2(c).

advised that appellant had lumbar and cervical spondylosis. Dr. Ilercil set forth his physical restrictions and recommended surgical and psychological evaluations.

In reports dated February 17 through July 26, 2010 and an April 27, 2010 progress note, Dr. Alfred G. Lyons, an attending Board-certified anesthesiologist, listed findings on physical examination. He advised that appellant had posterior disc bulges at L2-3, L3-4 and L4-5 with a posterior annular tear at L4-5, degenerative facet changes bilaterally at L4-5 and L5-S1, lumbar facet joint arthralgia, chronic low back and bilateral lumbar radicular pain with bilateral lower extremity radicular pain and without neurologic deficit and tension signs noted on physical examination. Appellant also had displacement of the lumbar intervertebral disc without myelopathy, hyperlipidemia, lumbar radiculopathy and sleep apnea. In reports dated March 18 and April 5, 2010, Dr. Lyons stated that he treated appellant's lumbar disc bulges and radicular pain with epidural steroid injections on those dates.

A July 26, 2010 laboratory report stated that appellant's urinalysis test results were negative with the exception of the presence of oxycodone.

In a February 11, 2011 decision, OWCP denied appellant's January 7, 2011 request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated June 8, 2009.⁴

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁶ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP decision for which review is sought.⁷

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁸

⁴ On appeal, appellant submitted new evidence. The Board cannot consider evidence that was not before OWCP at the time of the final decision. See 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003). Appellant may resubmit this evidence and legal contentions to OWCP accompanied by a request for reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹⁰ 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 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.¹³

To show 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 decision.¹⁴ The Board makes an independent determination of whether a claimant has submitted 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.¹⁵

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁶ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷

The most recent merit decision in this case was OWCP's June 8, 2009 decision, which found that the medical evidence of record was insufficient to establish a causal relationship between appellant's back and neck conditions and the established work duties. As appellant's January 7, 2011 letter requesting reconsideration of the merits of his claim by OWCP was made

⁹ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² *Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

¹⁶ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹⁷ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

more than one year after the June 8, 2009 merit decision,¹⁸ the Board finds that it was not timely filed.

The Board further finds that appellant has not established clear evidence of error on the part of OWCP. The duplicate medical report from Dr. Ilercil dated February 1, 2010 was previously of record and considered by OWCP in its prior decision and does not establish clear evidence of error the determination that appellant did not sustain an injury causally related to the established work duties. Dr. Ilercil attributed appellant's temporary total disability to his lumbar and cervical conditions, but failed to provide a specific diagnosis for these conditions or a medical opinion explaining how the accepted work duties caused the diagnosed conditions and resultant disability. The Board finds that the medical report resubmitted by appellant does not discharge his burden of showing clear evidence of error.

Dr. Lyons' reports and progress note found that appellant had several lumbar conditions including, posterior disc bulges at L2-3, L3-4 and L4-5 with a posterior annular tear at L4-5 and chronic low back and bilateral lumbar radicular pain with bilateral lower extremity radicular pain which he treated with epidural steroid injections. He did not address the relevant issue of whether appellant sustained a medical condition causally related to the established work duties. Similarly, the July 26, 2010 laboratory report did not provide a diagnosis or contain an opinion on the work relatedness of the diagnosed condition. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.¹⁹ Further, the Board notes that pain is a symptom, not a compensable medical diagnosis.²⁰ For the reasons stated, the Board finds that Dr. Lyons' reports and the laboratory report are insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim.

The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet his burden of proof to show clear evidence of error on the part of OWCP.

On appeal, appellant contended that the medical evidence established that he sustained employment-related lumbar and cervical injuries. As discussed above, the medical evidence was not sufficient to *prima facie* shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision denying his occupational disease claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

¹⁸ Appellant had one year to request reconsideration by OWCP of its June 8, 2009 decision. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

¹⁹ *F.R.*, Docket No. 09-575 (issued January 4, 2010).

²⁰ *Robert Broome*, 55 ECAB 339 (2004); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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