

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision and order issued March 14, 2012,² the Board affirmed OWCP's May 24, 2011 decision denying appellant's December 17, 2010 request for reconsideration of a November 18, 2010 merit decision denying his lumbar strain claim. OWCP's November 18, 2010 decision was issued on a lack of rationalized medical evidence supporting causal relationship. The Board found that appellant's request did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. The law and the facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

In a March 28, 2012 letter, appellant requested reconsideration. He submitted additional medical evidence which he asserted was sufficient to establish that he sustained a May 12, 2010 lumbar strain. In a July 11, 2011 report, Dr. Paul L. Asdourian, an attending Board-certified orthopedic surgeon, noted treating appellant for lumbar spondylosis through June 3, 2009. He opined that the May 12, 2010 injury aggravated preexisting lumbar spondylosis. Appellant also submitted an April 4, 2012 letter from his elected representative requesting information from OWCP, and an April 18, 2012 response that appellant's reconsideration request was currently under development.

By decision dated May 9, 2012, OWCP denied reconsideration on the grounds that appellant's request was not timely filed within one year of the November 18, 2010 merit decision and failed to present clear evidence of error. It found that appellant's March 28, 2012 letter, letters to and from his elected representative and the July 11, 2011 medical report were insufficient to raise a substantial question regarding the correctness of OWCP's November 18, 2010 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this

² Docket No. 11-1744 (issued March 14, 2012).

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 20 C.F.R. §§ 10.607, 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.⁸ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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 by OWCP.¹⁴ The Board must make 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

In its May 9, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on November 18, 2010. Appellant's request for reconsideration was dated March 28, 2012, more than one year after November 18, 2010. Accordingly, his request for reconsideration was not timely filed.

In the March 28, 2012 letter, appellant contended that a July 11, 2011 report from Dr. Asdourian, an attending Board-certified orthopedic surgeon, was sufficient to establish the claimed May 12, 2010 lumbar strain. The Board finds that appellant's March 28, 2012 letter

⁷ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 4; *Jesus D. Sanchez*, *supra* note 5.

⁸ *Thankamma Mathews*, *supra* note 4.

⁹ 20 C.F.R. § 10.607(b).

¹⁰ *Thankamma Mathews*, *supra* note 4.

¹¹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5.

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Gregory Griffin*, *supra* note 6.

does not raise a substantial question as to whether OWCP's November 18, 2010 decision was in error or shift the weight of the evidence in his favor. It is insufficient to establish clear evidence of error. The lack of medical rationale was a critical issue at the time of the November 18, 2010 merit decision denying appellant's claim. As Dr. Asdourian's July 11, 2011 report does not contain medical rationale addressing how and why work factors would cause the claimed lumbar strain, it does not establish clear evidence of error.¹⁶ Furthermore, the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error. 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.¹⁷ The correspondence to and from appellant's elected representative does not shift the weight of the evidence in this matter.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's November 18, 2010 decision. Consequently, OWCP properly denied appellant's reconsideration request as his request does not establish clear evidence of error.

On appeal, appellant asserts that Dr. Asdourian's opinion was sufficient to establish his claim based on the "actual merits of the evidence." However, as stated above, Dr. Asdourian's opinion is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

¹⁶ *Leona N. Travis, supra* note 13.

¹⁷ *M.L.*, Docket No. 09-956 (issued April 15, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 9, 2012 is affirmed.

Issued: November 27, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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