

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 4, 2010 appellant, then a 44-year-old electronics technician, filed a traumatic injury claim alleging that on October 22, 2009 he injured his right shoulder while attempting to remove a television from a rack above chest level. The employing establishment controverted the claim on the grounds that his supervisor had no knowledge that he had injured himself and his October 22, 2009 workload did not involve work on a television set. In addition, the employing establishment indicated that appellant partially filled out a traumatic injury claim in October 2009, but he stated that he did not wish to seek medical care or make it an active case. In a letter dated May 7, 2010, OWCP notified that he that no evidence had been received in support of his claim. Appellant was advised as to the type of medical and factual evidence to submit and given 30 days to provide this information. No evidence was received.

By decision dated June 7, 2010, OWCP denied appellant's claim on the grounds that he failed to establish fact of injury.

In a letter dated June 11, 2010, appellant's representative requested a telephonic hearing before an OWCP hearing representative, which was held on October 12, 2012. At the hearing, appellant testified that it was part of his work duties to remove and replace television sets. He testified that he did not immediately report the incident and did not seek medical treatment until the following day. Appellant stated that he had filed a traumatic injury claim in November 2009, but did not realize it had not been activated until the employing establishment asked him if he wanted the claim to be active in April 2010. He testified that, while there was no written work order for him to remove the television set, he had received verbal instructions from his supervisor.

Following the request for a telephonic hearing and the October 12, 2010 telephonic hearing, OWCP received medical evidence including reports for the period October 22, 2009 to September 9, 2010 from Dr. Roberto A. Moya, a treating Board-certified orthopedic surgeon, diagnosing right C5-6 cervical radiculopathy, post-traumatic facetogenic arthropathy and right shoulder tendinitis with a small partial rotator tear. Dr. Moya noted that appellant sustained the injury at work on October 22, 2009 removing a television set.

OWCP also received statements from appellant and the employing establishment regarding the filing of the claim form on May 4, 2010 instead of immediately following the October 22, 2009 incident. It also received a traumatic injury claim form dated November 7, 2009 noting that he sustained a right shoulder injury on October 22, 2009 while attempting to remove a television from a rack above chest level.

By decision dated December 15, 2010 and finalized on December 16, 2010, an OWCP hearing representative affirmed the denial of appellant's claim. He found that the evidence was insufficient to establish that the incident occurred as alleged due to the inconsistencies in the evidence including the lack of any witness statements or knowledge by his supervisor regarding the incident.

On December 19, 2011 OWCP received appellant's undated request for reconsideration. Appellant contended that the denial of his claim was contrary to OWCP policy and contained

erroneous information. He also argued that it was the fault of the employing establishment for failing to timely submit his claim form and that the employing establishment provided inaccurate information to OWCP regarding his claim. Appellant alleged retaliation by the employing establishment in its failure to timely file his claim due to his filing of an Equal Employment Opportunity (EEO) complaint in 2008 against his supervisor. He also alleged that subsequent to the filing of his EEO complaint he was subjected to retaliatory actions by his supervisor. In support of his request, appellant submitted a copy of his position description and e-mail correspondence.

By decision dated January 18, 2012, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.² It 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.³ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁴ Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,⁵ if the claimant's application for review shows clear evidence of error on the part of OWCP.⁶ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ 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 establish clear evidence of error. It is not enough to merely 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 show clear

² See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

³ 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

⁴ *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁵ 20 C.F.R. § 10.607.

⁶ See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

⁷ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

⁸ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

evidence of error, the evidence submitted 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's decision.⁹

OWCP's procedures note that 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 (for example, proof that a schedule award was miscalculated). 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.¹⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ The Board notes that, for merit decisions issued prior to August 29, 2011, OWCP's procedures provided that the timeliness for a reconsideration request was determined not by the date OWCP received the request, but by the postmark on the envelope.¹⁴ OWCP's procedures provide that timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.¹⁵ The envelope containing appellant's initial reconsideration request was not retained in the record. However, the initial request was undated and not received until December 19, 2011. This is more than one year after the December 15, 2010 decision. As appellant's undated request for reconsideration was received by OWCP on December 19, 2011, more than one year after the last merit decision of December 15, 2010, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁶

⁹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 6.

¹⁰ *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(c) (October 2011).

¹¹ *See M.L.*, *supra* note 6; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

¹² 20 C.F.R. § 10.607(a).

¹³ *Robert F. Stone*, 57 ECAB 393 (2005).

¹⁴ Federal (FECA) Procedure Manual, *supra* note 10, Chapter 2.1602.3(b)(1) (January 2004). OWCP's new procedures as of August 29, 2011 require that for all merit decisions issued on and after August 29, 2011, the timeliness of a reconsideration request is determined by the date the request is received by OWCP. Federal (FECA) Procedure Manual, *supra* note 10, Chapter 2.1602.4(e) (August 29, 2011).

¹⁵ 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, *supra* note 14.

¹⁶ *Id.* at § 10.607(a); *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

The underlying claim for compensation was denied on the grounds that appellant had not established fact of injury due to the inconsistencies in the factual evidence. On reconsideration appellant alleged that the evidence was sufficient to establish an employment incident occurred at the time, place and in the manner alleged on October 22, 2009. He also argued that OWCP failed to follow its procedures in denying his claim and that it failed to consider that he had filed an EEO claim against his supervisor. However, appellant does not state the basis for the EEO claim against his supervisor other than alleging retaliation for filing the claim. OWCP, however, had considered the contemporaneous evidence and found that there were inconsistencies that cast doubt as to whether the incident occurred as alleged.¹⁷ This included a review of employing establishment forms completed by appellant and statements from supervisors. Appellant alleged that he timely submitted his traumatic claim form and OWCP should accept the incident as alleged, but he did not submit probative evidence establishing clear evidence of error in the finding that the incident did not occur at the time, place and in the manner alleged. As noted above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The weight of the evidence must shift in favor of the claimant. Appellant did not show clear evidence of error in OWCP's finding as to the occurrence of an employment incident on October 22, 2009.

On appeal, appellant contends that his reconsideration request was timely filed as it was mailed on December 14, 2012. As noted above, the evidence demonstrates that his reconsideration request was filed after the one-year time period had elapsed. Appellant also asserted that the statements and evidence submitted by the employing establishment were false. However, he submitted no evidence showing that the employing establishment provided false statements or manufactured evidence in connection with his claim. Appellant also contends that his position description establishes that he was performing the duty he alleged caused his injury. While a position description details the duties of the position, it does not establish that he was performing those duties on the date of the alleged October 22, 2009 incident. Lastly, appellant asserted that he timely mailed his reconsideration request and submitted evidence of this to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision.¹⁸

CONCLUSION

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

¹⁷ It is well established that a claimant cannot establish fact of injury if there are inconsistencies that cast doubt as to whether the incident occurred as alleged. *S.P.*, 59 ECAB 184 (2007); *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

¹⁸ See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2012 is affirmed.

Issued: February 15, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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