

FACTUAL HISTORY

This case was previously on appeal before the Board. In a decision dated June 23, 2008, the Board found that appellant was not entitled to intermittent wage-loss compensation for the period July 12 to October 29, 2004.² The facts of the case, as set forth in the prior decision, are incorporated by reference.

On June 8, 2010 OWCP terminated appellant's compensation benefits. It found that Dr. Steven Valentino, an osteopath, was the weight of the medical evidence, which established that appellant no longer had residuals of his accepted aggravation of lumbosacral degenerative disc disease. Appellant requested reconsideration on August 3, 2010. By decision dated October 26, 2010, OWCP denied modification of the June 8, 2010 decision. Appellant requested reconsideration on December 13, 2010 and submitted additional medical evidence.

In a decision dated March 11, 2011, OWCP denied appellant's request for reconsideration without a review of the merits on the grounds that it was insufficient to warrant review of its prior decision. It found that, among the new evidence submitted, only the report of Dr. Christopher Plasteras, a physiatrist, was new. However, this report lacked the rationale to support continued residuals related to the injury.

Per a telephone memorandum dated November 9, 2011, appellant contacted OWCP to inquire into the status of a letter he sent on or about October 18, 2011. OWCP advised him that no letter was received. It noted that appellant was provided with the fax number to submit a copy of his correspondence.

In a letter dated December 16, 2011, appellant requested reconsideration and submitted additional evidence.

OWCP received an October 18, 2011 report from Dr. Natacha Falcon, a Board-certified physiatrist, who noted that he had reviewed Dr. Valentino's second opinion report, which indicated that appellant recovered from his work-related injury, returned to baseline and reached maximum medical improvement. Dr. Falcon opined that she disagreed with Dr. Valentino's opinion as appellant continued to suffer from back pain following his injury. She indicated that appellant continued to have back pain following an injury in 1985 and continued to receive ongoing medical treatments to include medication management and epidural steroid injections. Dr. Falcon advised that he was capable of working seven hours a day although he continued with intermittent episodes of pain which was managed with medication, epidural injections and physical therapy exercises. OWCP also received treatment notes from Dr. Plasteras for therapeutic injections dated August 24, 2010.

In a February 16, 2012 decision, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

² Docket No. 07-1963 (issued June 23, 2008).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”³

OWCP’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁴ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.⁵

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.⁶

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 manifest on its face that OWCP committed an error. Evidence that 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 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.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient

³ 5 U.S.C. § 8128(a).

⁴ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

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. 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.⁸

ANALYSIS

In its February 16, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on October 26, 2010. Appellant's December 16, 2011 letter requesting reconsideration was submitted more than one year after the October 26, 2010 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening his case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether OWCP, on October 26, 2010, properly found that the evidence of record was insufficient to warrant modification of the June 8, 2010 decision terminating his compensation and medical benefits. The issue underlying appellant's claim was whether appellant continued to have residuals of his work-related condition and is primarily medical in nature.

On reconsideration, appellant submitted new medical evidence. The new medical evidence included a report dated October 18, 2011 from Dr. Falcon. However, this report is insufficient to establish clear evidence of error. Dr. Falcon opined that she disagreed with the second opinion report of Dr. Valentino as appellant continued to suffer from back pain following his work injury. However, the Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized report which, if submitted prior to OWCP's merit decision might require additional development of the claim, is insufficient to establish clear evidence of error.⁹ Thus, this report is insufficient to raise a substantial question as to the correctness of OWCP's decision.

Regarding the August 24, 2010 reports of Dr. Plasteras, these reports were previously of record and do not provide an opinion on causal relationship and do not provide positive, precise or explicit evidence that manifests on its face that OWCP committed an error.

⁸ *Id.*

⁹ *See E.R.*, Docket No. 09-599 (issued June 3, 2009).

Appellant did not submit any new medical evidence or legal arguments sufficient to raise a substantial question as to the correctness of OWCP's decision. Consequently, OWCP properly denied his reconsideration request as it does not establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 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