

ISSUE

The issue whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that his requests were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. On May 13, 2008 the Board issued an order remanding the case to OWCP for proper assemblage of the record and a *de novo* decision as the case record was missing materials dated August 4, 1995 through December 14, 2004.³ By decision dated December 1, 2008, OWCP denied appellant's claim for compensation beginning August 9, 1992. It found that there were no missing documents for the period August 4, 1995 through December 14, 2004.⁴ By decision dated October 22, 1999, the Board affirmed the December 1, 2008 decision, which found that appellant did not meet his burden of proof to establish entitlement to wage-loss compensation beginning August 9, 1992.⁵ In decisions dated January 14, 2011 and April 4, 2012, OWCP reviewed the case on its merits and denied modification of the wage-loss compensation determination. On December 20, 2012 the Board issued an order dismissing appeal as it was untimely filed and the Board did not have jurisdiction to review the appeal. The Board found that appellant had not offered a reason to explain his failure to timely file an appeal with supporting documentation sufficient to establish compelling circumstances.⁶ The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.

On March 29, 2013 appellant requested reconsideration of OWCP's April 4, 2012 decision on an appeal request form from the January 14, 2011 decision. The request was postmarked March 29, 2013 and received by OWCP April 5, 2013.

In an April 18, 2013 letter, OWCP requested that appellant clarify for which OWCP decision (April 4, 2012 or January 14, 2011) reconsideration was sought. In response, appellant submitted a copy of his appeal request form indicating that he was requesting reconsideration of OWCP's April 4, 2012 decision. The evidence submitted in support of his reconsideration request included: September 6 and 29, 2012 letters designating his representative; a March 11,

³ Docket No. 08-278 (issued May 13, 2008).

⁴ On January 14, 1992 appellant, then a 49-year-old construction representative, sustained injuries to his neck and back when he slipped on a wet dock at work. He stopped work on January 16, 1992 and never returned. Appellant began leave without pay on August 9, 1992 and retired on September 2, 1993. Effective August 9, 1992, he elected a disability retirement annuity from the Office of Personnel Management (OPM). OWCP accepted the claim for cervical and lumbosacral sprains and paid compensation benefits until the election of OPM benefits. The record reflects that OPM reached a settlement with appellant regarding an overpayment for the period August 9, 1992 through March 29, 1993 and thereafter paid benefits beginning March 30, 1993. On January 5, 2007 appellant elected to receive wage-loss compensation from OWCP retroactive to August 9, 1992, in lieu of OPM benefits. He asserted that his disability was due to his accepted condition.

⁵ Docket No. 09-519 (issued October 22, 2009).

⁶ Docket No. 13-169 (issued December 20, 2012).

2013 statement requesting an extension of appeal request and an undated response from the Appeals Unit, Freedom of Information Act/Privacy Act; position description; statements dated March 30, 2013; December 20, 2006 statement of earnings and leave; July 13, 2009 letter from United States Bankruptcy Court; letters from Harmon Law Offices dated September 15 and 23, 2009, a March 5, 2010 release of all claims; statements from Dr. Michael Goldstein, D.C., and statement from appellant regarding bill payment issue; an August 30, 1995 report regarding a left elbow condition; and a February 24, 1993 letter from appellant's employer to Dr. Richard Bertini, a Board-certified orthopedic surgeon.

The medical reports of Dr. John Adams, a Board-certified internist, dated March 19, 2002, April 15, 2005 and October 18, 2007 were submitted. He advised that appellant had a prior history of low back pain in the L4-5 area. Dr. Adams treated her on December 12, 2013 for low back pain with muscle relaxants and ibuprofen therapy. On December 11, 2006 appellant continued to complain of intermittent discomfort in his lower back. Dr. Adams stated that a November 18, 1992 magnetic resonance imaging (MRI) scan was consistent with multilevel disc bulging and osteophytes as well as encroachment of the left L4-5 neural foramen.

Appellant resubmitted evidence previously of record, including medical reports from Dr. Albert Ackil, a Board-certified internist, dated June 15, 2005, October 26, 2006, May 31, 2007 and September 22, 2010; an undated addendum to a Rehabilitation Assessment; a July 11, 1995 report from the Hand Therapy Program; an October 2, 2006 MRI scan of lumbar spine and a December 17, 2011 report from Dr. Kenneth Lambert, a Board-certified orthopedic surgeon.

By decision dated May 8, 2013, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error. The decision noted that the only right to appeal was to the Board.

In letters dated May 10 and 17, 2013, appellant disagreed with OWCP's May 8, 2013 decision finding his reconsideration request untimely. He contended that his reconsideration request was mailed by registered mail on March 29, 2013. A copy of the U.S. Postal Service Certified Mail Receipt and accompanying sales receipt both dated March 29, 2013, showing an expected delivery of Monday, April 1, 2013 were submitted.

By decision dated August 14, 2013, OWCP denied appellant's reconsideration request as untimely filed 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 or her application for review within one year of the date of that decision.⁷ Section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁸

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.*

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.⁹

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

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.¹¹

Evidence that 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 the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁴ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

In its May 8, 2013 decision, OWCP determined that appellant failed to file a timely application for review. An application for reconsideration must be received within one year of the date of OWCP's decision.¹⁶ Appellant's March 29, 2013 request for reconsideration was received on April 5, 2013, more than one year after the date of the last merit decision of record on April 4, 2012. It was untimely. On May 10 and 17, 2013 appellant again requested reconsideration. He did not raise any argument pertaining to OWCP's last merit decision of April 4, 2012. Rather, appellant argued that OWCP erred in finding his March 29, 2013 request for reconsideration untimely in the May 8, 2013 decision. In support of his contention, he submitted a copy of the U.S. Postal Service Certified Mail Receipt and accompanying sales receipt both dated March 29, 2013, showing an expected delivery of Monday, April 1, 2013.

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

¹⁰ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁶ 20 C.F.R. § 10.607.

Section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received, not sent, within one year of the date of OWCP's decision for which review is sought.¹⁷ The record reflects that appellant's March 29, 2013 request for reconsideration was received by OWCP on April 5, 2012 and, thus, was not within one year of the April 4, 2012 decision. Contrary to his assertions, the request for reconsideration received on April 5, 2012 was not timely filed.

As appellant's requests for reconsideration were untimely, he must demonstrate clear evidence of error by OWCP in denying his claim.¹⁸

The Board finds that the evidence submitted by appellant in support of his March 29, 2013 request for reconsideration does not raise a substantial question as to the correctness of OWCP's decision denying wage-loss compensation for the period beginning August 9, 1992 through the present or shift the weight of the evidence of record in his favor. Dr. Adams, in his October 18, 2007 report, notes examination findings on December 11, 2006 and December 12, 2012 and discusses results of a November 18, 1992 lumbar MRI scan. However, he fails to provide any opinion to support that the back pain in the L4-5 region is connected to appellant's work activities. Thus, Dr. Adams' report is insufficient to establish that appellant was disabled for the claimed period beginning August 9, 1992 and is also insufficient to establish clear evidence of error in the correctness of OWCP's April 4, 2012 decision denying his claim. The other evidence appellant submitted, which pertained to information requests, other legal matters and a left elbow condition, are irrelevant to the issue of whether OWCP erred in denying wage-loss compensation beginning August 9, 1992 onward. Appellant also submitted letters from her counsel, a Freedom of Information Act appeal request, earnings and leave statements, a statement regarding bill payment. This evidence is insufficient to show that OWCP's decision was erroneous or raise a substantial question as to the correctness of OWCP's decision.

Appellant has not submitted any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of OWCP's April 4, 2012 decision denying wage-loss compensation beginning August 9, 1992 onward. Consequently, OWCP properly denied his reconsideration request as it was untimely and failed to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration as they were untimely filed and failed to establish clear evidence of error.

¹⁷ *Id.* at § 10.607(a).

¹⁸ See *Debra McDavid*, 57 ECAB 149 (2005).

ORDER

IT IS HEREBY ORDERED THAT the August 14 and May 8, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 11, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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