

¹ See 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 34-year-old special agent, filed a claim for benefits on October 11, 2011, alleging that he injured his right wrist on October 9, 2011 while searching a vehicle and moving heavy objects.

By letter dated December 5, 2011, OWCP advised appellant that he needed to submit additional factual and medical evidence in support of his claim. It provided 30 days to submit the requested information.

By decision dated January 6, 2012, OWCP denied appellant's claim. It found that he failed to submit medical evidence in support of his claim that he sustained a right wrist injury due to the October 9, 2011 incident.

On March 20, 2012 appellant requested reconsideration.

In a report dated February 7, 2012, received by OWCP on March 27, 2012, Dr. Robert M. Stack, a specialist in orthopedic surgery, stated that a magnetic resonance imaging (MRI) scan of the right wrist showed some extensor carpi ulnaris tendinitis, with no tears. He advised that appellant's right triangular fibrocartilage complex might have a central erosion. On examination, however, appellant did not have tenderness over the extensor carpi ulnaris tendon, but had pain with ulnar deviation of the wrist. Dr. Stack referred appellant to a hand surgeon, after which he would be reevaluated.

By decision dated June 20, 2012, OWCP denied modification of the January 6, 2012 decision.

On June 15, 2013 appellant requested reconsideration.

By decision dated June 21, 2013, OWCP denied appellant's application for review. It found that he neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

In a May 29, 2013 report, received by OWCP on July 12, 2013, Dr. Robert R. Bell, a specialist in orthopedic surgery, stated that appellant had complaints of right wrist pain stemming from an October 9, 2011 work injury. He related that the injury occurred when appellant was reaching down to pick up a heavy suitcase in the line of duty. Appellant had his arms out in a supinated position and, as he lifted, he felt a pop in his right wrist. Dr. Bell asserted that appellant strained the extensor carpi ulnaris tendon and had a partial tear of his right triangular fibrocartilage complex. He stated that lifting the suitcase in such a position and the sudden pop in the wrist was a classic mechanism for injury to the extensor carpi ulnaris tendon. Dr. Bell diagnosed a right wrist sprain and tenosynovitis of the hand and wrist.

In a letter received by OWCP on July 12, 2013, appellant requested reconsideration.

By decision dated August 8, 2013, OWCP denied appellant's request for reconsideration without a merit review. It found that he failed to timely request reconsideration and did not submit factual or medical evidence sufficient to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the FECA² does not entitle an employee to a review of an OWCP decision as a matter of right.³ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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 previously awarded; or

(2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, OWCP has stated that 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).⁶

In those cases where a request for reconsideration is not timely filed, the Board had held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error.⁷ OWCP procedures state that it will reopen an appellant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant’s application for review shows “clear evidence of error” on the part of OWCP.⁸

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and

² *Id.* at § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by (1) showing that OWCP erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by OWCP, or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

⁶ *See* cases cited *supra* note 3.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

must be manifested on its face that it committed an error.¹⁰ Evidence which 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's decision.¹⁴ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on June 20, 2012. It received appellant's requested reconsideration on July 12, 2013; thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's July 12, 2013 request for reconsideration failed to show clear evidence of error. Appellant's attorney argued on appeal that appellant submitted medical evidence to establish the causal relationship between the diagnosed conditions and the traumatic incident of October 9, 2011. Appellant submitted reports from Dr. Stack and Dr. Bell, both of whom indicated that appellant had complaints of right wrist pain stemming from an October 9, 2011 work injury and diagnosed strains of the extensor carpi ulnaris tendon and right triangular fibrocartilage complex. Dr. Bell stated that the injury occurred when appellant was reaching down to pick up a heavy suitcase in the line of duty; he opined that the lifting of the suitcase and the sudden pop in the right wrist was a classic mechanism for the diagnosed injuries. Dr. Stack indicates that an MRI scan of the right wrist showed some extensor carpi ulnaris tendinitis, with no tears. While these reports could be construed as favorable to appellant, neither of the reports appellant submitted with his request are 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. These opinions are not manifest on their face that OWCP committed an error in denying appellant's claim for compensation. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP.

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

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

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

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

¹⁴ *Faidley*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

OWCP reviewed the evidence appellant submitted and properly found it to be insufficient to shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review. The Board finds that OWCP did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her reconsideration request dated July 12, 2013. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on August 8, 2013.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 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