

FACTUAL HISTORY

On May 4, 2007 appellant, then a 51-year-old transportation security officer, sustained an injury while performing a bag check. He tripped on a loose rope and fell injuring his right knee, shoulder and ribs. Appellant returned to a limited-duty position on May 24, 2007. On July 31, 2007 OWCP accepted his claim for postconcussion syndrome, right shoulder sprain and strain and a right knee contusion.

A May 29, 2007 magnetic resonance imaging (MRI) scan of the right shoulder revealed mild rotator cuff tendinopathy without a tear, prior subacromial decompression and acromioplasty with postsurgical change and no labral tear. Appellant came under the treatment of Dr. Mayur C. Maniar, a Board-certified neurologist, from May 31, 2007 to March 27, 2008. Dr. Maniar reported daily left-sided frontotemporal and parietal headaches, difficulty with concentration and memory and right shoulder pain. An MRI scan of the brain dated July 2, 2007 revealed no abnormalities. Dr. Maniar noted that appellant remained symptomatic with visual problems, dizziness and headaches.

Appellant was also treated by Dr. Keith A. Skolnick, a Board-certified ophthalmologist, on December 2, 2007, for postconcussion syndrome causing visual disturbances and blurry vision. Dr. Skolnick opined that appellant's eye complaints were related to the May 4, 2007 work injury. On April 17, 2008 appellant's claim was accepted for visual disturbances. He stopped work on November 24, 2008.

Appellant was treated by Dr. Ely Pelta, a Board-certified psychiatrist, from March 9 to July 7, 2010 for organic mood disorder and status postconcussion syndrome. In a work capacity evaluation dated May 22, 2009, Dr. Pelta noted that appellant continued to have cognitive and emotional deficits and could return to work in a desk job full time. Dr. Maniar diagnosed status post work injury of May 4, 2007 with postconcussion syndrome with residual traumatic headaches, mild memory dysfunction, emotional problems with anxiety and depression. He released appellant to work full time without restrictions.

On April 13, 2010 OWCP referred appellant for a second opinion to Dr. Antonio Defilippo, a Board-certified ophthalmologist. In a May 14, 2010 report, Dr. Defilippo diagnosed mood disorder secondary to head injury in the resolution phase, a history of head injury with a postconcussion syndrome and bilateral knee surgeries. He noted that the psychiatric part of the mood disorder resulting from the postconcussion syndrome was well controlled with medication. Dr. Defilippo opined that appellant reached maximum medical improvement and could return to his regular duties as a screener.

On July 2, 2010 OWCP proposed to terminate appellant's wage-loss compensation benefits. It found that Dr. Defilippo's report established that appellant was no longer disabled from performing his date-of-injury job.

Appellant submitted a July 21, 2010 report from Dr. Maniar who noted he was stable neurologically and released to work full time.

By decision dated August 6, 2010, OWCP terminated appellant's wage-loss benefits effective July 8, 2010. Appellant remained entitled to medical benefits.

On January 9, 2014 appellant requested reconsideration. Through counsel, he asserted that his claim should be accepted chronic migraine syndrome and traumatically-induced organic mood disorder. Counsel contended that these conditions should have been considered when OWCP determined that he was able to return to work as a screener.

Appellant submitted an October 30, 2013 report from Dr. Michael K. Maraist, a Board-certified neurologist, who noted a history of appellant's May 4, 2007 injury and treatment for memory loss and lack of focus, which were associated with his chronic migraine syndrome and visual disturbances. Dr. Maraist diagnosed chronic migraine syndrome and traumatically-induced organic mood disorder. He stated to a reasonable degree of medical probability that the conditions were causally related to the May 4, 2007 injury.

Appellant submitted reports from Dr. Maniar dated September 1 and 20, 2010. Dr. Maniar noted that appellant was symptomatic with ongoing headaches, dizziness, trouble concentrating and with memory. On September 20, 2010 he took appellant off work for three weeks due to worsening symptoms. In Florida Workers' Compensation forms dated September 1 to December 13, 2010, Dr. Maniar diagnosed severe headaches and dizziness flare-up and noted appellant was disabled from work. In reports dated October 7 to December 14, 2010, he noted that on August 27, 2010 appellant developed significant stress at work and his symptoms were exacerbated. Dr. Maniar diagnosed closed head injury with postconcussion syndrome including headaches, difficulty with memory and concentration and emotional lability. He found that appellant was totally disabled.

Appellant was treated by Dr. Pelta from November 9, 2010 to November 22, 2011, who diagnosed organic mood disorder and opined that appellant's head injury and new injury on August 27, 2010 rendered him incapable of working as a screener as he was unable to make rapid decisions and remained emotionally labile. On January 31 and February 18, 2011 appellant was treated by Dr. Fred J. Petrilla, a clinical psychologist, for clinical depression. Dr. Petrilla noted appellant's short-term memory and concentration were less than satisfactory. Appellant appeared to be tense, frustrated, anxious and depressed. An MRI scan of the head dated August 16, 2011 revealed no abnormalities.

By decision dated January 17, 2014, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

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.”²

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 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.³ However, 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 that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁴

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 *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.⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.⁹

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L Billingsley*, 50 ECAB 210 (1998).

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Board finds that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ Appellant's request for reconsideration was not received by OWCP until January 15, 2014, more than three years after issuance of the August 6, 2010 merit decision. It was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in its August 6, 2010 decision terminating wage-loss benefits.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In his January 9, 2014 statement, counsel contended that the medical evidence supported additional conditions should have been accepted by OWCP and considered when determining appellant's ability to return to work as a screener. While appellant addressed his disagreement with OWCP's termination of his wage-loss benefits, his general allegations do not raise a substantial question as to the correctness of OWCP's decision. In 2010, both Dr. Maraist and Dr. Filippo found appellant able to return to work without restrictions.

Appellant submitted an October 30, 2013 report from Dr. Maraist who noted appellant's history and treatment. Dr. Maraist opined to a reasonable degree of medical probability that appellant suffered from chronic migraine syndrome and traumatically-induced organic mood disorder as a result of his injury May 4, 2007. He does not explain how appellant's disability was causally related to his accepted work injury. The Board notes that appellant's wage-loss benefits were terminated for the accepted conditions of postconcussion syndrome, right shoulder/sprain and strain, right knee contusion and visual disturbances. Dr. Maraist did not address continuing disability related to these conditions but attributed appellant's disability to conditions that were not accepted as work related. This evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. This evidence is not so positive, precise or explicit that it manifests on its face that OWCP committed an error. The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of 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.¹¹

In reports dated September 1 to December 14, 2010, Dr. Maniar noted that on August 27, 2010 appellant developed significant stress at work which exacerbated his symptoms. He diagnosed closed head injury with postconcussion syndrome including headaches, difficulty with memory and concentration and emotional liability. On September 20, 2010 Dr. Maniar noted that appellant was totally disabled. In Florida Workers' Compensation uniform reporting forms dated September 1 to December 13, 2010, he diagnosed severe headaches and dizziness flare-up and noted appellant was totally disabled. Dr. Maniar did not explain how appellant's disability was causally related to appellant's employment. He released appellant to regular duty in June 2010. Dr. Maniar failed to explain how appellant's disability of September 20, 2010

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *D.G.*, 59 ECAB 455 (2008).

related to the accepted conditions. These reports are not sufficient to establish clear evidence of error.

Appellant was treated by Dr. Pelta from November 9, 2010 to November 22, 2011. Dr. Pelta diagnosed organic mood disorder and opined that appellant's head injury and a new injury on August 27, 2010 rendered him incapable of working as a screener as he was unable to make rapid decisions and remained emotionally labile. Appellant submitted reports from Dr. Petrilla dated January 31 and February 18, 2011, who treated him for clinical depression. Dr. Petrilla noted appellant's short-term memory and concentration were less than satisfactory and he appeared to be tense, frustrated, anxious and depressed. This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. As noted above, even if these reports offered reasoned support for causal relationship, they would be insufficient to establish clear evidence of error

Thus, appellant has not established clear evidence of error by OWCP in its August 6, 2010 decision.

On appeal, appellant reiterated assertions that he made before OWCP indicating that the termination of his benefits was improper and that the newly diagnosed conditions of chronic migraine syndrome and traumatically-induced organic mood disorder should have been accepted as related to the May 4, 2007 work injury and considered when terminating compensation benefits. The Board does not have jurisdiction over the merits of the claim. As noted, appellant has not established clear evidence of error by OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2014
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