

FACTUAL HISTORY

OWCP accepted that on March 19, 1990 appellant, then a 34-year-old tractor operator, sustained a traumatic injury in the form of a left hand fracture when his hand became caught in a tractor steering wheel at work. It later accepted that on September 10, 1997 he sustained a traumatic injury in the form of right wrist and right foot sprains due to a fall at work. The files for the 1990 and 1997 injuries were later combined under the file for the 1997 injury.

On April 13, 1998 appellant filed a recurrence of disability claim (Form CA-2a) with OWCP. The form mentioned that the recurrence of disability was alleged as occurring due to both accepted work injuries.

In an August 20, 1998 decision, OWCP denied appellant's claim for a recurrence of disability due to his 1990 and 1997 work injuries. It discussed medical evidence from Dr. Noel Rogers, an attending Board-certified orthopedic surgeon, but noted that it did not establish appellant's recurrence of disability claim.

In a September 18, 2014 letter received on December 2, 2014, counsel requested reconsideration of OWCP's August 20, 1998 decision "denying a claim for recurrence" on behalf of appellant.³ He argued that the August 20, 1998 decision was erroneous on its face because it was not decided in accordance with OWCP procedure. Counsel stated:

"The claim for compensation was an initial claim and was incorrectly treated as a recurrence. As this was his first claim for compensation, you must vacate the decision and develop the claim in accordance with FECA PM [procedure manual], [Chapter] 2.901.05.

"The appropriate section of the FECA PM is [Chapter] 2.1400.7 which deals with recurrences when an employee has been terminated for cause. [Chapter] 2.1400.7(a)(4) specifically states that for an employee to be ineligible for compensation, 'Most importantly, there was no evidence in the record that the claimant was unable to perform the light[-]duty position....'

"The [August 20, 1998] denial is based on the fact that [appellant's] termination was not due to the accepted conditions. The only consideration in determining compensability is whether [appellant] was physically capable of returning to his work to his light[-]duty position."⁴

In a January 23, 2015 decision, OWCP denied appellant's request for further review of the merits of his claim as his request was untimely filed and failed to demonstrate clear evidence of error. It indicated that his request for reconsideration of its August 20, 1998 decision was untimely because it was received on December 2, 2014, a period more than one year after the

³ Counsel refers to an August 19, 1998 decision of OWCP, but he appears to have inadvertently misidentified OWCP's August 20, 1998 decision as being dated August 19, 1998.

⁴ In the remainder of the letter, counsel mentioned medical evidence, including evidence of Dr. Rogers, which he believed would establish that appellant sustained work-related disability.

issuance of the August 20, 1998 decision. Regarding why counsel's September 18, 2014 letter did not show clear evidence of error in OWCP's August 20, 1998 decision, OWCP found:

“[Counsel] states that the August 20, 1998 recurrence denial was erroneous because [OWCP] did not develop the initial claim in accordance with procedures. However, you submitted a CA-2a form, Notice of Recurrence on April 13, 1998 and it was properly developed by letter dated May 6, 1998. Since your cases were doubled, the August 20, 1998 recurrence denial addressed both of your injuries from 1990 and 1997. It was noted you did not stop work due to your physical inability to perform your assigned duties nor was there evidence you stopped due to your work injuries.”

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP 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.⁵ 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.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁷ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows “clear evidence of error” on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish

⁵ 20 C.F.R. § 10.607(a).

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

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedure further provides, “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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. 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.”

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

ANALYSIS

In its January 23, 2015 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on December 2, 2014, many years after OWCP's August 20, 1998 decision, and he, therefore, must demonstrate clear evidence of error on the part of OWCP in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its August 20, 1998 decision. He did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error.

Counsel, on behalf of appellant, argued that the August 20, 1998 decision was improper because it treated appellant's claim in 1998 as a claim for recurrence of disability rather than as an "initial claim." This argument would not tend to show that OWCP committed error as appellant actually filed a claim for recurrence of disability in 1998 and counsel's argument does not tend to show that OWCP improperly developed appellant's claim. In his letter, counsel mentioned medical evidence, including evidence of Dr. Rogers, an attending Board-certified orthopedic surgeon, which he believed would establish work-related disability. Counsel's argument does not establish clear evidence of error as it does not clearly show that OWCP improperly evaluated the medical evidence, including reports of Dr. Rogers, in its August 20, 1998 decision.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's August 20, 1998 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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