

**United States Department of Labor
Employees' Compensation Appeals Board**

D.L., Appellant)

and)

DEPARTMENT OF THE NAVY, MILITARY)
SEALIFT COMMAND AFLOAT PERSONNEL)
MANAGEMENT CENTER, Norfolk, VA,)
Employer)

**Docket No. 11-370
Issued: September 6, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 19, 2010 appellant filed a timely appeal from a September 20, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a May 15, 2007 decision, the Board affirmed OWCP's February 9 and October 4, 2006 decisions denying appellant's occupational disease claim. The Board found that the medical evidence of record was insufficient to establish that he sustained an injury due to work factors as alleged.² In a July 22, 2010 decision, the Board denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.³ The facts of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

On August 4, 2010 appellant, through his representative, filed a request for reconsideration. Counsel stated that the request was "based on all of the necessary medical evidence that [had] been sent to [OWCP]."

Appellant submitted an April 15, 2010 report from Dr. Mark Khorsandi, a Board-certified osteopath, specializing in general surgery. Dr. Khorsandi provided examination findings and diagnosed ulnar neuropathy, carpal tunnel syndrome (CTS) and cervical disc degeneration. He stated that appellant had been injured in a ship accident in 1996, and sustained an injury to his left index finger requiring surgery at the metacarpophalangeal joint.

On April 15, 2010 Dr. Joseph Dang, a Board-certified physiatrist, provided the results of an electrodiagnostic evaluation. He noted that appellant had been experiencing pain in the bilateral wrists and hands, as well as numbness and tingling in his fingers, for six years and also had cervical discogenic disc disease. Dr. Dang provided findings on examination and reported the results of nerve conduction studies, which revealed left carpal tunnel entrapment in both motor and sensory involvement, chronic neuropathy of left ulnar nerve most likely at the elbow and no electrodiagnostic evidence of left cervical radiculopathy.

Appellant provided a May 12, 2010 surgical report from Dr. Khorsandi for a left ulnar entrapment neuropathy procedure; an undated work excuse for an indefinite period of time beginning May 13, 2010; progress notes from Dr. Khorsandi dated May 13 and 20, June 3 and July 15, 2010, all of which contained diagnoses of ulnar neuropathy, carpal tunnel syndrome (CTS) and cervical disc degeneration; a June 28, 2010 return-to-work slip from Dr. Khorsandi reflecting his opinion that appellant could return to unrestricted duty on May 20, 2010; and a prescription for physical therapy.

² Docket No. 07-367 (issued May 15, 2007). On June 24, 2004 appellant, a 64-year-old deck engineer/machinist filed an occupational disease claim alleging that he developed pain in his shin area, which he attributed to an "old accident." He later attributed his medical condition to both a November 12, 1996 accident at work and his work duties, including heavy lifting, continuous bending, climbing and standing for extended periods. OWCP accepted that appellant sustained a work incident on November 12, 1996 when a door hit his left shoulder and he fell to the deck of a ship, but found that the medical records failed to provide a firm diagnosis related to the incident. Appellant claimed that his cervical degenerative changes, left thumb and forefinger parenthesis, hearing loss and cataracts were caused or aggravated by factors of his federal employment.

³ Docket No.10-133 (issued July 22, 2010).

In a September 20, 2010 decision, OWCP denied appellant's request for reconsideration of the merits of his claim on the grounds that it was untimely 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 under FECA, a claimant must file his or her application for review within one year of the date of that decision.⁴ 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.⁵

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, it must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁶ OWCP regulations and procedure 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 application for review shows "clear evidence of error" on the part of OWCP.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed

⁴ 20 C.F.R. § 10.607(a). According to OWCP's procedure, the one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

⁵ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles I. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's 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 an error (for example, proof that a schedule award was miscalculated). 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." *Id.* at Chapter 2.1602.3c.

⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991). The Board has found that reports containing equivocal or speculative opinions on causal relationship are of limited probative value. *See Leonard O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

so as to produce a contrary conclusion.¹¹ 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.¹²

ANALYSIS

In its September 20, 2010 decision, OWCP properly determined that appellant filed an untimely request for reconsideration of OWCP's denial of his claim for work-related conditions.¹³ Appellant's reconsideration request was filed on August 4, 2010, more than one year after the most recent merit decision of record, namely, the Board's May 15, 2007 decision.¹⁴ Therefore, he must demonstrate clear evidence of error on the part of OWCP.

Appellant contended that his claim was improperly denied as he submitted sufficient medical evidence to support his claimed condition. This contention does not establish error on the part of OWCP, but merely repeats arguments previously raised and considered by OWCP and the Board. The Board finds that appellant's contention is not persuasive as it is not consistent with the general legal standards applicable to establishing a claim. Appellant's arguments on reconsideration are insufficient to raise a substantial question concerning the correctness of OWCP's denial of his claim or to shift the weight of the evidence in his favor.

Moreover, the medical evidence submitted by appellant is insufficient to establish clear error by OWCP in denying his claim. Narrative reports from Dr. Dang and Dr. Khorsandi, both dated April 15, 2010, do not address the underlying issue of causal relationship. They are, therefore, irrelevant to the basis on which his claim was denied. The remaining medical evidence submitted in support of appellant's reconsideration request, including test results, disability slips and progress notes, are similarly devoid of any opinion on causal relationship. Consequently, these reports do not raise a substantial question as to the correctness of OWCP's decision. The term clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted prior to when the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁵

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ Appellant claimed that his multiple medical problems were due to both a November 12, 1996 accident at work and his duties at work including engaging in heavy lifting, continuous bending, climbing and standing for extended periods. OWCP accepted that appellant sustained a work accident on November 12, 1996 when a door hit his left shoulder and he fell to the deck of a ship, but found that the medical records failed to provide a firm diagnosis related to the incident.

¹⁴ See *supra* notes 6 and 7 and accompanying text.

¹⁵ *Joseph R. Santos*, 57 ECAB 554 (2006).

For these reasons, the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of OWCP's prior decisions. The Board finds that appellant did not establish clear evidence of error.¹⁶

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁶ On appeal, appellant contends that OWCP unfairly denied his occupational disease claim. For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e). As the last merit decision in this case was issued on May 15, 2007, the Board lacks jurisdiction to review the merits of this case. Moreover, the subject matter adjudicated by the Board in its May 15, 2007 decision is not subject to further consideration by the Board absent further review by OWCP. *See Robert G. Burns*, 57 ECAB 657 (2006); *Clinton E. Anthony*, 49 ECAB 476 (1998).