

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, appellant contends that the medical evidence of record is sufficient to establish that his continuing total disability was due to his accepted employment injuries.

FACTUAL HISTORY

On October 6, 2005 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim alleging that on October 5, 2005 he hurt his back, neck, right and left shoulders and right knee when a wheel came off the motor vehicle he was driving back to the employing establishment.³ The vehicle tilted to the left, skidded to the right and hit a curb. OWCP accepted appellant's claim for a sprain/strain of the lumbar region and neck with aggravation of lumbar degenerative disc disease.

On February 24, 2006 appellant filed a claim for a recurrence of disability on February 22, 2006. In a March 31, 2006 decision, OWCP denied his recurrence claim, finding that the medical evidence of record was insufficient to establish that he became totally disabled commencing February 22, 2006 due to his accepted employment-related injuries.

On April 7, 2006 the employing establishment placed appellant on administrative leave for unacceptable conduct as an investigation by the Office of Inspector General and workers' compensation analysts revealed that he performed activities that exceeded his medical restrictions and had provided false information in an official investigation regarding the filing of his February 24, 2006 recurrence claim. Appellant was removed from employment on September 9, 2006 for unacceptable conduct.

In a November 20, 2006 decision, OWCP terminated appellant's wage-loss compensation effective February 22, 2006 on the grounds that he no longer had any disability causally related to the accepted employment injuries. It did not terminate his medical benefits.

A July 19, 2006 x-ray report of Dr. Jack W. Snarr, a Board-certified radiologist, stated that there was evidence of appellant's prior accepted right wrist condition.

In medical reports dated November 21, 2006 to December 28, 2010, Dr. Sushmita Veloor, an attending Board-certified physiatrist, advised that appellant's ongoing

³ Prior to the instant claim, OWCP accepted appellant's claim filed under OWCP File No. xxxxxx969 for right wrist and arm strains sustained on July 23, 2001 and authorized bilateral carpal tunnel release which was performed on October 25, 2002. It later accepted his claim filed under OWCP File No. xxxxxx686 for bilateral carpal tunnel syndrome and right scapholunate ligament tear sustained on July 17, 2002 and authorized scaphotrapeziotrapezoid joint fusion which was performed on September 6, 2002. By decision dated January 6, 2004, OWCP granted appellant a schedule award for 23 percent impairment of the right upper extremity. On May 13, 2005 it granted him a schedule award for 14 percent impairment of the left upper extremity. In an October 5, 2007 decision, the Board affirmed a February 27, 2007 OWCP decision which denied appellant's claim for an additional schedule award for permanent impairment of the right and left upper extremities. Docket No. 07-979 (issued October 5, 2007).

low back pain was secondary to underlying lumbar degenerative disc disease with spinal stenosis at L4-5. Appellant also had mid-back pain that was most likely secondary to thoracic paraspinal muscle strain or possibly due to a combination of thoracic facet joint arthropathy, spondylosis and degenerative disc disease. He had right knee pain that was most likely secondary to osteoarthritis. Dr. Veloor advised that the decline in appellant's functional status was secondary to the stated diagnoses. In reports dated July 9 and August 27, 2007 and January 23, 2009, he stated that appellant could not work due to moderate-to-severe pain, which limited his mobility and lumbar range of motion.

In a June 28, 2006 report, Dr. Marlin J. Fugate, a Board-certified radiologist, advised that magnetic resonance imaging (MRI) scans of revealed findings that were compatible with minimal-to-mild degenerative changes throughout the cervical spine that were most pronounced involving the mid-to-lower cervical spine. He also found mild-to-moderate degenerative changes throughout the lumbar spine which were most pronounced at L4-5. The findings appeared to be grossly unchanged compared to a prior lumbar study.

In a March 15, 2007 report, Dr. James K. Fisher, a Board-certified radiologist, advised that a lumbar MRI scan revealed multilevel degenerative bulging discs causing slight canal narrowing that were most prominent at L4-5 and L3-4. He stated that a herniated disc was not seen.

On April 26, 2007 Dr. John D. Ebeling, a Board-certified neurosurgeon, noted appellant's continued complaint of lumbar discomfort. He reported stable findings on physical examination and on review of MRI scan results. Dr. Ebeling advised that, even with a successful fusion, appellant would still have significant pain syndrome.

In a July 17, 2007 report, Dr. J. Douglas Gardner, a Board-certified internist, advised that appellant had back pain following his October 5, 2005 employment injuries.

On January 17, 2008 Dr. Louis J.K. Pau, a Board-certified anesthesiologist, advised that appellant had low back pain, bilateral lower extremity neuropathic pain, a moderate disc bulge with slight canal narrowing at L4-5 and bilateral cervicgia.

A June 7, 2008 hospital emergency room report from Stormont Vail Health Center provided a history that appellant fell on a waxed floor. Appellant was diagnosed as having right wrist and left hip contusions. He was discharged to work.

In x-ray reports dated June 7, 2008, Dr. Curtis P. Schworm, a Board-certified radiologist, advised that appellant's left hip was normal and there was no acute fracture of his right wrist. In a February 18, 2010 report, he stated that an MRI scan revealed degeneration of the lumbar intervertebral discs that were most marked in the lower lumbar spine. There was also an element of broad-based disc bulging mostly marked at L4-5, slightly greater on the left and unchanged on the right. There was unchanged minimal broad-based disc bulging at the L3-4 level.

On July 31, 2009 OWCP granted appellant a schedule award for 17 percent impairment of the right lower extremity and 5 percent impairment of the left lower extremity. The award ran from March 23 to June 9, 2010. OWCP determined that appellant's compensation should be paid at the rate of statutory 66 2/3 percent. In an August 7, 2009 schedule award decision, it

corrected his pay rate from two-thirds to the three-fourths rate of pay for employees with dependents.

On June 11, 2010 appellant requested that OWCP reinstate his wage-loss compensation since his schedule award had been paid. He also requested that it issue a formal decision on his recurrence claim, contending that his dismissal for cause had been overturned by the Merit Systems Protection Board (MSPB). Appellant advised OWCP that he had been reinstated and returned to work at a lower pay rate based on the decision.

A notification of personnel action (PS Form 50) dated April 16, 2008 and accompanying history corrected a prior PS Form 50 to reflect that appellant voluntarily resigned from the employing establishment on September 9, 2006 in accordance with a November 30, 2007 MSPB settlement agreement.

A July 22, 2010 report of Janelle Williamson, a registered nurse, stated that appellant had carpal tunnel syndrome, bilateral leg pain and knee and lower leg osteoarthritis and lumbar stenosis.

On August 23, 2010 Dr. Veloor performed an electromyogram (EMG) and nerve conduction study (NCS) scans, which revealed no findings suggestive of acute radiculopathy. There was evidence of mild peripheral sensory neuropathy in the bilateral lower extremities.

By letter dated January 25, 2011, OWCP advised appellant that, although his appeal rights accompanying its November 20, 2006 termination decision had expired, he was still entitled to a request for reconsideration of that decision. It would consider the evidence submitted to determine whether it established clear evidence of error on the part of OWCP in the termination decision.

In a February 1, 2011 letter, appellant requested reconsideration of the November 20, 2006 OWCP decision.⁴

In a February 11, 2011 decision, OWCP denied appellant's February 1, 2011 request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in the last relevant merit decision dated November 20, 2006.⁵

⁴ Appellant actually sought reconsideration of a January 25, 2011 "decision." The Board concludes, however, that the January 25, 2011 letter is not an OWCP decision. The document is an informational letter and, thus, does not purport to be a final adverse decision. See 20 C.F.R. § 501.3(a). As stated, in this letter, OWCP advised appellant that it would review the evidence of record to determine whether it established clear evidence of error in the November 20, 2006 termination decision.

⁵ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before OWCP at the time of the final decision. See 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁷ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of its implementing regulations provide that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought.⁸

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.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 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.¹⁴

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 decision.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁶

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Id.* at § 10.607(b).

¹⁰ *Nancy Marciano*, 50 ECAB 110, 114 (1998).

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. The Board's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁷ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁸

On February 1, 2011 appellant requested reconsideration of the termination of his wage-loss compensation. OWCP rendered its most recent merit decision on November 20, 2006. As appellant's February 1, 2011 letter requesting reconsideration of the merits of his claim by OWCP was made more than one year after the November 20, 2006 merit decision,¹⁹ the Board finds that it was not timely filed.

The Board further finds that appellant has not established clear evidence of error on the part of OWCP in the issuance of the November 20, 2006 decision. Dr. Veloor's reports and EMG and NCS study addressed appellant's ongoing lumbar, thoracic and bilateral lower extremity conditions. He opined that appellant was unable to work on intermittent dates between July 9, 2007 and January 23, 2009. Dr. Veloor opined generally that appellant was disabled, but failed to address how his disability was causally related to residuals of the October 5, 2005 employment injuries. The Board finds that Dr. Veloor's reports and EMG and NCS study do not show that OWCP committed an error or raise a substantial question concerning the correctness of OWCP's decision terminating appellant's wage-loss compensation.²⁰ As noted earlier, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²¹

None of the other medical evidence submitted by appellant in support of his untimely reconsideration request established clear evidence of error on the part of OWCP or raised a substantial question concerning the correctness of OWCP's termination decision. The reports by Dr. Snarr and those from Dr. Gardner, Dr. Pau and Stormont Vail Health Center and the diagnostic test results from Dr. Fugate, Dr. Fisher and Dr. Schworm addressed appellant's cervical, lumbar, left hip, right wrist, bilateral knee and leg conditions and right wrist surgery. This evidence did not raise a substantial question accepted conditions. The Board finds, therefore, that appellant did not discharge his burden of showing clear evidence of error.²²

¹⁷ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹⁸ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁹ Appellant had one year to request reconsideration by OWCP of its November 20, 2006 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

²⁰ Evidence, such as a detailed were rationalized medical reports, that if submitted timely, could have created a conflict of medical opinion, is insufficient to establish clear evidence of error. *Annie L. Billingsley*, 50 ECAB 210 (1998).

²¹ *Leona N. Travis*, *supra* note 11.

²² *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

The report by Nurse Williamson is of no probative value as a nurse if not a physician as defined in FECA.²³ Thus, her reports do not *prima facie* shift the weight in favor of appellant to demonstrate clear evidence of error on the part of OWCP in the issuance of its November 20, 2006 decision.

The April 16, 2008 PS Form 50 and history noted a correction of appellant's reason for leaving the employing establishment on September 9, 2006. These documents do not raise a substantial question as to the correctness of OWCP's termination decision. They relate to an incident that occurred after appellant stopped working for the employing establishment and do not pertain to the termination of his wage-loss compensation.

The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet his burden of proof to show clear evidence of error on the part of OWCP.

On appeal, appellant contended that the medical evidence established that his continuing total disability was causally related to the employment-related lumbar and cervical injuries. As discussed above, the medical evidence was not sufficient to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision terminating his wage-loss compensation.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

²³ 5 U.S.C. § 8101(2).

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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