

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

C.D., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Redondo Beach, CA, Employer

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**Docket No. 12-585
Issued: August 3, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2011 appellant filed a timely appeal of an August 4, 2011 nonmerit decision of the Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision. Because more than 180 days has elapsed between the last merit decision of OWCP, dated March 23, 2007, and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.* For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3 (2008).

On appeal, appellant contends that his claim was improperly denied because the Board used an incorrect file number when it issued its March 23, 2007 decision. He also alleges that he did not request a review by the Board in his prior appeal and was improperly denied review by the Branch of Hearings and Review.

FACTUAL HISTORY

This case has previously been before the Board. On March 7, 2005 appellant filed an occupational disease claim alleging that he developed a bilateral shoulder condition due to factors of his federal employment. In a March 23, 2007 decision, the Board affirmed OWCP's June 19, 2006 decision denying his claim, on the grounds that the medical evidence was insufficient to establish a causal relationship between his claimed shoulder condition and his federal work activities.² The facts of the case as set forth in the prior decision are incorporated herein by reference.³

Subsequent to the Board's March 23, 2007 decision, appellant submitted an April 2, 2007 report from his treating physician, Dr. I. Grant Orlin, a general practitioner, who diagnosed medial lateral and right epicondylitis and right carpal tunnel syndrome. Dr. Orlin provided examination findings, which included tenderness over the volar surface of the right wrist and positive Phalen's and Tinel's signs. In an accompanying duty status report, he provided work restrictions that precluded lifting or carrying more than 15 pounds and reaching above the shoulder.

Appellant submitted April 24, 2007 reports of magnetic resonance imaging (MRI) scans of the upper extremities and elbow. He also submitted copies of previously submitted documents, including a June 6, 2006 second opinion report from Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, an August 21, 2006 report from Dr. Orlin and August 21, 2006 electromyogram/nerve conduction study (EMG/NCS) reports. Appellant submitted a November 20, 2006 statement contending that his condition was causally related to his federal employment duties.

On June 29, 2011 appellant requested reconsideration on the grounds that OWCP erred by referencing an incorrect file number for a different case.⁴

In an August 4, 2011 decision, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

² Docket No. 06-1910 (issued March 23, 2007).

³ Other claims include a May 30, 2002 occupational disease claim (File No. xxxxxx229) for a left upper extremity injury that was denied; a March 19, 2004 occupational disease claim (File No. xxxxxx379) that was accepted for right wrist strain, bilateral carpal tunnel syndrome and left elbow strain; and a January 24, 2008 occupational disease claim (File No. xxxxxx758) that was accepted for right major lateral medial epicondylitis.

⁴ The Board notes that appellant requested review by the Branch of Hearings and Review on April 5, 2011. By decision dated June 3, 2011, a hearing representative denied his request for review on the grounds that the Branch of Hearings and Review did not have jurisdiction to review decisions of the Board. As appellant's appeal was filed more than 180 days after the date of the June 3, 2011 decision, the Board does not have jurisdiction over the issue addressed in that decision. 20 C.F.R. § 501.3 (2008).

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁵ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁶ 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.⁷

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.⁸ OWCP regulations and procedure provide that it 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.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 manifest on its face that OWCP committed an error.¹¹ Evidence which 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 The Board makes an independent determination of whether a claimant has submitted clear evidence of error

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Supra* note 6; *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). 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.

¹⁰ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ *See M.L.*, Docket No. 09-956 (issued April 15, 2010). *See Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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. The one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision and upon any subsequent merit decision.¹⁶ As appellant's June 29, 2011 request for reconsideration was submitted more than one year after the Board's March 23, 2007 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.¹⁷

Appellant contended that OWCP erred by referencing an incorrect file number in another case. He did not, however, specify the error or explain how the error adversely affected the outcome of his case. Therefore, appellant's contention does not establish clear evidence of error on the part of OWCP. His November 20, 2006 statement contending that his condition was causally related to his federal employment duties merely repeats claims previously made and considered by OWCP. Moreover, his lay opinion is irrelevant to OWCP's decision, which was based on the insufficiency of the medical evidence of record.

Appellant submitted copies of previously submitted documents, including a June 6, 2006 second opinion report from Dr. Bleecker, an August 21, 2006 report from Dr. Orlin and August 21, 2006 EMG/NCS reports. These duplicative reports have no evidentiary value and do not establish error on the part of OWCP.¹⁸

April 2, 2007 reports from Dr. Orlin contained a diagnosis, minimal examination findings and work restrictions. Neither report, however, addressed the underlying issue of causal relationship. The reports, therefore, are irrelevant to the issue at hand and 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.¹⁹

The Board finds that appellant's arguments and evidence submitted 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.

On appeal, appellant raises several issues regarding the Board's March 23, 2007 decision. He contends that his claim was improperly denied because the Board used an incorrect file

¹⁵ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁶ 20 C.F.R. § 10.607(a); see *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

¹⁹ *Joseph R. Santos*, 57 ECAB 554 (2006).

number when it issued its March 23, 2007 decision. Appellant also alleges that he did not request a review by the Board in his prior appeal and was improperly denied review by the Branch of Hearings and Review. In addressing the finality of the Board's decisions, the applicable regulations provide: "The decision of the Board shall be final upon the expiration of 30 days from the date of the filing of the order, unless the Board shall in its order fix a different period of time or reconsideration by the Board is granted."²⁰ The Board's decision becomes final unless the Board grants a petition for reconsideration and reopens the case. As appellant did not file a petition for reconsideration with the Board following the issuance of the March 23, 2007 decision, it became final 30 days after issuance and is not further reviewable.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

²⁰ 20 C.F.R. § 501.6.

The Board notes that the March 23, 2007 decision properly addressed the issues raised in OWCP's June 19, 2006 decision and the evidence contained in the instant file.