

ISSUE

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

FACTUAL HISTORY

On March 12, 2010 appellant, a laborer/custodian, filed a traumatic injury claim stating that, on February 25, 2010 while unloading birdcages, he strained his back. He stopped work that day and sought treatment from Dr. Christopher Dodson, a chiropractor.

On March 31, 2010 appellant completed an OWCP questionnaire in which he further described the work incident and medical treatment received. He indicated that he had a Family Medical Leave Act (FMLA) "packet" for his back and received a service-connected disability from the Veterans Administration. The medical evidence received included a nurse's report, a statement from an occupational health nurse administrator, an x-ray and notes from Dr. Dodson, who diagnosed lumbosacral sprain/strain with segmental dysfunction and lumbago.

By decision dated April 29, 2010, OWCP denied the claim. It found that Dr. Dodson was not a physician under FECA and that appellant had not submitted medical evidence establishing his claim.

On May 19, 2010 appellant disagreed and requested a review of the written record. He submitted an April 23, 2010 Form CA-17 from Dr. Dodson together with a list of dates he attended physical therapy. By decision dated September 15, 2010, an OWCP hearing representative affirmed the April 29, 2010 decision finding that appellant submitted insufficient medical evidence to establish his claim. The hearing representative found that Dr. Dodson was not a physician as defined under FECA and that the medical evidence did not include a history of his prior back condition.

In a January 20, 2012 telephone call memorandum, appellant informed OWCP that he sent additional information after the September 15, 2010 decision but did not submit a reconsideration request. In a January 20, 2012 letter and January 23, 2010 telephone call, OWCP advised appellant that the submission of additional evidence did not constitute a reconsideration request. It advised him to put the request in writing and clearly state the grounds upon which reconsideration was based.

In a January 24, 2012 letter, appellant requested reconsideration. He requested that the one-year time limit be excused as he had sent in medical evidence after the September 15, 2010 decision but did not exercise his appeal rights. Appellant stated that he had sent in a letter on November 16, 2011 inquiring about his case. The Board notes there is no record of a November 16, 2011 letter from him.

Appellant submitted a December 4, 2008 certification of health care provider from Dr. Thomas H. Benton, a Board-certified family practitioner, who diagnosed chronic low back pain and stated that appellant would have to be off work intermittently from two to three days or

9 to 12 times yearly. Additional progress reports from Dr. Dodson dated February 26 to September 13, 2011 were received together in a February 18, 2011 letter from the Department of Veterans Affairs certifying that appellant had a 10 percent service-connected disability due to chronic lumbar strain effective November 6, 2001.

In a September 12, 2011 report, Dr. Derek Lewis, a family practitioner, reviewed the records of Dr. Jon H. Dodson, a general practitioner, and Dr. Christopher E. Dodson, pertaining to appellant's February 25, 2010 injury while lifting mail. Dr. Lewis opined that, from the history of injury and medical review, appellant's injury was consistent with his history.

By decision dated February 2, 2012, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. 20 C.F.R. § 10.607(a) provides that a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.⁵ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁷

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP⁸ is positive, precise and explicit and manifests on its face that OWCP committed an error.⁹ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited

⁴ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁵ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

⁶ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

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

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁰

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.¹¹ The most recent merit decision in this claim is OWCP's September 15, 2010 decision. Appellant's request for reconsideration was dated January 24, 2012, more than one year after September 15, 2010. The reconsideration request was not timely filed. Appellant argued before OWCP and on appeal that the one-year time limit should be waived as he submitted new evidence and had inquired about his case after the September 15, 2010 decision. The record reflects that he did not request reconsideration at that time. Appellant was informed in the September 15, 2010 decision and on January 20, 2012 that a reconsideration request must be in writing and clearly state the grounds upon which reconsideration is being requested.¹² Merely, submitting additional evidence does not constitute a reconsideration request.¹³

The Board finds that appellant has not established clear evidence of error on the part of OWCP. The underlying issue in this case is whether he submitted sufficient medical evidence to establish fact of injury. Appellant, however, did not submit any new medical evidence sufficient to shift the weight of the evidence in his favor or establish that OWCP erred in denying his claim.

In support of his reconsideration request, appellant submitted Dr. Lewis' September 12, 2011 report. Dr. Lewis opined that, given the history of injury and his review of the medical records, appellant's injury was consistent with his history. Dr. Lewis' opinion fails to offer a diagnosis or provide any reasoning for his conclusion. Additionally, the Board notes that clear evidence of error is intended to represent a difficult standard. 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 and would not require reopening the case.¹⁴ The Board finds that Dr. Lewis' report is not the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error.¹⁵ The additional progress reports from Dr. Christopher Dodson do not constitute medical

¹⁰ See *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹¹ 20 C.F.R. § 10.607(a).

¹² See *id.* at § 10.606(b)(1) (specifies that a reconsideration request must be submitted in writing).

¹³ *Id.*

¹⁴ See *Joseph R. Santos*, 57 ECAB 554 (2006); Federal (FECA) Procedure Manual, *supra* note 7.

¹⁵ See *D.D.*, 58 ECAB 206 (2006).

evidence under FECA.¹⁶ It is noted that an x-ray report showing specific findings and demonstrating the presence of spinal subluxation has not been received in the record. As the chiropractor did not diagnose a subluxation as demonstrated by x-ray, he is not considered a physician under FECA and his report is of no probative medical value.¹⁷ The other evidence received, the disability letter from the Department of Veterans Affairs and the December 4, 2008 certification of health care provider from Dr. Benton, is not relevant to the issue of whether appellant sustained a work-related injury on February 25, 2010.

Thus, OWCP properly determined appellant's untimely reconsideration request did not demonstrate clear evidence of error in its September 15, 2010 decision.

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 Office of Workers' Compensation Programs' decision dated February 2, 2012 is affirmed.

Issued: December 17, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁶ OWCP's regulations, at 20 C.F.R. § 10.5(bb), defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁷ *Isabelle Mitchell*, 55 ECAB 623 (2004).