

On appeal, counsel contends that OWCP improperly accorded the weight of the medical evidence to a referral physician to terminate appellant's compensation benefits. He asserts that the physician's opinion was speculative on the issue of whether appellant had any continuing employment-related residuals. Counsel further asserts that there is a conflict in medical opinion between the referral physician and an attending physician regarding any continuing employment-related residuals or disability.

FACTUAL HISTORY

This case has previously been before the Board. In decisions dated June 3, 2005³ and July 8, 2008,⁴ the Board affirmed OWCP's July 7, 2004 and April 6, 2007 decisions which denied appellant's requests for reconsideration of a February 9, 1995 OWCP decision. In the February 9, 1995 decision, OWCP terminated his wage-loss compensation and medical benefits effective March 5, 1995 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injuries. In a May 20, 2010 order,⁵ the Board dismissed appellant's appeal of a February 25, 2009 OWCP decision, which denied his request for reconsideration of the February 9, 1995 termination decision, as untimely filed.⁶ The facts as set forth in the Board's prior decisions and order are hereby incorporated by reference.⁷ The relevant facts are set forth below.

By letter dated August 9, 2010, appellant, through his attorney, requested reconsideration of OWCP's February 9, 1995 termination decision. He contended that OWCP erred in terminating compensation benefits as it mistakenly relied on the August 31, 1994 opinion of Dr. Roy C. Ponder, a Board-certified orthopedic surgeon and OWCP referral physician, which was speculative on the issue of whether appellant's continuing residuals were causally related to his accepted injuries. Appellant also contended that Dr. Ponder's opinion created a conflict in

³ Docket No. 05-179 (issued June 3, 2005).

⁴ Docket No. 07-1916 (issued July 8, 2008).

⁵ Docket No. 09-2198 (issued May 20, 2010).

⁶ This case has previously been before the Board on a separate issue. In a decision dated June 10, 1999, Docket No. 97-1139, the Board affirmed OWCP's May 10 and October 24, 1996 decisions, which found that appellant forfeited his right to compensation for the periods August 4, 1986 to November 4, 1987, August 10, 1988 to January 16, 1992 and May 31, 1992 to April 28, 1994 based on his failure to report earnings from employment and that he was at fault in creating a \$60,492.05 overpayment due to this forfeiture. The Board also found that OWCP properly denied appellant's request for merit review of his claim under 5 U.S.C. § 8128(a). In an April 6, 2004 decision, Docket No. 04-311, the Board affirmed an OWCP decision dated October 16, 2003 which found that his request for reconsideration was untimely filed and did not establish clear evidence of error with regard to the forfeiture and overpayment decision. In a June 18, 2004 order, Docket No. 04-311, the Board denied appellant's request for reconsideration of its April 6, 2004 decision.

⁷ On November 16, 1972 appellant, then a 23-year-old distribution clerk, filed an occupational disease claim alleging that he sustained an employment-related injury. OWCP accepted his claim for right mid-trapezius strain and recurrent low back strain. It paid appellant appropriate compensation for total disability.

medical opinion with the opinion of Dr. Booker T. Wright, Jr., an attending Board-certified orthopedic surgeon.⁸

In an April 4, 2011 decision, OWCP denied appellant's August 9, 2010 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated February 9, 1995.

LEGAL PRECEDENT

Section 8128(a) of FECA⁹ does not entitle a claimant to a review of an OWCP decision as a matter of right.¹⁰ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.¹¹

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.¹²

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹³ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷

⁸ Dr. Ponder found no employment-related residuals and concluded that appellant was capable of returning to his date-of-injury position. In reports dated September 29, 1993, Dr. Wright opined that appellant still had residuals and disability due to his accepted injuries.

⁹ 5 U.S.C. § 8128(a).

¹⁰ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ 20 C.F.R. § 10.607(a).

¹² *Id.* at § 10.607(b).

¹³ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹⁴ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁵ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁶ *Leona N. Travis*, *supra* note 14.

¹⁷ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁸ 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.¹⁹

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.²⁰ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²¹

The most recent merit decision in this case was OWCP's February 9, 1995 decision, which terminated appellant's wage-loss compensation and medical benefits on the grounds that he no longer had any residuals or disability causally related to his accepted employment injuries. As appellant's August 9, 2010 letter requesting reconsideration of the merits of his claim by OWCP was made more than one year after the February 9, 1995 merit decision,²² 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 his August 9, 2010 reconsideration request, appellant contended that OWCP improperly relied on the medical opinion of Dr. Ponder, a second opinion referral physician, in terminating his compensation benefits as it was speculative regarding the causal relationship between his continuing residuals and the accepted employment injuries. He reiterated his contention on appeal. However, counsel raised this argument on prior appeals. The Board finds that the argument is insufficient to shift the weight of the evidence in favor of appellant or raise a substantial question as to the correctness of OWCP's decision as he does not clearly show that OWCP erred in relying on Dr. Ponder's opinion. OWCP found that Dr. Ponder's report supported the termination of appellant's compensation benefits as the physician found he had no employment-related disability and residuals. Appellant has provided insufficient evidence to establish error on the part of OWCP in terminating his compensation benefits.

Appellant contended in the alternative that Dr. Ponder's opinion created a conflict in medical opinion with Dr. Wright on whether he had any continuing residuals or disability due to

¹⁸ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

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

²¹ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

²² Appellant had one year to request reconsideration by OWCP of its February 9, 1995 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

his work injuries. He reiterated his contention on appeal. The Board has held that, while medical opinions may be construed as being of equal weight to create a conflict, this is not sufficient to establish clear evidence of error. A possible conflict in medical opinion does not establish that OWCP's decision was erroneous because the weight of the evidence rests with neither side of the conflict.²³ The Board finds, therefore, that appellant has failed to establish clear evidence of error.

The Board finds that appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's termination decision.

CONCLUSION

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

ORDER

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

Issued: February 24, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

²³ *Fidel E. Perez*, 48 ECAB 663 (1997).