

On appeal, appellant's representative asserts that the newly submitted evidence establishes that appellant sustained an employment-related low back injury.

FACTUAL HISTORY

This case has previously been before the Board.³ In an April 3, 1998 decision, the Board reversed a September 14, 1994 OWCP decision which found that the selected position of security guard fairly and reasonably represented appellant's wage-earning capacity.⁴ In a December 14, 2005 decision, the Board affirmed a May 2, 2004 OWCP decision finding that it properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).⁵ The law and the facts of the previous Board decisions are incorporated herein by reference.

On July 1, 2009 Dr. David Wren, an orthopedic surgeon, performed repeat surgery to the right shoulder. In reports dated July 30, August 21 and September 24, 2009, Dr. Alisha Wren, Board-certified in emergency medicine and an associate of Dr. David Wren, advised that appellant was totally disabled while recovering from shoulder surgery.

In October 2009, appellant was referred to Dr. Joel W. Renbaum, Board-certified in orthopedic surgery, for a second-opinion evaluation. In a November 19, 2009 report, Dr. Renbaum reported the history of injury, reviewed the medical record and provided findings on physical examination. He noted that appellant had three right shoulder procedures in 1979, 1995 and 2009 and low back surgery in 2007. Dr. Renbaum advised that appellant's right shoulder and low back conditions were directly caused by work injuries and recommended conservative treatment. He estimated that appellant would reach maximum medical improvement in April 2010, nine months following his most recent right shoulder surgery, at which time it would be appropriate to discuss physical limitations. In a supplementary report dated December 14, 2009, Dr. Renbaum reiterated that appellant had not reached maximum medical improvement and would be capable of performing limited duty with the left upper extremity.

³ On September 13, 1978 appellant, a mechanic helper, sustained an employment-related right acromioclavicular shoulder separation that required surgery. On March 8, 1979 he sustained aggravation of the 1978 shoulder injury and lumbar strain while lifting engine mounts at work. Appellant stopped work on March 15, 1979 and did not return to federal employment. On February 6, 1984 he was granted a schedule award for a 27 percent permanent impairment of the right arm. Appellant worked at various outside employment positions including as an automobile mechanic, a heavy equipment operator and a longshoreman. On August 23, 1992 he elected retirement benefits from the Office of Personnel Management, effective June 29, 1992. As a longshoreman appellant worked intermittently until March 2002. He has a service-connected back injury, but the record is unclear as to whether he receives Veterans Affairs benefits for this condition. By decision dated February 28, 2002, OWCP denied appellant's November 29, 2001 claim that he sustained a recurrence of disability. In a December 26, 2002 decision, OWCP's hearing representative found that appellant did not establish that he had an employment-related emotional condition, diabetes or high blood pressure and remanded the case to OWCP for further development regarding his low back condition. Based on the April 8, 2003 opinion of Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and OWCP referral physician, on May 8, 2003, OWCP found that appellant failed to establish a recurrence of disability due to a low back condition. On May 2, 2004 OWCP denied his reconsideration request.

⁴ 49 ECAB 440 (1998).

⁵ Docket No. 05-1169 (issued December 14, 2005).

On November 12, 2010 appellant, through counsel, submitted a request for reconsideration of the May 2, 2004 OWCP decision. Counsel asserted that OWCP should not have given weight to the second-opinion evaluation of Dr. Swartz because he determined that appellant did not sustain a low back injury on March 8, 1979 or base his opinion on a complete and accurate factual background, including the statement of accepted facts. Appellant submitted an emergency room report dated March 15, 1979 with an illegible signature that refers to back pain, March 16, 1979 orthopedic clinic notes from Dr. L. Jenkins describing complaints of upper back pain that extended into the mid and lumbar area and a November 20, 2002 lumbar spine magnetic resonance imaging (MRI) scan that demonstrated mild degenerative changes at multiple levels and a posterior disc bulge at L3-4 that could be impinging on the left L4 nerve root.

By decision dated December 9, 2010, OWCP denied appellant's reconsideration request on the grounds that his request was untimely filed and that he failed to present clear evidence of error on the part of it.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁷ Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of its regulations,⁸ if the claimant's application for review shows "clear evidence of error" on the part of OWCP. In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

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

⁶ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁸ 20 C.F.R. § 10.607.

⁹ *Alberta Dukes*, 56 ECAB 247 (2005).

shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰

OWCP procedures note that 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.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

The only decision before the Board is the December 9, 2010 decision in which OWCP denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. The Board finds that as more than one year has elapsed between the most recent merit decision of OWCP, May 8, 2003 and appellant's request for reconsideration dated November 12, 2010, his request for reconsideration was untimely.¹³

The Board further finds that appellant failed to establish clear evidence of error. In order to establish clear evidence of error, a claimant must submit evidence that is positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁴ In the case at hand, with appellant's reconsideration request he asserted that OWCP improperly found the weight of the medical evidence rested with the April 8, 2003 opinion of Dr. Swartz, who opined that appellant did not sustain an employment-related low back injury and submitted medical reports from March 1979 in which appellant complained of low back pain and a November 20, 2002 MRI scan of the lumbar spine. The merit issue in the May 8, 2003 OWCP decision was whether appellant sustained a recurrence of disability in 2001 caused by his accepted low back condition. Appellant's medical condition in 1979 is, therefore, irrelevant as to whether he sustained a recurrence of disability in 2001 and the MRI scan was reviewed in the May 2003 OWCP decision.¹⁵

As to appellant's argument on appeal that he sustained an employment-related low back injury and should not have relied on Dr. Swartz's second-opinion evaluation, a low back sprain is an accepted condition in this case. Furthermore, he made similar arguments in his

¹⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *James R. Mirra*, 56 ECAB 738 (2005).

¹² *Nancy Marciano*, 50 ECAB 110 (1998).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Id.*

¹⁵ The MRI scan report indicates that it was ordered on November 12, 2001, yet it was signed on November 20, 2002 and was initially submitted to the record on December 5, 2002.

February 26, 2004 reconsideration request, which was reviewed by the Board in its December 14, 2005 decision.¹⁶ Appellant has not explained how rearguing this point raises a substantial question concerning the correctness of OWCP's decision.

The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.¹⁷ As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of the May 8, 2003 OWCP decision, appellant has not established that OWCP committed error by its December 9, 2010 decision.¹⁸ The Board therefore finds that in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the argument submitted by appellant with his November 12, 2010 reconsideration request to ascertain whether it demonstrated clear evidence of error in the May 8, 2003 decision and correctly determined that it did not, and thus denied appellant's untimely request for a merit reconsideration on that basis.¹⁹

The Board, however, notes that the record contains a claim for compensation filed by appellant on August 19, 2010 that has not been adjudicated by OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and that he failed to establish clear evidence of error. OWCP, therefore, properly denied a merit review of his claim.

¹⁶ *Supra* note 5.

¹⁷ *Robert G. Burns, supra* note 10.

¹⁸ *Nancy Marcano, supra* note 12.

¹⁹ 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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