

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.

FACTUAL HISTORY

On August 27, 2008 appellant, a 56-year-old tools and parts attendant, filed a traumatic injury claim alleging that he sustained injuries to his right shoulder, hip and back when he slipped and fell down a flight of stairs at work on August 25, 2008.

By decision dated December 15, 2008, OWCP denied appellant's claim on the grounds that the evidence failed to establish that he had sustained an injury causally related to the claimed employment incident. In a February 9, 2009 nonmerit decision, it denied appellant's request for reconsideration. In an April 6, 2009 merit decision, OWCP denied modification of its December 15, 2008 decision. Due to inconsistencies in the evidence, it found that the evidence did not establish that appellant was injured in the manner alleged.³

On May 24, 2010 appellant, through counsel, requested reconsideration. Counsel contended that medical reports submitted from appellant's treating physicians established a causal relationship between his diagnosed shoulder condition and the alleged August 25, 2008 employment incident.

In a December 11, 2009 statement, appellant reiterated that he fell down a set of stairs on August 25, 2008. He did not report the alleged fall to Dr. Allstadt on August 25, 2008 because he thought he would recover and just wanted to be released to return to work following hernia surgery.

Appellant submitted a May 24, 2010 report from Dr. John P. Finley, an attending physician, who stated that he had treated appellant since April 17, 2009 for problems relating to a right rotator cuff tear. Dr. Finley stated that the mechanism of falling on the stairs, as described by appellant, would be consistent with a rotator cuff tear. He opined that the rotator cuff tear injury was directly related to the August 25, 2008 employment injury.

In a March 26, 2009 report, Dr. Scott L. Silliman, a Board-certified neurologist, related appellant's report that he fell at work in August 2008. He provided examination findings and diagnosed chronic low back pain exacerbated by the fall; neck pain exacerbated by the fall; and paresthesias of the right hand. Appellant also submitted hospital records relating to the June 29, 2009 rotator cuff repair surgery.

In an April 5, 2011 decision, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

³ The claims examiner noted that appellant had been examined by Dr. Karen Allstadt, an occupational medicine physician, immediately following the alleged work injury. In her August 25, 2008 report, Dr. Allstadt did not make any mention of the claimed work injury, which allegedly occurred just an hour prior to the examination.

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.⁴ 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.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted to OWCP under section 8128(a) of FECA.⁶

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.⁷ OWCP regulations and procedures 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² A limited review by OWCP is required to determine 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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Supra* note 3. See *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ 20 C.F.R. § 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.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *M.L.*, Docket No. 09-956 (issued April 15, 2010). See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁴

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.¹⁵ As appellant's May 24, 2010 request for reconsideration was submitted more than one year after the April 6, 2009 merit decision, it was untimely filed. Consequently, he must establish clear evidence of error on the part of OWCP in the denial of his claim.¹⁶

Appellant contended that his claim was improperly denied as he submitted sufficient medical evidence to support a causal relationship between his diagnosed shoulder condition and the alleged August 25, 2008 employment incident. This contention does not establish error, but merely repeats arguments previously raised and considered by OWCP. Counsel's argument, based on medical evidence, is not relevant to the issue decided by OWCP, which was factual in nature. Appellant's statement as to why he did not inform his physician that he fell down stairs immediately following his claimed injury is insufficient to establish that OWCP erred when it found that he failed to establish factually an incident in the manner alleged. His arguments 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.

The medical reports submitted by appellant are insufficient to establish clear error by OWCP in denying his claim. Dr. Finley stated that the mechanism of falling on the stairs, as described by appellant, would be consistent with a rotator cuff tear and opined that the rotator cuff tear injury was directly related to the August 25, 2008 employment injury. Dr. Silliman provided examination findings and diagnosed chronic low back pain exacerbated by the claimed August 2008 fall; neck pain exacerbated by the fall; and paresthesias of the right hand. Appellant also submitted hospital records relating to the June 29, 2009 rotator cuff repair surgery. These medical reports, however, are not relevant to the issue decided by OWCP, namely, whether appellant established factually that the August 25, 2008 incident occurred as alleged. Therefore, they do not raise a substantial question as to the correctness of OWCP's decision.¹⁷ The Board finds that appellant did not establish clear evidence of error.

On appeal, counsel argues that the medical evidence submitted establishes clear evidence of error. For reasons stated, the Board finds that the evidence submitted by appellant in support of his request for reconsideration fails to establish clear evidence of error on the part of OWCP.

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001).

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

¹⁶ *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ 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. *Joseph R. Santos*, 57 ECAB 554 (2006).

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 April 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2012

Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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