

ISSUE

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

FACTUAL HISTORY

On October 23, 2002 appellant, then a 49-year-old mail processor, filed a traumatic injury claim alleging that on October 7, 2002, he sustained an injury to his low back when he was bending over to pull mail out of the all purpose container in the performance of duty. He did not stop work.

By decision dated December 3, 2002, OWCP denied appellant's claim on the grounds that he did not establish an injury as alleged. It found that the medical evidence did not establish that his low back condition was related to the accepted work activities.

On August 16, 2010 appellant's representative contacted OWCP regarding the status of several of appellant's claims. With regards to the present claim, he advised OWCP that appellant stated that he had requested reconsideration but no ruling was made on the request.³ Counsel requested that OWCP provide a status on the reconsideration request. OWCP treated this correspondence as a request for reconsideration.

In letters dated October 25, 2010 and March 3, 2011, counsel again requested that OWCP provide him a status with respect to appellant's request for reconsideration.

In a decision dated March 9, 2011, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁵

³ Following OWCP's December 3, 2002 decision, the record does not contain a reconsideration request prior to the August 16, 2010 correspondence from counsel which OWCP treated as a request for reconsideration.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8128(a).

OWCP's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁶ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the 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.⁷

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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 merely to 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.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁰

ANALYSIS

In its March 9, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on December 3, 2002. Counsel requested reconsideration on August 16, 2010, which was more than one year after the December 3, 2002 merit decision and was, therefore, untimely. While reference was made to a

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.607(b).

⁹ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

¹⁰ *Id.*

prior request made by appellant the evidence of record in this appeal does not document any such request.

OWCP properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening his case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by him in support of his application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that counsel did not submit any evidence in support of his application for review and he did not raise a substantial question as to the correctness of OWCP's most recent merit decision and therefore, he has not provided any evidence sufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error in OWCP's December 3, 2002 decision that denied his traumatic injury claim on the basis that the medical evidence did not establish that the claimed injury was causally related to the October 7, 2002 work incident.

Counsel did not submit any evidence in his August 16, 2010 request for reconsideration. While he suggested that appellant had requested reconsideration of the December 3, 2002 decision, he did not indicate when the request was made or provide a copy of the request. The Board finds that counsel's letter is insufficient to show that OWCP's denial of the claim was erroneous or raise a substantial question as to the correctness of its determination denying the claim for a traumatic injury.

OWCP procedures provide 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹¹

The Board finds that appellant did not submit any evidence which would be sufficient to *prima facie* shift the weight of the evidence in favor of his claim or raise a substantial question that OWCP erred in decision denying his claim for a traumatic injury. Therefore, the Board finds that he has not presented clear evidence of error.

On appeal, counsel agrees that the medical evidence does not support the claim for benefits in the present claim. He asserted that the denial of benefits for the injury sustained on October 7, 2002 should have no effect on matters regarding other claimed injuries. As noted, the Board only has jurisdiction over whether OWCP's March 9, 2011 decision properly denied appellant's reconsideration request, without a merit review, on the grounds that the request was not timely filed and did not establish clear evidence of error with regards to the claimed October 7, 2002 injury. The Board does not have jurisdiction over the merits of this claim for an October 7, 2002 injury nor does it have jurisdiction over any proceedings regarding other claims that appellant may have filed.

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 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