

On appeal, appellant contends that OWCP failed to accept all conditions sustained as a result of the accepted December 11, 2006 employment injury.

FACTUAL HISTORY

On December 14, 2006 appellant, then a 50-year-old security worker, filed a traumatic injury claim alleging that on December 11, 2006 he sustained injury to his neck, back and knee when his crutch slipped and he fell into an all-purpose container.

By letter dated March 15, 2007, OWCP informed appellant that the evidence was insufficient to support his claim. Appellant was advised as to the type of medical and factual evidence to submit and given 30 days to provide the requested information.

By decision dated April 27, 2007, OWCP found the evidence insufficient to establish fact of injury. It found the record contained no medical evidence diagnosing a condition due to the accepted employment incident.

On April 24, 2008 appellant requested reconsideration. In support of his request, he submitted medical evidence including an April 18, 2008 report by Dr. Janet L. Bivens, a treating Board-certified family medicine practitioner, who noted he sustained an employment injury on December 11, 2006 when he slipped and fell on a metal container hitting his head, neck and back. Dr. Bivens diagnosed low back and neck pain, neck strain and muscle spasm which she attributed to the December 11, 2006 employment injury.

On May 14, 2008 OWCP modified in part the April 27, 2007 decision. It found that appellant had submitted sufficient medical evidence to establish that he sustained a neck injury due the accepted December 11, 2006 employment injury. OWCP affirmed the denial of his claim for shoulder, arm, upper and lower back injuries. Based on the May 14, 2008 decision, it accepted appellant's claim for a neck sprain.

On August 6, 2011 appellant requested reconsideration of the denial of his claim for injuries sustained to his shoulder, arm, upper and lower back as a result of his accepted December 11, 2006 employment injury. In support of his claim, he submitted progress notes for the period August 5, 2008 to February 14, 2010 from Dr. Christophe A. Jarrett, a treating Board-certified orthopedic surgeon and disability notes dated September 30, 2008 and March 9, 2009. Dr. Jarrett provided physical findings and diagnoses including lumbago, shoulder and upper arm strains, rotator cuff sprain and pelvic, joint and thigh pain.

By decision dated September 6, 2011, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and that he failed to establish clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.³ It will not review a decision denying or terminating a

³ See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

benefit unless the application for review is filed within one year of the date of that decision.⁴ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁵ 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 OWCP regulations,⁶ if the claimant's application for review shows clear evidence of error on the part of OWCP.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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. Evidence which 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 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's 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

⁴ 20 C.F.R. § 10.607; *see B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ 20 C.F.R. § 10.607.

⁷ *See M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

⁸ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

⁹ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁰ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 7.

¹¹ *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (October 2011).

¹² *See M.L.*, *supra* note 7; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹³ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁴ As appellant's August 6, 2011 request for reconsideration was submitted more than one year after the May 14, 2008 merit decision it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁵

The Board finds that the evidence submitted by appellant in support of his August 6, 2011 request for reconsideration does not raise a substantial question as to the correctness of OWCP's decision not to accept shoulder, arm, upper and lower back injuries. It does not shift the weight of the medical evidence of record in appellant's favor. Appellant submitted medical evidence from Dr. Jarrett who diagnosed lumbago; shoulder and upper arm strains; rotator cuff sprain; and pelvic, joint and thigh pain. Dr. Jarrett provided no opinion addressing the causal relationship between the conditions he diagnosed and the accepted December 11, 2006 employment injury. The Board has held that the submission of 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 still not sufficient to establish clear evidence of error.¹⁶ The Board finds that these reports are insufficient to show that OWCP's failure to expand the acceptance of appellant's claim to shoulder, arm, upper and lower back injuries was erroneous or raised a substantial question as to the correctness of OWCP's decision.

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 May 14, 2008 decision which accepted a neck injury, but denied acceptance of shoulder, arm, upper and lower back injuries. Consequently, OWCP properly denied his reconsideration request as it was untimely and failed to establish clear evidence of error.

CONCLUSION

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

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Robert F. Stone*, 57 ECAB 393 (2005).

¹⁵ *Supra* note 13; *see D.G.*, *supra* note 5; *Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *D.G.*, 59 ECAB 455, 460 (2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 6, 2011 is affirmed.

Issued: October 3, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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