

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On August 21, 2008 appellant, then a 35-year-old federal air marshal, filed a traumatic injury claim alleging that on August 19, 2008 he was stung by a sea urchin in his right foot while on duty status in Athens, Greece. No evidence was submitted with his claim.

By letter dated September 5, 2008, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised as to the medical and factual evidence to submit and given 30 days to provide this information.

By decision dated October 8, 2008, OWCP denied the claim on the grounds that appellant failed to submit any evidence supporting his claim. It found there was no evidence to establish that the incident occurred as alleged or medical evidence to provide a diagnosis connected to the alleged incident.

On April 13, 2009 OWCP received an August 20, 2008 report from Dr. Marcel Stern, a treating Board-certified internist, who diagnosed right foot puncture wounds by a sea urchin. Appellant related that, while deployed in Athens, Greece on August 18, 2008 he sustained six puncture wounds to his right foot as the result of stepping on a sea urchin.

On April 28 and July 10, 2011 appellant requested reconsideration of the denial of his claim. He contended that he never received the decision denying his claim. Appellant alleged that it was not until he had been contacted by Health Med Associations informing him that the medical bill for his injury had not been paid by OWCP that he realized his claim had been denied. In support of his request, he submitted an August 20, 2008 authorization for examination and/or treatment (Form CA-16) for the August 19, 2008 alleged incident, Federal Air Marshal Fitness Program policy and a May 31, 2011 witness statement from Frederick H. Wetzstein, a coworker, who stated that on August 19, 2008 he witnessed appellant yell in pain after going into the water at the beach for a swim. Mr. Wetzstein stated that he saw spike-like objects sticking out of appellant's foot, which he later found were sea urchin spikes.

In an August 23, 2011 letter, David Wichterman, an employing establishment Workers' Compensation Program Manager, stated that swimming in a hotel pool was authorized as part of the Federal Air Marshall Fitness Program policy, but that swimming at the beach would not be considered as authorized.

By decision dated October 24, 2011, OWCP determined that appellant's request for reconsideration was untimely and failed to show 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 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

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

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.

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

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 April 28 and July 10, 2011 requests for reconsideration were submitted more than one year after the October 8, 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 April 28 and July 10, 2011 requests for reconsideration does not raise a substantial question as to the correctness of OWCP's finding that he had failed to establish fact of injury or shift the weight of the evidence of record in his favor. Appellant submitted a May 31, 2011 witness statement from Mr. Wetzstein regarding the August 19, 2008 incident, a copy of the employing establishment's fitness program policy and an August 20, 2008 report from Dr. Stern. The record also contains an August 23, 2011 letter from the employing establishment contending that appellant was not in the performance of duty at the time of the August 19, 2008 incident. While Dr. Stern's August 20, 2008 report and Mr. Wetzstein's statement note that appellant sustained a right foot puncture injury on August 19, 2008 from stepping on a sea urchin, the evidence does not establish that the injury was sustained while in the performance of duty. The employing establishment stated that the Federal Air Marshal Fitness Program policy authorizes swimming in a hotel pool, but not in the ocean. The Board finds that the evidence submitted by appellant is insufficient to show that OWCP's October 8, 2008 decision concerning the denial of his traumatic injury claim was erroneous or raises a substantial question as to the correctness of OWCP's decision.

The Board finds that the arguments and evidence submitted by appellant in support of his April 28 and July 10, 2011 requests for reconsideration do not shift the weight of the evidence in his favor or raise a substantial question as to the correctness of OWCP's October 23, 2011 decision and are thus insufficient to demonstrate clear evidence of error.

¹¹ *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, 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).

¹³ 20 C.F.R. § 10.607(a).

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

¹⁵ 20 C.F.R. § 10.607(a); *see D.G.*, *supra* note 4; *Debra McDavid*, 57 ECAB 149 (2005).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 24, 2011 is affirmed.

Issued: October 5, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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