

rolls and paid compensation for intermittent periods of disability. Appellant returned to work in 1993. Her earnings were offset by an informal wage-earning capacity determination.

Appellant filed several notices of recurrence of disability that were denied. She alleged a recurrence of disability as of September 1, 1996, which was denied by OWCP on April 18, 1997. On November 7, 2000 appellant filed a Form CA-2a claim alleging recurrences of disability on January 7 and November 7, 2000. OWCP denied the recurrence claims on August 6, 2001 and October 9, 2002.

On August 24, 2009 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability on August 11, 2009 which was causally related to her accepted lumbar strain condition. She also filed a Form CA-7 claim for a schedule award based on a partial loss of use of her left and right upper extremities. Appellant did not submit any factual or medical evidence in support of these claims.

On November 23, 2009 OWCP denied appellant's claim for a recurrence of disability as of August 11, 2009. It also denied her claim for a schedule award.

On February 1, 2012 appellant requested reconsideration. She submitted statements describing the history of her claim. Appellant also submitted progress notes from a Veterans Administration Health Clinic. The initial January 5, 2009 note was cosigned by Dr. Marek J. Korzeniowski, Board-certified in physical medicine and rehabilitation. It listed findings on examination, noted that appellant had experienced low back pain since her 1987 lifting injury, and indicated that she had undergone diagnostic testing and pain management treatment. Dr. Korzeniowski stated that she continued to have pain in her back and left leg. A progress note dated August 18, 2009, signed by Dr. Aurelio J. Muyot, a specialist in geriatric medicine, noted that appellant was assessed at a fall prevention/pain management clinic following a series of falls at home, the last occurring on August 11, 2009. Appellant was diagnosed with chronic low back pain, lumbar spondylosis, degenerative disc disease and radiculitis.

By decision dated May 7, 2012, OWCP denied appellant's request for reconsideration without a merit review. It found her request was untimely and that she had not established clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA¹ does not entitle an employee to a review of OWCP's decision as a matter of right.² This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

accordance with the facts found on review may: (1) end, or increase the compensation awarded; or (2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ As one such limitation, OWCP has stated that 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 The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).⁵

In those cases where a request for reconsideration is not timely filed, the Board had held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁶ OWCP procedures state that OWCP will reopen an appellant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if her application for review shows “clear evidence of error” on the part of OWCP.⁷

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

³ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁴ 20 C.F.R. § 10.607(b).

⁵ *See* cases cited *supra* note 2.

⁶ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *See Jesus D. Sanchez*, *supra* note 2.

¹¹ *See supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

a conflict in medical opinion or establish a clear procedural error, but 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.¹³ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. It issued the most recent merit decision in this case on November 23, 2009. Appellant requested reconsideration on February 1, 2012; thus, her request was untimely as it was outside the one-year time limit.

The Board finds that appellant's February 1, 2012 request for reconsideration also failed to establish clear evidence of error. The underlying issue in this case was whether appellant sustained a recurrence of disability on August 11, 2009 causally related to her accepted low back condition. In support of her request for reconsideration, she submitted progress notes from Dr. Korzeniowski and Dr. Muyot. Dr. Korzeniowski's January 5, 2009 report stated that appellant continued to experience low back pain and noted that she had undergone diagnostic tests and pain management treatment. This report pertained to appellant's medical condition and treatment months prior to her alleged recurrence of disability. The August 18, 2009 progress note from Dr. Muyot, noted a history that appellant had fallen on August 11, 2009, stated a diagnosis and listed her assessment for fall prevention. The term clear evidence of error is intended to represent a difficult standard. It is not enough to merely show that the evidence could be construed to produce a different conclusion. The note from Dr. Korzeniowski dated January 5, 2009 and the August 18, 2009 report from Dr. Muyot do not discuss a recurrence of disability, as of August 11, 2009 due to her accepted injuries in 1987. Appellant did not present the type of positive, precise and explicit evidence that manifests on its face that OWCP committed any error in denying her August 11, 2009 recurrence of disability. For these reasons, the evidence submitted by her does not raise a substantial question concerning the correctness of OWCP's November 23, 2009 decision. OWCP properly determined that appellant had not established clear evidence of error in that decision.

On appeal, appellant provided a summary of her claim and submitted a number of additional medical reports. The Board's review of a case is limited to evidence that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.¹⁵

¹³ *Leon D. Faidley, Jr., supra* note 2.

¹⁴ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁵ *See* 20 C.F.R. § 501.2(c)(1).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for further review as her request was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2012
Washington, DC

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

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

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