

On appeal, appellant contends that he sustained a recurrence of his accepted employment-related condition commencing in 2008 for which he underwent surgery. He also contends that the employing establishment failed to provide him with cross-training to work in a field other than food service.

FACTUAL HISTORY

On May 11, 1992 appellant, then a 42-year-old cook, filed an occupational disease claim alleging that on January 22, 1992 he first realized that his infected hands, fingers and nails were caused by his exposure to different types of mixes and water while working at the employing establishment.² On May 29, 1993 OWCP accepted the claim for chronic paronychia and paid compensation benefits.

On March 20, 2008 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits based on a February 26, 2008 medical report of Dr. Gregory J. Cox, a Board-certified dermatologist and OWCP referral physician, who found that there was no evidence of chronic paronychia and that appellant was capable of performing his usual job with no restrictions. Appellant was afforded 30 days to submit additional evidence or argument if he disagreed with the proposed action.

In a March 20, 2008 letter, appellant stated that he had long awaited a decision in favor of his return to work.

In a December 4, 2008 decision, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective December 21, 2008. It found that the weight of the medical evidence established that he no longer had any residuals or disability due to his accepted condition.

On March 16, 2009 appellant filed a claim alleging that he sustained a recurrence of disability on March 4, 2009 causally related to the accepted employment injury. He submitted progress notes dated March 12, 2009 from the employing establishment's emergency room for treatment of paronychia in the right thumb nail for which he underwent a digital block and a discharge diagnosis of peronychium (infected nail margin). Laboratory test results also dated March 12, 2009 listed his ancillary glucose levels.

By letter dated March 25, 2009, OWCP addressed appellant's recurrence claim. It stated that, as his claim was denied, it would not consider the recurrence claim. OWCP advised appellant to pursue his appeal rights.

In a December 20, 2009 letter, appellant, through his attorney, requested reconsideration of the December 4, 2008 termination decision on the grounds that he sustained a recurrence of his chronic paronychia for which he underwent outpatient surgery in March 2009.

² Appellant stopped work on February 11, 1993 and applied for disability retirement which was approved by the Office of Personnel Management (OPM). He received retirement benefits from OPM while in receipt of wage-loss compensation from OWCP, who stated that OPM records indicated that as of February 6, 1996 he had repaid the retirement benefits as he received dual benefits.

In a December 15, 2011 decision, OWCP denied appellant's request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in its December 4, 2008 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP decision for which review is sought.⁵

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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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 decision.¹² The

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

Board makes an independent determination of whether a claimant 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.¹³

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. The Board's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁴ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵

The most recent merit decision in this case was OWCP's December 4, 2008 decision which finalized the termination of appellant's wage-loss compensation and medical benefits effective December 21, 2008 on the grounds that he no longer had any residuals or disability causally related to the accepted employment-related chronic paronychia. As appellant's December 20, 2009 letter requesting reconsideration of the merits of his claim by OWCP was made more than one year after the December 4, 2008 merit decision,¹⁶ the Board finds that it was not timely filed.

The Board further finds that appellant has not established clear evidence of error on the part of OWCP. In his December 20, 2009 reconsideration request, counsel contended that OWCP improperly terminated appellant's compensation benefits as he sustained a recurrence of his chronic paronychia for which he underwent outpatient surgery in March 2009. The Board notes that appellant filed a recurrence claim accompanied by medical evidence and was told by OWCP in a March 25, 2009 letter that no action could be taken on his recurrence claim since his claim was denied. The Board finds that the March 25, 2009 letter was based on a faulty premise. In this case, appellant's claim was not denied, but was accepted for chronic paronychia. However, by decision dated December 4, 2008, OWCP terminated his entitlement to continuing compensation for wage-loss and medical benefits. Since appellant's claim was terminated and not denied, it improperly interpreted the relevant facts of the present case and failed to evaluate his claim for recurrence of disability. However, as OWCP never issued a final decision on his recurrence claim, the Board has no jurisdiction over this matter.¹⁷ Moreover, the Board notes that at the time OWCP issued its final termination decision, appellant had not submitted the requested medical evidence to establish that he had any continuing employment-related residuals or disability. For the stated reasons, the Board finds that his argument is insufficient to demonstrate clear evidence of error.

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ *Supra* note 5; *see A.F.*, 59 ECAB 714 (2008).

¹⁵ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁶ Appellant had one year to request reconsideration by OWCP of its December 4, 2008 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

¹⁷ 20 C.F.R. §§ 501.2(c) and 501.3.

Appellant has not 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 December 4, 2008 termination decision. Consequently, OWCP properly denied his reconsideration request as his request does not establish clear evidence of error.

This leaves adjudicated, however, the March 16, 2009 claim appellant filed a Form CA-2a for a recurrence of his medical condition.

In response to appellant's recurrence claim, OWCP issued a brief March 25, 2009 letter stating that the 2008 termination decision precluded any consideration of the recurrence of his medical condition. "Therefore, no further action will be taken concerning your claim for recurrence." No citation to any legal authority that would support such a position was provided to appellant. No final decision, complete with findings of fact or statement of reasons, was provided for effectively denying this aspect of his case. Instead, appellant was referred to follow the appeal rights attached to the 2008 termination decision.

The request by counsel in December 2009 complied with OWCP's instructions, but was captioned as an appeal from the 2008 termination decision. Counsel informed OWCP, however, that appellant also filed a recurrence claim in March 2009, seeking further medical treatment for chronic paronychia.

The December 15, 2011 decision addressed the reconsideration request in terms of the 2008 decision, finding it untimely and not sufficient to establish clear error. OWCP went further, stating:

"The mere fact that you may have had another incident of nail infection in March 2009 (the diagnosis of which appears to be supported by the medical records submitted from the [Atlanta] VAMC) does not establish that your work-related exposure was that cause of that condition or that your work-related condition/disability had not resolved as previously determined. Of note is that documentation on file indicates that your retirement benefits through the Office of Personnel Management were restored effective December 21, 2008; you had not been working." (Emphasis in the original.)

In this case, OWCP has intermingled the issue of the termination of appellant's benefits in 2008 with his 2009 claim for a recurrence of a medical condition.¹⁸ Appellant's claim for a recurrence of medical condition has effectively been rejected in the March 25, 2009 letter and in the 2011 decision denying reconsideration. He has never been issued a merit denial by OWCP of his claim through an appropriate decision. Appellant is entitled to a decision on the question of whether he sustained a recurrence of his medical condition in 2009, which necessitated surgery.

Appellant further contended that the employing establishment failed to cross-train him to work in a field other than food service. The issue of his vocational cross-training is not pertinent

¹⁸ See *Sammy Kay Eads*, 32 ECAB 1842 (1981). See also *Andrew Kozar*, Docket No.92-2077 (issued October 7, 1993).

to the underlying issue in this appeal, which is medical in nature, as to whether he had any residuals or disability causally related to his work injury.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2013
Washington, DC

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

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

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