

FACTUAL HISTORY

On February 15, 2008 appellant, then a 55-year-old special agent, filed an occupational disease claim for aggravation of injuries previously sustained on September 27, 2007. He stated that on January 31, 2008 he injured his back and left elbow during nondeadly force training, which included heavy pushing, punching, kicking and swinging. OWCP converted the claim to a traumatic injury rather than an occupational disease as the injury described occurred during the course of one work shift.

By decision dated April 11, 2008, OWCP denied the claim on the basis that it was not established that the claimed medical condition was related to the established work-related events.

In a May 7, 2012 letter, appellant, through his representative, requested reconsideration. In support of the reconsideration request, an April 18, 2008 report from Dr. Fred Blackwell, a Board-certified orthopedic surgeon, was resubmitted. The representative noted that Dr. Blackwell's report was submitted after the April 11, 2008 decision. In his report, Dr. Blackwell stated the history of injury and that appellant was working full-time modified duty with restrictions when the injury occurred. He provided examination findings and an impression of chronic musculoligamentous strain and sprain of the cervicothoracic spine with acute aggravation and chronic contusion and sprain left elbow with acute aggravation. Dr. Blackwell noted that, while appellant was more symptomatic than previously, he stated it did not appear that appellant had a new and greater injury, but more of an exacerbation of the injuries sustained on September 27, 2007 and therefore he did not report it as a new injury. He opined that there was no permanent impairment as a result of the January 31, 2008 injury over and above that which would be characterized for the September 27, 2007 injury.

By decision dated August 9, 2012, OWCP denied reconsideration on the grounds that appellant's request was untimely filed and did not present clear evidence of error. It found that the submitted report as well as the reconsideration request failed to provide any explanation as to how OWCP's decision was improperly decided.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁵ OWCP regulations and procedure provide that it will reopen a claimant's

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.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 manifest on its face that OWCP committed an error.⁸ Evidence which 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

ANALYSIS

In its August 9, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on April 11, 2008. Appellant's request for reconsideration was dated May 7, 2012, more than one year after April 11, 2008. Accordingly, his request for reconsideration was not timely filed. Appellant must therefore demonstrate clear evidence of error on the part of OWCP in issuing its April 11, 2008 decision.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The underlying issue in this case is whether OWCP properly denied appellant's claim for an injury in the performance of duty on the grounds that the medical evidence was insufficient to establish that any diagnosed condition was caused or contributed to by the accepted employment incident of January 31, 2008.

With his May 7, 2012 request for reconsideration, appellant's representative submitted Dr. Blackwell's April 18, 2008 report. Dr. Blackwell noted appellant's history of injury and provided impressions of several conditions. He stated that appellant was more symptomatic than he had been and opined that the January 31, 2008 incident was more of an exacerbation of his September 27, 2007 conditions. The Board finds that, while this medical report provides some

⁶ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedure further provides 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).

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

support for causal relationship, it is insufficient to establish clear evidence of error as it does not show that OWCP's denial of the claim was erroneous or raise a substantial question as to the correctness of OWCP's determination that appellant did not establish an injury in the performance of duty. The Board has held 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.¹²

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in denying appellant's claim for an injury in the performance of duty. Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, appellant's representative references two Board decisions but provides no explanation of the relevance of either case. Of the first case cited, *C.P.*, Docket No. 08-2523 (issued July 13, 2009), the Board notes no such case exists. To the extent appellant is referring to *C.P.*, Docket No. 08-2535 (issued July 13, 2009), the Board notes that such case is not germane to the appeal presently before the Board as it pertains to the standard of review to be used when a reconsideration request is timely, which is a different standard of review than that used for an untimely reconsideration request. Similarly, the second case cited, *Billy B. Scoles*, 57 ECAB 258 (2005), also pertains to a timely request for reconsideration. To reopen a claim for a merit review where a reconsideration request is made within one year of the most recent merit decision, the claimant must meet one of the three requirements of 20 C.F.R. § 10.606(b). As explained, where the reconsideration request is untimely, the claimant must demonstrate clear evidence of error on the part of OWCP in its most recent merit decision.¹³ The Board notes that, while Dr. Blackwell's April 18, 2008 report was submitted after the claim was denied, appellant did not request reconsideration until May 7, 2012. As noted, for the reasons articulated herein, appellant has not established clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ *See supra* notes 3, 4.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 9, 2012 is affirmed.

Issued: April 4, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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