

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 19, 2010 appellant, then a 47-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on September 13, 2010 he sustained a right wrist injury after he was carrying sheetrock and a wind gust caused him to twist his right wrist and hurt his tendon. He stated that he sought medical treatment 10 days later when the pain did not go away. A witness statement from James Roland, a fellow employee, was provided which stated that he was not working on the date of the incident and appellant informed him of the incident several days later. Appellant first sought treatment on September 24, 2010, stopped work on September 27, 2010 and notified his supervisor on November 19, 2010. The employing establishment controverted the claim stating that he never reported or identified any injury or possible injury on duty.

By letter dated December 16, 2010, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed, provided a questionnaire for completion and directed to submit it within 30 days. No evidence was received.

By decision dated January 25, 2011, OWCP denied appellant's claim finding that the evidence failed to establish that the incident occurred as alleged. It also found that the medical evidence failed to establish a firm diagnosis which was related to the alleged employment incident. OWCP noted that its December 16, 2010 development letter provided appellant with the information needed to support his claim but no evidence was received.

On November 19, 2012 appellant requested reconsideration of OWCP's decision. In a November 19, 2012 narrative statement, he reported that he was employed at Many Farms High School since 1992 and that there were two employees with the same name at the high school. Appellant stated that, because there were two men with the same name, he did not get his letters right away and often received them late. He noted that he only received his OWCP papers approximately three weeks ago from a Mr. Tungovia, the safety officer, which showed his denial. As a result, appellant was unable to provide a timely reconsideration request. He provided details regarding how his injury occurred and the active medical treatment he was seeking for his wrist condition. Appellant stated that he had used most of his sick leave and was released to light duty but was informed that there was no light-duty job available. He also provided the completed questionnaire which OWCP sent to him on December 16, 2010.

In support of his claim, appellant provided a September 14, 2012 letter written to the principal of Many Farms High School, which described the incident that occurred on September 13, 2010 and the course of his medical treatment. He requested help reopening his OWCP claim.

Appellant also submitted progress notes dated February 21 to October 30, 2012 from physician's assistant Tobin Purslow, a March 6, 2012 diagnostic report documenting a magnetic resonance imaging (MRI) scan of appellant's right wrist, an April 4, 2012 right wrist operative report, a July 30, 2012 right wrist ulnar shortening osteotomy operative report from Dr. Mark Mellinger and various work release notes.

By decision dated December 3, 2012, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.³

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's 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.⁴ 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.⁵

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁷

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence

³ The Board notes that appellant submitted additional evidence after OWCP rendered its December 3, 2012 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

demonstrates clear error on the part of OWCP.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

ANALYSIS

In its December 3, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ As appellant's November 19, 2012 request for reconsideration was submitted more than one year after the date of the last merit decision of record on January 25, 2011, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim.¹⁴

In his November 19, 2012 statement, appellant alleged that he never received the January 25, 2011 decision until approximately three weeks prior to the filing of his appeal on November 19, 2012. He did not assert that his address changed or that the address used by OWCP was otherwise incorrect. Appellant stated that there were two men employed at Many Farms High School with the same name and that he often did not receive his mail. However, he has provided no evidence establishing that his mail was delivered incorrectly. The address used by OWCP in its January 25, 2011 decision is the same as the address of record and the same as the one appellant used in his appeal to the Board. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have arrived at the mailing address in due course.¹⁵ This is known as the mailbox rule.¹⁶ Appellant submitted no evidence substantiating why the presumption would not apply. Therefore, the Board finds that he is presumed to have received the January 25, 2011 decision.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. The underlying claim for compensation was denied on the grounds that he had not established fact of injury due to the lack of the factual and medical evidence. On reconsideration, appellant provided a detailed statement dated November 19, 2012 explaining the circumstances of his alleged injury to establish that the employment incident occurred at the time, place and in the manner alleged on September 13, 2010. The only evidence received by OWCP prior to the denial of his claim on January 25, 2011 was the CA-1 form. This included a

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² *Supra* note 6.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹⁴ *See Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ *M.Y.*, Docket No. 07-2202 (issued February 12, 2008).

¹⁶ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

review of comments provided by the employing establishment, as well as appellant's coworker, which cast doubt as to whether the incident occurred as alleged.¹⁷ In the December 16, 2010 OWCP development letter, appellant was informed of the information required to establish his claim and provided a questionnaire to complete describing the factual circumstances surrounding his claim. He did not respond. Appellant alleged that he timely submitted his traumatic claim form and OWCP should accept the incident as alleged, but he did not submit probative evidence establishing clear evidence of error in the finding that the incident did not occur at the time, place and in the manner alleged. As noted above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The weight of the evidence must shift in favor of the claimant. Appellant did not show clear evidence of error in OWCP's finding as to the occurrence of an employment incident on September 13, 2010.¹⁸

In support of his request for reconsideration, appellant also submitted various medical records documenting treatment for his right wrist. This evidence, however, is insufficient to establish that OWCP erred in its denial of his claim.¹⁹ The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.²⁰ While the reports of appellant's physician are supportive of his claim to establish a firm medical diagnosis, they do not establish clear evidence of error on the part of OWCP as they were submitted after OWCP's January 25, 2011 merit decision.²¹ Thus, the medical reports do not raise a substantial question as to the correctness of OWCP's January 25, 2011 merit decision or demonstrate clear evidence of error.²²

On appeal, counsel for appellant argues that his supervisor would not assist him in filing a workers' compensation case and appellant had to seek the help of Mr. Tungovia. Counsel further argued that the claims examiner failed to review the medical evidence which established appellant's claim. She focuses on evidence that she believes supports his claim and errors which she believed that the employing establishment and OWCP committed in handling his claim. The Board reiterates that appellant submitted no evidence prior to the January 25, 2011 decision other than the CA-1 form. As appellant filed his reconsideration request more than one year after the initial decision on January 25, 2011, he was not entitled to a merit review of his claim. As previously noted, the Board does not have jurisdiction over the merits of the claim.

To the extent that counsel for appellant asserts that he was denied due process because his claim was denied on a substantive issue, the Board notes that this argument would be related to a constitutional question. The Supreme Court has held that constitutional questions are

¹⁷ *S.P.*, 59 ECAB 184 (2007); *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

¹⁸ *D.H.*, Docket No. 12-1586 (issued February 15, 2013).

¹⁹ *See W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²⁰ Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.1602.3(c) (March 2011).

²¹ *V.W.*, Docket No. 12-1901 (issued March 5, 2013).

²² Docket No. 12-90 (issued July 2, 2012).

unsuited to resolution in administrative hearing procedures.²³ As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant.²⁴ The federal courts retain jurisdiction over decisions under FECA where there is a charge of a violation of a clear statutory mandate or there is a constitutional due process claim.²⁵ The Board notes that appellant's traumatic injury claim was denied because he did not provide any factual and medical evidence to establish that he suffered an injury causally related to the alleged September 13, 2010 injury. Appellant appealed the January 25, 2011 decision more than one year later. These arguments do not show clear evidence of error in OWCP's decision denying his traumatic injury claim.²⁶

As none of the evidence raises a substantial question concerning the correctness of OWCP's decision, appellant has failed to establish clear evidence of error on the part of OWCP in denying further merit review.²⁷

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

²³ See *Johnson v. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

²⁴ See *Robert F. Stone*, 57 ECAB 292 (2005); *Diana L. Smith*, 56 ECAB 524 (2005); *Vittorio Pittelli*, 49 ECAB 181 (1997).

²⁵ See *Andrew Fullman*, 57 ECAB 574 (2006).

²⁶ *F.G.*, Docket No. 08-573 (issued October 7, 2008).

²⁷ *A.S.*, Docket No. 11-356 (issued September 16, 2011).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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