

On appeal, appellant contends that his request for reconsideration was timely filed as it was received by OWCP within one year of the December 21, 2011 merit decision.

FACTUAL HISTORY

This case has previously been before the Board. In the prior decision dated December 21, 2011, the Board conducted a merit review of appellant's claim and concluded that OWCP properly determined that his employment-related aggravation of degenerative disc disease had resolved. The facts as set forth in the Board's prior decision are hereby incorporated by reference.²

By letter dated December 12, 2012 and received by OWCP on December 18, 2012, appellant requested reconsideration. In support of his request, he submitted a new report by Dr. Guy H. Earle, a Board-certified family practitioner, who opined that appellant had an identifiable back condition, and that, although the degenerative changes seen in the imaging studies were not caused by his exposure to vibration, on a more probable than not basis, appellant's condition is a "lighting up of a preexisting but asymptomatic degenerative condition of his lumbar spine. The proximate cause of this would be the excessive vibration between September 2001 and August 2002." Appellant also submitted a supplemental letter, dated December 18, 2012, wherein he contended that OWCP made various errors in evaluating the medical evidence.

By decision dated December 27, 2012, OWCP denied appellant's request for reconsideration as it found that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file 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 The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁵

² Docket No. 11-131 (issued December 21, 2011). On December 24, 2002 appellant, then a 53-year-old supervisory general engineer, filed an occupational disease claim alleging a low back condition as a result of riding the shipyard's handicapped vehicles. OWCP accepted his claim for temporary aggravation of lumbar degenerative disc disease for the period September 2001 through August 2002.

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 *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

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.⁶ OWCP regulations and procedures provide that OWCP will reopen a claimant's 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest 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 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.¹³

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated December 27, 2012 wherein it declined to review appellant's case on the merits because the request for reconsideration was not timely filed and did not show clear evidence of error.

In its December 27, 2012 decision, OWCP denied appellant's request for reconsideration, received by OWCP on December 18, 2012, finding that it was untimely filed and failed to

⁶ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide 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 evidence of error. *Id.* at Chapter 2.1602.3c.

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 4.

present clear evidence of error. The Board finds that OWCP improperly determined that appellant's request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607. The last merit decision issued in this case was the Board's decision dated December 21, 2011. As appellant's request was received by OWCP on December 18, 2012, within one year of the Board's December 21, 2011 decision, his request for reconsideration was timely filed.

The Board further finds that OWCP improperly denied appellant's reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. Accordingly, OWCP should have applied the standard for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).¹⁴ Since it erroneously reviewed the evidence in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

CONCLUSION

The Board finds that OWCP improperly found that appellant's request for reconsideration was untimely filed.

¹⁴ 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provide that an application for reconsideration must be in writing and set forth argument and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 27, 2012 is set aside and remanded for action consistent with this decision.

Issued: December 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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