

On appeal appellant generally asserts that his case should be reviewed regarding denial of schedule award and wage-loss compensation.

FACTUAL HISTORY

This case has previously been before the Board. In a November 15, 2010 decision, the Board affirmed a September 29, 2009 and a January 4, 2010 merit decision of OWCP that denied appellant's claim for a schedule award.³ The law and the facts of the previous Board decision are incorporated herein by reference.⁴

In May 18, 2012 correspondence, appellant asked that his case be reviewed because he was in financial hardship. On August 2, 2012 he requested reconsideration. Appellant asked that all old and new evidence be reviewed.

The record contains numerous medical reports submitted subsequent to OWCP's last merit decision dated January 4, 2010 during appellant's claim for schedule award. These include a February 23, 2010 electrodiagnostic study of the upper extremities, an April 9, 2012 magnetic resonance imaging (MRI) scan of the cervical spine; reports from Dr. Henry Leis, a Board-certified orthopedic surgeon, dated from March 3, 2010 to July 25, 2012; reports from Dr. Fani Manney, a Board-certified neurologist, dated June 3 to September 2, 2010; reports from Dr. Brian Tsang, Board-certified in anesthesiology and pain management, dated December 8, 2011 to July 19, 2012; reports from Dr. Eric Letonoff, a Board-certified osteopath specializing in orthopedic surgery, dated January 12 and March 19, 2012; reports from Dr. Chelsea Grow, an osteopath, dated January 19 and February 16, 2012; and reports dated April 18 to June 6, 2012 from Dr. Charles J. Winters, a Board-certified orthopedic surgeon.

By decision dated August 17, 2012, OWCP denied appellant's reconsideration request on the grounds that his request was untimely filed and that he failed to present clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. 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.⁵

³ Docket No. 10-823 (issued November 15, 2010). On July 8, 2008 appellant, a materials handler, sustained work-related sprains of the right elbow and forearm and right lateral epicondylitis while unloading pallets. He had right arm surgery on February 16, 2009 and returned to modified duty on March 2, 2009. Appellant was removed from his position for cause in April 2009. By decision dated September 29, 2009, OWCP denied the claim for disability compensation. It noted that appellant returned to modified duty after the February 13, 2009 surgery and was then terminated for cause and not due to his inability to perform his modified-duty assignment. This decision was not appealed to the Board. In a separate decision dated September 29, 2009, OWCP denied appellant's claim for a schedule award on the grounds that the medical evidence did not establish a permanent impairment.

⁴ Appellant has an additional appeal before the Board of a July 26, 2012 decision denying his request for a hearing. The appeal was assigned Docket No. 12-1699 and will be adjudicated separately.

⁵ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁶ Its regulations state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth section 10.607 of its regulations, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

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

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

In schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of an existing schedule award. When a claimant is asserting that the original award was erroneous, based on his or her medical condition at that time, this is considered a request for reconsideration. However, a claimant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.¹²

⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁷ 20 C.F.R. § 10.607.

⁸ *See Alberta Dukes*, 56 ECAB 247 (2005).

⁹ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 1.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹¹ *Nancy Marcano*, 50 ECAB 110 (1998).

¹² *See B.K.*, 59 ECAB 228 (2007).

ANALYSIS

The Board finds this case is not in posture for decision. There are two underlying merit issues in the instant case. The first issue is whether appellant is entitled to a schedule award for his accepted right upper extremity condition. As noted above, a claimant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.¹³ A review of the medical evidence in this case indicates that in a September 15, 2010 report, Dr. Leis provided an impairment evaluation of appellant's right upper extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).¹⁴ This report has not been reviewed by OWCP. The Board therefore finds that OWCP erroneously issued a denial of appellant's request for reconsideration regarding appellant's entitlement to a schedule award under the clear evidence of error standard and the case must be remanded to OWCP. On remand, OWCP should review and develop the medical evidence and issue an appropriate decision regarding appellant's request for a schedule award.

The second underlying issue is whether appellant is entitled to disability compensation. By decision dated September 29, 2009, OWCP denied his claim for disability compensation. It noted that appellant returned to modified duty following February 13, 2009 surgery and was then terminated for cause and not due to his inability to perform his modified-duty assignment.¹⁵ Appellant did not request reconsideration of the September 29, 2009 decision regarding denial of wage-loss compensation until 2012. The Board finds that as more than one year has elapsed from the most recent merit decision of OWCP regarding this issue of disability compensation, his request for reconsideration is untimely.¹⁶

The Board also finds that appellant failed to establish clear evidence of error regarding this issue. On reconsideration appellant requested that OWCP reconsider whether he was entitled to monetary compensation.

A review of the medical evidence regarding disability indicates that on March 3, 2010 Dr. Leis advised that appellant could return to limited-duty work.¹⁷ In "medical excuse" letters dated May 24, June 21 and July 19, 2012, Dr. Tsang advised that appellant's arm pain and weakness prevented him from returning to his supply job. On April 18, 2012 Dr. Winters advised that appellant was unable to return to work. He diagnosed a herniated cervical disc with myelopathy, ulnar neuropathy, neck pain and cervical radiculitis, none of which are accepted conditions. None of the medical evidence discusses the issue of total disability in September 2009. Thus, this evidence could not show that OWCP committed clear evidence of

¹³ *Id.*

¹⁴ A.M.A., *Guides* (6th ed. 2008).

¹⁵ As previously noted in *supra* note 3, appellant did not file an appeal with the Board of this decision.

¹⁶ 20 C.F.R. § 10.607(a).

¹⁷ Appellant was working light duty when he was dismissed for cause in April 2009.

error in its September 29, 2009 decision on the issue of entitlement to disability compensation. The Board further notes that appellant last filed a claim for wage-loss compensation on July 27, 2009 when he claimed wage loss for the period February 16 to July 27, 2009.

The term “clear evidence of error” is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.¹⁸ As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the September 29, 2009 OWCP decision regarding denial of wage-loss compensation, appellant has not established that OWCP committed error by its August 17, 2012 decision.¹⁹ The Board therefore finds that in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the argument and evidence submitted by appellant with his reconsideration request to ascertain whether it demonstrated clear evidence of error in the September 29, 2009 decision denying wage-loss compensation and correctly determined that it did not, and thus denied appellant’s untimely request for a merit reconsideration on that basis.²⁰

CONCLUSION

The Board finds that OWCP erroneously issued a denial of appellant’s request for reconsideration of the denial of a schedule award under the clear evidence of evidence standard. The Board further finds that, with regard to the issue of denial of wage-loss compensation, appellant’s request for reconsideration was untimely filed and he failed to establish clear evidence of error. OWCP, therefore, properly denied a merit review of his claim on that issue.

¹⁸ *Robert G. Burns, supra* note 9.

¹⁹ *Nancy Marcano, supra* note 11.

²⁰ 20 C.F.R. § 10.607(b); *see D.G., 59 ECAB 455* (2008).

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2012 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: February 14, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board