

FACTUAL HISTORY

This case has previously been before the Board. OWCP accepted appellant's claim for a herniated disc with laminectomy and bilateral lower extremity resulting from an employment injury on January 13, 1972. By decision dated January 25, 1980, it adjusted appellant's compensation to reflect his wage-earning capacity as a telephone solicitor.

The effective date of the wage-earning capacity determination was initially determined to be February 5, 1976. In April 1980 OWCP found that a conflict arose in the medical evidence, and appellant was referred to Dr. Wallace Holderman, a Board-certified orthopedic surgeon. In a report dated May 27, 1980, Dr. Holderman opined that appellant was currently able to perform the duties of a telephone solicitor. By decision dated June 18, 1984, OWCP's hearing representative affirmed a January 25, 1980 decision. The hearing representative found that appellant had received compensation for temporary total disability through May 27, 1980, and the effective date of the wage-earning capacity determination was May 28, 1980.

In a July 22, 1985 decision, the Board affirmed the hearing representative's June 18, 1984 decision, finding that the position of telephone solicitor represented appellant's wage-earning capacity as of May 28, 1980.³ By decision dated August 31, 1987, the Board affirmed an OWCP decision dated December 18, 1986, finding that the position of telephone solicitor represented appellant's wage-earning capacity from May 28, 1980 to November 29, 1985.⁴ By decision dated April 12, 1993, the Board reversed OWCP's decision dated January 30, 1992, finding that OWCP did not meet its burden to establish that the position of merchandise deliverer represented appellant's wage-earning capacity.⁵

By decision dated August 18, 1997, the Board affirmed an OWCP decision dated September 21, 1994, finding that OWCP properly determined that appellant's letter dated August 31, 1994 requesting reconsideration of the August 31, 1987 decision, was untimely and failed to establish clear evidence of error.⁶ By decision dated July 6, 2000, the Board affirmed OWCP's nonmerit decision dated March 13, 1998, denying appellant's request for reconsideration and affirmed OWCP's April 24, 1998 decision denying appellant's request for a hearing.⁷ By decision dated September 17, 2002, the Board affirmed an OWCP decision dated May 25, 2001, which found that appellant's letter requesting reconsideration dated February 20, 2001 filed more than a year after the last merit decision of August 31, 1997, was untimely and failed to establish clear evidence of error.⁸

³ Docket No. 85-843 (issued July 22, 1985).

⁴ Docket No. 87-811 (issued August 31, 1987).

⁵ Docket No. 92-1175 (issued April 12, 1993). A petition for reconsideration was denied by order dated August 26, 1993.

⁶ Docket No. 95-612 (issued August 18, 1997).

⁷ Docket No. 98-1830 (issued July 6, 2000).

⁸ Docket No. 01-2218 (issued September 17, 2002).

In a decision dated July 21, 2004, the Board found that correspondence dated December 6, 2002 from appellant was a request for modification of the January 25, 1980 wage-earning capacity determination.⁹ The Board remanded the case for a decision on the modification issue.

By decision dated May 18, 2005, the Board found that appellant had not established that modification of the January 25, 1980 wage-earning capacity determination was warranted prior to November 19, 1985.¹⁰ The history of the case as contained in the Board's prior decisions is incorporated herein by reference.

Appellant submitted a January 2, 2009 letter requesting reconsideration of his claim. He stated that a decision had yet to be reached on whether he was totally disabled from February 5, 1976 to July 25, 1977, and May 28, 1980 to November 28, 1985. According to appellant, the claim forms he filed did not properly describe his injuries; safety violations occurred with respect to the forklift; he was misled on the issue of retirement eligibility; that some medical evidence was false and based on limited examination, and the medical evidence regarding his disability was not properly considered.

By decision dated April 7, 2009, OWCP found the application for reconsideration was untimely and failed to show clear evidence of error.

In a letter dated January 31, 2013, appellant again requested reconsideration. He stated that he disagreed with decisions dated June 19, 1984, April 12, 1993, September 21, 1994 and June 25, 2001. Appellant also stated that he disagreed with the decision to deny benefits from February 5, 1976 to July 25, 1977, and May 28, 1980 to November 28, 1985. He argued that the medical and factual evidence had not been properly considered. Appellant stated, "I have for many years addressed these issues concerning denial of back benefits and the issue of misrepresentation of medical facts by [OWCP]." He resubmitted medical evidence previously of record.

By decision dated April 26, 2013, OWCP denied appellant's application for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.¹¹ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."¹²

⁹ Docket No. 03-1178 (issued July 21, 2004).

¹⁰ Docket No. 05-359 (issued May 18, 2005).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.605.

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.¹³ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁴ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹⁵ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁶

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.¹⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.²⁰

ANALYSIS

Appellant filed an application for reconsideration and referred to the issue of his disability from February 5, 1976 to July 25, 1977, and May 28, 1980 to November 28, 1985. As to disability in 1976 and 1977, he did not list the relevant OWCP decision. The decisions noted in appellant's letter considered issues relating to the January 25, 1980 wage-earning capacity determination. If appellant seeks to pursue the issue of disability from February 5, 1976 to July 25, 1977 he may do so in an appropriate manner with OWCP.

With respect to entitlement to compensation during the period May 28, 1980 to November 28, 1985, the last decision on the merits of the claim was the Board's May 18, 2005

¹³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁴ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

¹⁵ 5 U.S.C. §§ 8101-8193.

¹⁶ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁹ *Id.*

²⁰ *Thankamma Mathews*, 44 ECAB 765 (1993).

decision. Since appellant's application for reconsideration was dated January 13, 2013, it is untimely filed.

There are circumstances where a claimant may submit new evidence or argument with respect to modification of a wage-earning capacity determination, and receive a merit review by OWCP. The Board found in its July 21, 2004 decision that appellant was entitled to a merit review on the issue of modification of the January 25, 1980 wage-earning capacity determination prior to November 28, 2005. In such a case, the application for reconsideration is properly considered a request for modification of the wage-earning capacity and is not subject to the one-year time limitation.²¹ In the January 13, 2013 letter, appellant simply reiterated a previous argument that OWCP had not properly considered the medical evidence in his claim. He resubmitted medical evidence previously of record. The Board considered such evidence in its May 18, 2005 decision. Appellant does not present any new evidence or argument that would require reopening the case for merit review.²² The January 13, 2013 letter is an application for reconsideration that is untimely and fails to show clear evidence of error.

On appeal, appellant disagreed with the decisions dated June 19, 1984, April 12, 1993, September 21, 1994, March 7 and April 26, 2013.²³ As noted, the evidence of record established that the January 31, 2013 application for reconsideration was untimely and did not establish clear evidence of error.

Appellant may submit new evidence or argument to OWCP with respect to a modification of the wage-earning capacity and receive a merit decision. As to compensation from February 5, 1976 to July 25, 1977, appellant may pursue the issue with OWCP in an appropriate manner.

CONCLUSION

The Board finds that appellant submitted an application for reconsideration that was untimely and failed to show clear evidence of error.

²¹ See also *C.S.*, Docket No. 12-1834 (issued December 4, 2012); *L.C.*, Docket No. 10-827 (issued March 4, 2011). As the Board noted, a modification of a wage-earning capacity determination may be based on a material change in the nature and extent of the injury-related condition, evidence that the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.

²² See, e.g., *A.S.*, Docket No. 09-553 (issued August 21, 2009) (appellant did not submit evidence or argument with respect to a specific error in the wage-earning capacity determination).

²³ March 7, 2013 was the date of an informational letter sent to appellant, not a final decision by OWCP. The Board notes that, with respect to additional evidence submitted on appeal, the Board's review of a case is limited to evidence that was before OWCP at the time of the final decision on appeal. 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 26, 2013 is affirmed.

Issued: October 29, 2013
Washington, DC

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

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

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