



On appeal, counsel acknowledged that after appellant filed a timely September 28, 2010 request for reconsideration of OWCP's November 6, 2009 merit decision, he "asked that no further action be taken" until the submission of additional medical evidence. He asserted that OWCP did not properly consider appellant's request for reconsideration after submission of additional evidence. Counsel contends that appellant's reconsideration request was timely filed.

### **FACTUAL HISTORY**

On September 21, 2009 appellant, then a 62-year-old emergency medical technician coordinator, filed a traumatic injury (Form CA-1) claiming that while stepping out of his vehicle on September 20, 2009 he sustained lumbar pain radiating into the right leg.<sup>2</sup> He stopped work on September 20, 2009. In a September 25, 2009 letter, an employing establishment supervisor confirmed that appellant went to the hospital on September 20, 2009 for back pain.

In a September 23, 2009 letter, OWCP advised appellant of the additional evidence needed to establish his claim. It requested factual evidence regarding the September 20, 2009 incident and a statement from his attending physician explaining how and why that incident would cause the claimed lumbar injury. Appellant was afforded 30 days to submit such evidence.

Appellant submitted September 20, 2009 hospital emergency room discharge instructions for a back sprain and a September 30, 2009 report from Dr. Burak Alptekin, an attending physiatrist, who diagnosed sacroiliac dysfunction attributable to a September 20, 2009 incident. In an October 21, 2009 note, Dr. Alptekin released appellant to full duty as of October 25, 2009. In an October 15, 2009 letter to Dr. Alptekin, appellant described a July 2008 occupational lumbar injury while retrieving an oxygen bottle.

By decision dated November 6, 2009, OWCP denied appellant's claim on the grounds that causal relationship was not established. It accepted that the September 20, 2009 incident occurred at the time, place and in the manner alleged. OWCP found, however, that appellant submitted insufficient medical evidence to establish that the accepted incident caused or aggravated a back condition.

In a September 28, 2010 letter, appellant requested reconsideration of the November 6, 2009 decision. He submitted an August 28, 2008 lumbar x-ray report and a chart note regarding a February 17, 2009 lumbar epidural steroid injection. Appellant also provided a September 20, 2009 form report from a physician whose signature is illegible. It noted a history of spinal stenosis and diagnosed a back sprain/strain with right-sided sciatica.

In an October 19, 2010 letter, counsel requested that OWCP "refrain from further action" on appellant's September 28, 2010 reconsideration request until counsel obtained the requested information from appellant's treating physician. "We will supplement the record once it is received."

---

<sup>2</sup> Appellant filed a second Form CA-1 on October 7, 2009 for the same incident. On November 4, 2009 he claimed that the September 20, 2009 injury was not a traumatic incident but a recurrence of disability.

In a November 1, 2010 letter, OWCP advised counsel that, in compliance with his October 19, 2010 letter, it would take no further action on appellant's September 28, 2010 reconsideration request. If appellant wished to pursue reconsideration of his claim, counsel was asked to contact OWCP.

Counsel next contacted OWCP by June 2, 2011 letter, enclosing a May 11, 2011 report from Dr. Alptekin, who attributed a lumbar sprain and right sacral disorder to a July 2008 work incident. In a September 1, 2011 letter, OWCP asked counsel if he wanted to pursue reconsideration.

On March 5, 2012 appellant claimed a schedule award. He submitted a November 14, 2011 impairment rating by Dr. Morris Horwitz, a physician specializing in legal and forensic medicine, finding a four percent impairment of the right lower extremity due to lumbar radiculopathy according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. In a July 20, 2012 letter, OWCP advised counsel that it could not process the schedule award claim as appellant's injury claim had been denied. It noted that, if he still wished to appeal, he should follow the instructions attached to the November 6, 2009 decision.

In a December 7, 2012 letter, counsel requested clarification regarding the status of appellant's claim. He asserted that appellant's "request for reconsideration was timely filed, however, it was never acted upon by [OWCP]." Counsel submitted copies of documents previously of record.

By decision dated December 19, 2012, OWCP denied reconsideration on the grounds that appellant's December 7, 2012 letter requesting reconsideration was not timely filed and failed to present clear evidence of error. It found that counsel withdrew appellant's September 28, 2010 request for reconsideration. OWCP further found that the evidence submitted was insufficient to create a substantial question regarding the correctness of OWCP's November 6, 2009 decision denying the claim or to establish any procedural error by OWCP.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>3</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>4</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP 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.<sup>6</sup> The Board has found that the imposition of this

---

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>5</sup> *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>6</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>7</sup>

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>8</sup> OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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 by OWCP.<sup>14</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

### ANALYSIS

In its December 19, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on November 6, 2009. Appellant initially requested reconsideration on September 28, 2010, within one year of the November 6, 2009 decision. Counsel withdrew appellant's timely request for reconsideration on October 19, 2010, asking that OWCP take no further action until additional medical evidence was submitted. OWCP advised counsel by November 1, 2010 letter that it take no action on appellant's reconsideration request and that counsel should contact OWCP if appellant wished to request reconsideration in the future.

---

<sup>7</sup> 5 U.S.C. § 10.607(b); *supra* note 4, *Jesus D. Sanchez*, *supra* note 5.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> 20 C.F.R. § 10.607(b).

<sup>10</sup> *Supra* note 4.

<sup>11</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *Jesus D. Sanchez*, *supra* note 5.

<sup>13</sup> *Supra* note 11.

<sup>14</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>15</sup> *Gregory Griffin*, *supra* note 6.

Counsel submitted additional medical evidence with a June 2, 2011 letter, but did not request reconsideration. On a September 1, 2011 OWCP asked counsel if he wished to pursue reconsideration. Appellant claimed a schedule award on March 5, 2012 but did not request reconsideration. OWCP again advised counsel in a July 20, 2012 letter that he should follow the appeal rights accompanying the November 6, 2009 decision if he still sought to appeal. Counsel submitted a December 7, 2012 letter contending that OWCP had failed to act on appellant's September 28, 2010 reconsideration request. He enclosed documents previously of record. OWCP denied the December 7, 2012 request in a December 19, 2012 decision finding that it was not timely filed and failed to present clear evidence of error.

The Board finds that the December 7, 2012 reconsideration request was not timely filed. It must now be determined whether the request demonstrated clear evidence of error in OWCP's November 6, 2009 decision. The Board finds that counsel's December 7, 2012 letter does not raise a substantial question as to whether the November 6, 2009 decision was in error or shift the weight of the evidence in appellant's favor. Therefore, it is insufficient to establish clear evidence of error.

The medical evidence submitted following the November 6, 2009 decision did not address the causal relationship between the September 20, 2009 workplace incident and the claimed lumbar injury; the issue at the time of the November 8, 2009 merit decision. The August 28, 2008 x-ray report and February 17, 2009 chart note predate that incident. Dr. Alptekin's May 11, 2011 report does not address causal relationship and Dr. Horwitz' impairment rating is not relevant to the issue of causal relationship in establishing appellant's claim of injury. Therefore, these reports do not establish clear evidence of error.<sup>16</sup> The September 20, 2009 report is unattributed and therefore cannot be considered as medical evidence.<sup>17</sup> Accompanying his December 7, 2012 letter, counsel submitted copies of evidence previously of record. The Board has held that evidence that repeats or duplicates evidence previously submitted is insufficient to *prima facie* shift the weight of the evidence in favor of the claimant.<sup>18</sup>

Appellant has not provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of OWCP's November 6, 2009 decision. Consequently, OWCP properly denied his reconsideration request as his request does not establish clear evidence of error.

On appeal, counsel acknowledges that he instructed OWCP not to take action on appellant's timely September 28, 2010 request for reconsideration. He asserts, however, that OWCP should have considered the withdrawn request as timely. As noted, after counsel withdrew appellant's timely reconsideration request, he did not submit a request for reconsideration within one year of the November 6, 2009 decision. OWCP advised counsel of this deficiency by letters dated November 1, 2010, September 1, 2011 and July 20, 2012.

---

<sup>16</sup> *Supra* note 11.

<sup>17</sup> *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>18</sup> *D.E.*, 59 ECAB 438 (2008).

Counsel did not request reconsideration until December 7, 2012. OWCP properly denied counsel's December 7, 2012 request as it was untimely filed and did not present clear evidence of error.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 19, 2012 is affirmed.

Issued: September 4, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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