

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal, appellant argues that OWCP erred in terminating his compensation benefits and that he sustained a traumatic brain injury as a result of his accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board. On October 27, 1982 the Board set aside a June 15, 1982 OWCP hearing representative's decision affirming a January 8, 1982 decision.⁴ In the January 8, 1982 decision, OWCP terminated appellant's compensation, pursuant to 5 U.S.C. § 8106(c), on the grounds that he refused an offer of suitable work. The Board found that OWCP failed to show that the work was suitable and remanded the case to OWCP for further development. In the second appeal on June 11, 1984, the Board affirmed a November 10, 1983 OWCP decision terminating appellant's compensation benefits effective November 3, 1983.⁵ OWCP found that the medical evidence established that he no longer had any residuals or disability due to his accepted March 21, 1969 employment injuries of head trauma, postconcussion cervical trauma and cervical spine neuropathy. It also found that the medical evidence was insufficient to establish that appellant's psychiatric condition was causally related to the accepted March 21, 1969 employment injury. On October 6, 1989 in a third appeal, the Board affirmed OWCP's merit decisions dated June 7 and November 21, 1988 denying modification on the issue of whether his psychiatric condition was causally related to the accepted March 21, 1969 employment injury. The Board also affirmed a March 8, 1989 OWCP nonmerit decision denying appellant's request for reconsideration. On October 29, 2002 the Board affirmed OWCP's June 19, 2000 decision denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. The facts and circumstances surrounding the prior appeals are hereby incorporated by reference.⁶

In an April 20, 2013 letter, appellant requested reconsideration. He contended that OWCP decisions were erroneous and wrongfully denied him wage-loss and medical benefits for disability and residuals of his accepted March 21, 1969 employment injury. Appellant argued that the Board failed to consider two decisions by the U.S. District Court or his Veterans Administration outpatient clinic treatment for neuropsychological treatment. He alleged that his quality of life was adversely impacted by his traumatic brain injury, chronic vestibular damage and cervical spine neuropathy, which were due to the accepted March 21, 1969 employment injury.

⁴ 34 ECAB 144 (1982).

⁵ Docket No. 84-341 (issued June 11, 1984).

⁶ On March 21, 1969 appellant, then a 31-year-old mail handler, fell backwards over a mailbag and struck his head on a pallet. OWCP accepted the claim for head trauma, postconcussion cervical trauma and cervical spine neuropathy. By letter dated November 12, 1974, it placed appellant on the periodic rolls for temporary total disability effective November 8, 1974.

Appellant submitted statements detailing the history of his claim. He also resubmitted medical and factual evidence previously considered by OWCP, including an August 5, 1981 letter from a Dr. J. Mattes, a treating physician with the Veterans Administration Medical Center, Bronx, NY and an August 6, 1981 letter addressed to a Dr. T.P. Naidu from the employing establishment's Chief, Medical Administration Service. In an August 5, 1981 Veterans Hospital report, Dr. Mattes noted that appellant was being referred to Harlem Hospital for psychiatric treatment.

The August 6, 1981 letter addressed to Dr. Naidu noted appellant's diagnosis of major depressive disorder and provided information regarding his psychiatric treatment.

By decision dated August 5, 2013, OWCP denied reconsideration on the grounds that appellant's request was untimely filed and failed to establish clear evidence of error.

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.⁷ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁸

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.⁹ OWCP's 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.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish

⁷ 20 C.F.R. § 10.607(a).

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

⁹ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011). OWCP's 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 2.1602.5a.

¹¹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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's decision.¹⁶

OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹⁷

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. The most recent merit decision in this case was issued on October 6, 1989. OWCP received appellant's April 30, 2013 request for reconsideration on May 7, 2013; thus, the request was outside the one-year time limit.¹⁸ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁹

The Board finds that the evidence submitted by appellant in support of his April 30, 2013 request for reconsideration does not raise a substantial question as to the correctness of OWCP's termination of his compensation benefits and the denial of his claim to include a psychiatric condition as causally related to the accepted March 21, 1969 employment injury or *prima facie* shift the weight of the evidence of record in his favor. Appellant resubmitted evidence concerning treatment for his major depression. This evidence was previously considered by OWCP in its prior decisions and does not establish that OWCP committed clear evidence of error in terminating his compensation effective November 10, 1983 and denying his claim that his psychiatric condition was causally related to the accepted March 21, 1969 employment injury. Further, this evidence did not provide any opinion addressing whether the diagnosed condition was causally related to the accepted March 21, 1969 employment-related injuries. The

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 8.

¹⁷ 20 C.F.R. § 10.607.

¹⁸ See *supra* note 10 at Chapter 2.1602.4 (October 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision and the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.

¹⁹ 20 C.F.R. § 10.607(a); see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

Board finds that the medical reports resubmitted by appellant do not discharge his burden of showing clear evidence of error.

Appellant argued that OWCP erred in the handling of his claim as he continues to have residuals and disability due to his accepted March 21, 1969 employment injuries. He has not provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's termination of his compensation benefits effective November 10, 1983 nor of the denial that his psychiatric condition was caused by the accepted March 21, 1969 employment injuries. Consequently, OWCP properly denied appellant's reconsideration request as his request does not establish clear evidence of error.

On appeal, appellant contends that OWCP erred in terminating his compensation benefits as he continues to have residuals of his accepted employment injuries. He also contends that OWCP erred that he sustained a traumatic brain injury as a result of the accepted March 21, 1969 employment injury. As discussed above, appellant failed to timely file a request for reconsideration and failed to establish clear evidence of error. He submitted no evidence raising a substantial question as to the correctness of OWCP's termination of his compensation benefits effective November 10, 1983 or denying expansion of his claim to include a psychiatric condition.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 5, 2013 is affirmed.

Issued: April 9, 2014
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