

On appeal appellant contends that the medical reports from his treating physician prepared in 2000 were misplaced in another file; that he was not provided legal assistance and therefore OWCP should have helped him with discovery and obtaining a referee examination.

FACTUAL HISTORY

On August 24, 2000 appellant, then a 43-year-old labor custodian, filed a traumatic injury claim alleging that on August 24, 1999 he sustained injuries to his foot, leg and back while riding a scrubber with no shocks. He was jerked back and forth and bumped into walls while travelling on uneven floors. Appellant had to press his foot very hard on the brake pedal to make the necessary abrupt stops. He stated that the scrubber malfunctioned several times that date. The employing establishment controverted the claim.

By decision dated November 9, 2000, OWCP denied appellant's claim. It found that the medical evidence was not sufficient to establish that his condition was caused or aggravated by the employment activities of August 24, 1999. In a decision dated February 9, 2001, OWCP denied appellant's request for an oral hearing before an OWCP hearing representative.³

On September 25, 2012 appellant advised that he was exercising his appeal rights. By letter dated October 12, 2012, OWCP informed him that, if he disputed a decision, he must follow the appeal rights which accompanied the decision and specify the appeal right he was requesting. By letter dated October 17, 2012, appellant requested "reconsideration based on the written record." On January 2, 2014 he asked OWCP to reconsider his claim and noted that he was appealing the November 9, 2000 decision. Appellant indicated that five months after the claim was closed the employing establishment accepted his medical documentation for fitness-for-duty restrictions.

Appellant submitted a January 25, 2008 report from Dr. Randall N. Smith, a Board-certified orthopedic surgeon. He was seen for a history dating back to 1999 when he was injured at work. Appellant basically hurt all over, particularly in the neck and down the left arm and into the lower back and down both legs. Dr. Smith noted that the diagnostic testing showed some disc herniations and radiculopathy. He recommended repeat studies. In an April 4, 2008 report, Dr. Smith noted that appellant continued to have problems in the left side of his neck, down the left arm, the left side of the lower back, down the left leg, with the lower back being the most prominent. Appellant also noted numbness in his hands and left leg. He had not had any diagnostic studies; but clinically, Dr. Smith believed that appellant had a herniated disc or discs in his cervical and/or lumbar spine causing cervical radiculopathy and lumbar radiculopathy. He advised that appellant was able to work with restrictions.

OWCP also received a social security disability award dated September 3, 2001; documents concerning a settlement agreement reached with the Merit Systems Protection Board

³ The Board notes that appellant also filed two other claims. In OWCP File No. xxxxxx930, appellant filed a claim for a traumatic injury sustained on May 24, 1991. OWCP accepted the claim for sprain/strain of the lumbosacral joint ligament and was administratively closed on April 1, 1992 as all benefits were paid. In OWCP File No. xxxxxx761, appellant alleged a traumatic injury on July 23, 1992 and OWCP accepted this claim for thoracic and lumbar sprain/strain and benefits were paid until it terminated benefits on December 6, 1999.

(MSPB) with regard to appellant's proposed removal from employment; documents of Equal Employment Opportunity (EEO) cases; materials concerning a class action suit against the employing establishment; and documents concerning appellant's other OWCP claims. Appellant also submitted medical evidence which predated his alleged injury of August 24, 1999.

On January 2, 2014 appellant again requested reconsideration of the November 9, 2000 OWCP decision. He argued that the medical documentation showed permanent injuries and that the employing establishment accepted the same medical documentation concerning his back in a fitness-for-duty examination with permanent restrictions five months after the case was closed.

By decision dated January 24, 2014, OWCP denied appellant's request for reconsideration as it was not timely filed and failed to establish 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 his application for review within one year of the date of that decision.⁴ 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.⁵ 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.⁶

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.⁷ 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.⁸

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ 20 C.F.R. § 10.607(b); 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 the 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴

ANALYSIS

OWCP denied appellant's claim for compensation in a decision dated November 9, 2000. This was the last merit decision in this case. The only issue before the Board in this appeal is whether OWCP properly declined to review appellant's case on the merits because it was not timely filed and did not show clear evidence of error.

The Board finds that appellant filed an untimely request for reconsideration. The most recent merit decision in this case is OWCP's November 9, 2000 decision denying appellant's claim. Appellant did not request reconsideration until he filed a January 2, 2014 request for reconsideration. Because more than one year elapsed from the November 9, 2000 merit decision to appellant's request for reconsideration, the Board finds that this request was untimely filed. The Board also notes that appellant filed appeal documents on September 25 and October 17, 2012. These documents were insufficient to show that appellant requested reconsideration as appellant did not indicate at that time which appeal route he chose to take. Nevertheless, these documents were also untimely as they were filed almost 12 years after the last merit decision of November 9, 2000, and accordingly, would not constitute a timely request for reconsideration in any event. The Board notes that the regulatory language unequivocally sets a one-year time limit for filing reconsideration requests and does not indicate that a late filing may be excused by extenuating circumstances.¹⁵

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona D. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁵ *D.S.*, Docket No. 12-919 (issued August 23, 2012); *see also* 20 C.F.R. § 10.607.

The Board also finds that appellant failed to demonstrate clear evidence of error. OWCP denied his claim for the reason that the medical evidence was not sufficient to establish that his medical condition was caused or aggravated by the alleged August 24, 1999 employment incident. None of the evidence submitted addresses this issue. Since the November 9, 2000 merit decision, appellant filed reports from Dr. Smith, who generally noted appellant's symptoms and diagnosed disc herniations with radiculopathy. Whether or not appellant had physical limitations is not the issue, his claim was denied because the evidence did not establish a causal relationship between his medical conditions and the August 24, 1999 employment incident. The reports do not manifest on their face that any error by OWCP was made in denying appellant's claim. Dr. Smith did not address causal relationship. The medical evidence that predates the August 24, 1999 work incident is not relevant to appellant's claim. The Board notes that the term clear evidence of error is intended to represent a difficult standard. Even the submission of a detailed well-rationalized medical report which, if submitted before the denial was issued would have required further development of the evidence, is not sufficient to establish clear evidence of error.¹⁶

Appellant alleges that there were mistakes made in the development of the case such as reports by Dr. Smith from 2000 not being entered into the record, lack of discovery and failure to obtain a referee examination. As he did not have an attorney, OWCP should have pursued these issues. But appellant has the burden of proof to establish the essential elements of his claim.¹⁷ There are no medical records from 2000 by Dr. Smith in the record. Furthermore, an impartial medical examination was unnecessary as there was no conflict in medical opinion.¹⁸ Appellant submitted documents concerning multiple cases he had before other government agencies such as the EEO Commission and the MSPB, but these documents are not relevant to the underlying issue as decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA.¹⁹

Thus, appellant has not established clear evidence of error by OWCP.

CONCLUSION

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

¹⁶ *D.C.*, Docket No. 14-663 (issued June 26, 2014).

¹⁷ *D.T.*, Docket No. 12-1597 (issued January 15, 2013); *F.Z.*, Docket No. 10-1184 (issued November 10, 2010).

¹⁸ If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

¹⁹ *G.J.*, Docket No. 14-32 (issued May 21, 2014); *see also A.C.*, Docket No. 12-1579 (issued December 13, 2012); *Andrew Fullman*, 57 ECAB 574 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 24, 2014 is affirmed.

Issued: August 4, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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