

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, a 36-year-old veterans service representative, filed a claim for benefits on September 11, 2009, alleging that he sustained a hand, neck, and back injury when he fell out of his chair on September 3, 2009. The employing establishment controverted the claim, contending that appellant's disability did not incur in the performance of duty because a September 3, 2009 vital signs check showed elevated blood pressure and he admitted that he did not take his hypertension medicine. It also noted that, while he complained of a head, neck, and back injury, medical documentation did not show any impact to those parts of appellant's body.

By decision dated November 9, 2009, OWCP denied the claim as the injury did not occur within the performance of duty. It found that, based on the "consensus" of his coworkers' statements and a September 3, 2009 diagnosis of hypertension and syncope diagnoses, the fall, and any resulting injury was idiopathic in nature, a consequence of a sudden drop in blood pressure. OWCP further found that the evidence was in conflict with regards to whether appellant struck a part of his body on a desk, cabinet, or other object before hitting the floor, but did not reach the issue, citing the lack of medical evidence of trauma secondary to such impact.

By decision dated January 15, 2010, OWCP denied appellant's application for review as it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision. On March 12, 2010 it denied appellant's request for a hearing. He had previously requested reconsideration and was not, as a matter of right, entitled to an oral hearing on the same issue.

By decision dated February 11, 2011,² the Board vacated OWCP's November 9, 2009 decision, finding that the medical evidence was not sufficient to establish an idiopathic fall on September 3, 2009. It found that the only medical evidence to which it referred was a September 3, 2009 hospital discharge form, which diagnosed syncope and hypertension but contained no opinion explaining how appellant's elevated blood pressure or any other personal, nonoccupational pathology led to his fall in the workplace; this was not sufficient to establish that appellant's September 3, 2009 fall was idiopathic. It further found that OWCP's decision did not allow appellant to understand the precise defects of his claim. The Board found that OWCP had not made a clear finding as to whether appellant struck a piece of equipment, furniture, or some similar object as he fell which would also bring the fall within the performance of duty. It therefore remanded for OWCP to further develop the evidence and make appropriate fact findings with regard to whether appellant's fall occurred within the performance of duty and, if so, the nature and extent of any injury or disability that resulted from the fall. The facts of this case are set forth in the Board's February 11, 2011 decision and are by reference herein incorporated.

On August 1, 2011 OWCP accepted the claim for a scalp contusion, resulting from the September 3, 2009 fall.

By decision dated September 26, 2012, OWCP denied appellant continuation of pay as a result of the September 3, 2009 fall. It found that the medical reports appellant submitted had

² Docket No. 10-1344 (issued February 11, 2011).

not contained a probative rationalized medical opinion sufficient to establish disability or required medical treatment after the September 3, 2009 fall.

By letter dated July 20, 2013, received by OWCP on August 14, 2013, appellant requested reconsideration.

By decision dated September 16, 2013, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

By letter dated April 21, 2014, appellant requested reconsideration. He indicated that he would be submitting new evidence pertaining to his neck and back dated December 18, 2013 which contained a diagnosis that was not available at the time of his initial filing, along with evidence he asserted that he submitted on November 6, 2009 *via* fax. Appellant stated that he would be presenting evidence from Dr. Marcus Allen and Dr. Carl Sperling, Board-certified in internal medicine.

Appellant submitted a January 3, 2014 form report from Dr. Sperling diagnosing a cervical-thoracic sprain as a result of the September 3, 2009 fall which rendered him totally disabled from September 3 to 13, 2009.

By decision dated May 28, 2014, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and that appellant had not established clear evidence of error.

LEGAL PRECEDENT

FECA does not entitle a claimant to a review of an OWCP decision as a matter of right.³ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). As one such limitation, it has stated that 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. In those cases where a request for reconsideration is not timely filed, the Board had held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁴ OWCP procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.⁵

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁷ Evidence which does not raise a

³ 5 U.S.C. § 8128(a).

⁴ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁵ *See D.E.*, 59 ECAB 438 (2008).

⁶ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227 (1991).

substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹²

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on September 26, 2012. OWCP received appellant's request for reconsideration on April 22, 2014; thus, the request was untimely as it was outside the one-year time limit.

The Board finds that appellant's April 22, 2014 request for reconsideration failed to show clear evidence of error. The underlying issues of disability and need for medical treatment are medical in nature. In support of this request for reconsideration, appellant submitted the January 3, 2014 form report from Dr. Sperling. While Dr. Sperling did opine that appellant sustained a cervical-thoracic sprain as a result of the September 3, 2009 fall, which rendered him totally disabled for a period of time, this report is not sufficient to establish clear evidence of error in OWCP's decision. 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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁴ It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ Appellant did not submit sufficient medical evidence to shift the weight of the

⁸ See *Jesus D. Sanchez*, *supra* note 2.

⁹ See *Leona N. Travis*, *supra* note 9.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹⁴ *Nancy Marciano*, 50 ECAB 110 (1998).

¹⁵ See *A.F.*, 59 ECAB 714 (2008).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. Consequently, on reconsideration appellant has failed to establish clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review. The Board finds that OWCP did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in his reconsideration request dated April 22, 2014. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on May 28, 2014.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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