

**United States Department of Labor
Employees' Compensation Appeals Board**

M.W., Appellant)	
)	
and)	Docket No. 13-1816
)	Issued: January 27, 2014
DEPARTMENT OF THE AIR FORCE,)	
SPECIAL OPERATIONS COMMAND,)	
RANDOLPH AIR FORCE BASE, TX, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 30, 2013 appellant, through his attorney, filed a timely appeal from a March 21, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days elapsed since the most recent merit decision dated May 2, 2011 and the filing of this appeal on July 30, 2013, the Board lacks jurisdiction to review the merits of appellant's case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was not timely filed and did not establish clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

² The Board notes that, following the issuance of the March 21, 2013 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

On March 25, 2009 appellant, then a 54-year-old wood worker/forklift operator, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right shoulder injury in the performance of duty on March 24, 2009 while pushing a sheet of plywood.

By decision dated May 2, 2011, OWCP denied the claim as the evidence submitted was not sufficient to establish a causal relationship between appellant's condition and the March 24, 2009 employment incident.

In an appeal request form postmarked June 4, 2011, appellant requested an oral hearing before an OWCP hearing representative. He also submitted an October 6, 2009 x-ray of the right shoulder showing mild osteoarthritis and mild acromioclavicular (AC) arthrosis and a January 31, 2011 x-ray revealing moderate degenerative arthropathy in the right shoulder.

By decision dated July 13, 2011, OWCP denied appellant's request for an oral hearing finding that his request was untimely because it was not made within 30 days of its May 2, 2011 decision. It further indicated that it had exercised its discretion and further denied the request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

On March 12, 2013 appellant, through his attorney, requested reconsideration and submitted an April 13, 2009 magnetic resonance imaging (MRI) scan of the right shoulder which revealed a high grade partial tear along the articular surface of the distal supraspinatus tendon, a partial tear along the deep fibers of the subscapularis tendon, tendinosis of the infraspinatus tendon and AC arthritic changes.

Appellant submitted reports dated October 6, 2009 through October 31, 2011 from Dr. Mimi Zumwalt, a Board-certified orthopedic surgeon, who diagnosed torn right rotator cuff based on clinical examination and on an MRI scan. On October 6, 2009 Dr. Zumwalt indicated that appellant had a "distant history of right shoulder weight[-]lifting injury about 30 years ago" and was pushing a piece of plywood at work weighing about 60 pounds and noted a pop and pain. In an October 24, 2011 report, she diagnosed right shoulder pain, post work-related injury, right shoulder impingement syndrome, right AC joint disorder, right shoulder long head biceps tendon and partial supraspinatus and subscapularis tears. Dr. Zumwalt stated that appellant was seen for his right shoulder pain after he sustained a traumatic injury to his shoulder while working approximately two years ago.

On December 5, 2011 Dr. Leslie Donaldson, an internist, indicated that she had been treating appellant for the past eight years. In March 2009 appellant was seen for right shoulder pain, loss of strength and mobility and hernia. Dr. Donaldson stated that appellant was lifting and moving approximately 4,000 pounds of materials and equipment per day at work and opined that this was too much for one man to be doing. She also indicated that appellant had trace amounts of blood in his urine due to the heavy lifting. Dr. Donaldson opined that appellant's right shoulder, hernia and blood conditions were a direct result of constant and steady heavy lifting at work from 2008 to 2009, which was set off by an awkward movement during the employment incident on March 24, 2009.

By decision dated March 21, 2013, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to 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).⁴ One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which review is sought.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

To establish 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.¹³ The

³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁵ 20 C.F.R. § 10.607(a).

⁶ See *Jesus D. Sanchez*, *supra* note 3; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

⁷ 20 C.F.R. § 10.607(b).

⁸ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

⁹ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

¹⁰ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

Board makes an independent determination of whether a claimant 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.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent merit decision was OWCP's May 2, 2011 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since he did not file his request until March 12, 2013, it was filed outside the one-year time period. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.¹⁵

The Board finds that appellant's untimely request failed to demonstrate clear evidence of error. In its May 2, 2011 merit decision, OWCP denied appellant's traumatic injury claim because there was insufficient medical evidence to establish a causal relationship between his condition and the March 24, 2009 employment incident. Thereafter, counsel submitted reports from Dr. Donaldson and Dr. Zumwalt. As noted, the question of whether a claimant has established clear evidence of error entails a limited review of how the new evidence submitted bears on the evidence previously of record. None of the reports, though, manifest on their face, that an error had been made by OWCP in denying the claim. Dr. Donaldson's December 5, 2011 report stated that appellant was lifting and moving approximately 4,000 pounds of materials and equipment per day at work and opined that appellant's right shoulder, hernia and blood conditions were a direct result of constant and steady heavy lifting at work from 2008 to 2009, which was set off by an awkward movement during the employment incident on March 24, 2009. Although supportive of appellant's claim, it does not establish error in OWCP's prior decision.

Dr. Zumwalt's reports also diagnosed right shoulder pain, post work-related injury, right shoulder impingement syndrome, right AC joint disorder, right shoulder long head biceps tendon and partial supraspinatus and subscapularis tears. On October 6, 2009 she indicated that appellant had a "distant history of right shoulder weight[-]lifting injury about 30 years ago" and was pushing a piece of plywood across his body weighing about 60 pounds at work and noted a pop and pain. These reports from Dr. Zumwalt do not establish that OWCP committed an error in denying appellant's claim on the grounds that the medical evidence did not establish causal relationship, nor does it raise a substantial question as to the correctness of that decision. The Board has held that even reports that could have created a conflict in medical evidence, if timely filed, would not be sufficient to establish clear evidence of error.¹⁶

The April 13, 2009 MRI scan and x-rays dated October 6, 2009 and January 31, 2011 are diagnostic in nature and also are insufficient to establish clear evidence of error.

¹⁴ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ *Supra* note 5; see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ See *J.R.*, Docket No. 10-2137 (issued July 12, 2011).

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹⁷ None of the evidence submitted establishes on their face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that counsel's argument is not substantiated.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 8.