

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

G.T., Appellant)	
)	
and)	Docket No. 13-1818
)	Issued: January 7, 2014
DEPARTMENT OF TRANSPORTATION,)	
FEDERAL HIGHWAY ADMINISTRATION,)	
Vancouver, WA, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Raquell Krueger-Denio, for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2013 appellant, through his representative, filed a timely appeal from a March 22, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than 180 days elapsed from the last merit decision dated January 25, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

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's representative contends that the request for reconsideration was timely as it was postmarked on January 23, 2013. Appellant contends that none of the documents he received indicated that a reconsideration request had to be filed within one year.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 8, 2009 appellant, then a 55-year-old engineering technician, filed a traumatic injury claim alleging that on May 9, 2009 he sustained a lower back pinched nerve as the result of lifting and carrying luggage at the airport. OWCP accepted the claim for temporary aggravation of a preexisting lumbar sprain and temporary left radiculitis or thoracic/lumbosacral neuritis.

In progress notes dated July 29, 2010, Dr. Hans Russell, a treating Board-certified family practitioner, provided physical findings. He diagnosed chronic low back pain. Appellant informed Dr. Russell that he had not worked since May 24, 2010 due to extreme pain caused by performing his work duties.

In a September 13, 2010 report, Dr. Marc A. Wagner, a treating Board-certified physiatrist, diagnosed lumbago and provided physical findings. He related that appellant had a 25-year history of leg and low back pain which originated as the result of lifting rocks at work. Dr. Wagner noted that appellant quit work approximately four months prior due to pain.

In a January 27, 2011 report, Dr. Theodore Ford, an attending physician, provided examination findings. He diagnosed radiculitis, sacroiliitis, lumbosacral spondylosis and postlaminectomy syndrome, lumbar. Dr. Ford noted that appellant had been unable to work for the past seven months.

On February 28, 2011 OWCP received an August 23, 2010 report from Dr. Wagner, who diagnosed lumbago and lumbar postlaminectomy syndrome.

In a March 30, 2011 report, Dr. Timothy R. Borman, a second opinion osteopath Board-certified in orthopedic surgery, reviewed the medical evidence, a statement of accepted facts and set forth findings of a physical examination. He diagnosed a temporary aggravation of lumbar strain/sprain and temporary aggravation of lumbar radiculopathy. Dr. Borman concluded that the May 9, 2009 employment injury did not cause any permanent residuals and that appellant had returned to his preinjury baseline status.

On May 22, 2011 appellant filed a claim for wage-loss compensation (Form CA-7) commencing May 24, 2010.

By letter dated August 5, 2011, OWCP informed appellant that the evidence was insufficient to support his wage-loss claim. He was advised as to the medical evidence required to support his claim and given 30 days to provide such information.

In an August 15, 2011 progress note, Dr. Kent Yundt, a treating Board-certified neurological surgeon, diagnosed low back pain, lumbar radiculopathy, spondylosis and paresthesia/numbness. Appellant reported a worsening in his lower back pain over the past five to six months.

By decision dated September 28, 2011, OWCP denied appellant's claim. It found that the medical evidence failed to establish disability causally related to his accepted May 9, 2009 employment injury. In an attachment detailing appellant's appeal rights, OWCP informed him,

with emphasis added, that any reconsideration request must be “signed, dated and received [by OWCP] within one calendar year of the date of the decision.”

On October 10, 2011 appellant requested a review of the written record by an OWCP hearing representative. His representative noted that additional medical evidence was being sought from an attending physician.

By decision dated January 25, 2012, OWCP’s hearing representative affirmed the September 28, 2011 decision. She found that the medical evidence did not establish that appellant’s disability commencing May 24, 2010 was due to his accepted condition. The appeal rights accompanying the hearing representative’s decision also set forth that a reconsideration request must be made within one year of the date of the decision.

On January 29, 2013 OWCP received appellant’s request for reconsideration dated January 23, 2013. Appellant submitted progress notes dated September 16, 2011 through January 15, 2013 from Dr. Yundt; Dr. David Kane, a treating physician; Dr. Jon Lutz, a treating Board-certified internist; and Jason Winebarger and Lisa Turner, certified physician assistants. The physicians listed physical findings and the treatment provided. The diagnoses included: muscle weakness, numbness/paresthesia, lumbar spondylosis, low back pain and lumbar radiculopathy.

In a June 6, 2012 report, Ms. Turner noted that appellant sustained a work injury due to running through an airport with heavy bags and lifting them to place in the overhead storage area of the airplane. She stated that appellant was totally disabled for work on and after May 23, 2010. Ms. Turner stated that the May 9, 2009 employment injury permanently aggravated appellant’s preexisting lumbar condition.

By decision dated March 22, 2013, OWCP denied appellant’s reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.² 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.³ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP’s final merit decision was in error.⁴ Its procedures state that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,⁵ if the claimant’s application for review shows clear evidence of error on the part of OWCP.⁶ In this

² See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

³ 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

⁴ *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁵ 20 C.F.R. § 10.607.

⁶ See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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 manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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.⁹

OWCP's 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.¹⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration must be received by OWCP within one year of the date of the decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ OWCP did not receive appellant's January 23, 2013 request for reconsideration until January 29, 2013 which was more than one year after the most recent merit decision issued on

⁷ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

⁸ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

⁹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 6.

¹⁰ *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (October 2011).

¹¹ *See M.L.*, *supra* note 6; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

¹² 20 C.F.R. § 10.607(a).

¹³ *Robert F. Stone*, 57 ECAB 393 (2005).

January 25, 2012. The request is therefore untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for wage-loss compensation.¹⁴

The Board finds that appellant's request for reconsideration fails to establish clear evidence of error. The request does not show on its face that OWCP's denial of wage-loss compensation commencing May 24, 2010 was erroneous. Appellant submitted reports and treatment notes from September 16, 2011 through January 15, 2013 from Drs. Kane, Lutz and Yundt. While the treatment records address his diagnosis and set forth findings from examination, none of the physicians discussed appellant's disability beginning May 24, 2010 or its relationship to the accepted May 9, 2010 employment injury. The only report addressing appellant's disability beginning on May 24, 2010 was the June 6, 2012 report by Ms. Turner, a physician's assistant. The Board has held that reports from a physician assistant is of no probative medical value as a physician assistant is not a "physician" as defined under FECA.¹⁵ The Board has held 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 (*i.e.*, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report, which if submitted prior to OWCP's denial, would have created a conflict in the medical opinion evidence requiring further development, is not clear evidence of error.¹⁶

The arguments raised in support of appellant's untimely reconsideration request did not establish that OWCP error in denying his claim. Appellant's representative argued that the medical evidence was sufficient to support appellant's claim for wage-loss compensation and that he was unfamiliar with the process to claim benefits. The medical evidence submitted with his request is not positive, precise or explicit and manifest on its face that OWCP committed an error.¹⁷ Appellant has not demonstrated clear evidence of error on the part of OWCP in finding that he was not entitled to wage-loss compensation as of May 24, 2010. His request for reconsideration does not establish on its face that OWCP's January 25, 2011 merit decision was erroneous. Therefore, the Board finds that appellant has not established clear evidence of error.

On appeal appellant's representative contends that OWCP erred in considering his request to be untimely as it was postmarked on January 23, 2013. She also argued that appellant did not have notice regarding the change in OWCP's regulations regarding how timeliness of reconsideration requests was determined. Effective August 29, 2011 OWCP amended its regulations to reflect that an "application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought."¹⁸ As opposed to the use

¹⁴ 20 C.F.R. § 10.607(a); *see D.G.*, *supra* note 4; *Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ Section 8101(2) of FECA provides that that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See E.K.*, Docket No. 09-1827 (issued April 21, 2010); *J.M.*, 58 ECAB 303 (2007); *Thomas O. Bouis*, 57 ECAB 602 (2006).

¹⁶ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁷ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert G. Burns*, *supra* note 6.

¹⁸ 20 C.F.R. § 10.607(a).

of the postmark to determine timeliness.¹⁹ Contrary to the argument advanced by appellant's representative, he had sufficient notice that any request for reconsideration had to be received by OWCP within one year of the date of the merit decision. The initial decision denying his claim for wage-loss compensation advised him that any request for reconsideration had to be received by OWCP within one year of its decision. Appellant's request was untimely as it was not received by OWCP until January 29, 2013.

Consequently, the Board finds that OWCP properly denied appellant's reconsideration request as it was untimely filed and failed to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2013 is affirmed.

Issued: January 7, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ Prior to August 29, 2011, OWCP's regulations provided in pertinent part: "An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed." 20 C.F.R. § 10.607(a) (April 1, 2011).