

FACTUAL HISTORY

On April 19, 2009 appellant, then a 50-year-old mail handler (tram driver), sustained a traumatic injury in the performance of duty when a box of mail fell from an overhead belt and struck him on the head. He did not return to work. OWCP accepted appellant's claim for a variety of conditions.²

In a decision dated May 24, 2010, OWCP denied authorization for dental treatment. Appellant was conversing with his wife on May 22, 2009 and when he stood up from his chair, he suddenly dropped. His wife heard him fall and found him face down, rigid, with some jerking movement of his left shoulder and upper extremity. Appellant was unconscious for about two minutes and then gradually woke up as if from a very deep sleep, seeming confused. The fall had lacerated his lips and damaged his teeth. OWCP denied appellant's claim finding that the medical evidence did not support the May 22, 2009 incident which was a direct and natural result of what happened at work on April 19, 2009. Appellant requested a hearing.

On October 4, 2010 an OWCP hearing representative affirmed, finding that appellant had not met his burden to establish that the need for dental treatment arose as a consequence of the April 19, 2009 work injury. Medical evidence, including the opinion of appellant's surgeon, indicated that the employment injury did not result in a seizure or seizure disorder.

On November 13, 2012 appellant requested reconsideration for the repair of his teeth. He noted that he suffered a massive seizure six weeks after the blow to his head that broke his neck. Appellant noted that his claim was now accepted for traumatic brain injury/postconcussion syndrome, "which can cause seizures and is directly related to the injury on April 19, 2009."

OWCP received a February 15, 2013 report from Dr. Rhonda G. Taubin, a Board-certified psychiatrist, who noted that a heavy box of mail dropped onto appellant's head in April 2009 and he was later diagnosed with a C1-2 fracture, which required surgical fixation. In June of that same year, appellant experienced a seizure. He fell forward, knocking out two of his teeth and hitting his head once again. Appellant was currently taking medication for seizure control and has had no further seizures since then. Dr. Taubin offered the following: "It is my medical opinion that the seizure suffered and resultant facial injury and loss of teeth is related to his workplace injury, as he has no medical documentation related to seizure history."

In a decision dated September 19, 2013, OWCP denied appellant's reconsideration request. It found his request untimely and further found that it did not present clear evidence of error in its October 4, 2010 decision denying authorization for dental treatment. OWCP noted that new medical information did not rely on contemporaneous diagnostic testing but rather on appellant's unsupported assertion that he had suffered a seizure. It pointed to the attending surgeon's rationale in February 2010 that he had suffered no seizure activity whatsoever.

² The accepted conditions included scalp laceration, neck sprain, contusion, closed fracture of cervical vertebrae without spinal cord injury, displacement of cervical intervertebral disc without myelopathy, concussion, postconcussion syndrome (resolved as of April 30, 2012), major depression and generalized anxiety disorder.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP’s 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. If there is no such postmark or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.⁴

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵

The term “clear evidence of error” is intended to represent a difficult standard.⁶ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁷

ANALYSIS

The most recent merit decision denying authorization for dental treatment was OWCP’s hearing representative’s October 4, 2010 decision finding that appellant had not met his burden to establish that the need for dental treatment arose as a consequence of his April 19, 2009 work injury. Appellant had one calendar year or until October 4, 2011, to request reconsideration of this decision. His November 13, 2012 reconsideration request is therefore over a year too late. Appellant’s request is untimely.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Id.* at § 10.607(b).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁷ *Id.* at Chapter 2.1602.3.d(1).

Nevertheless, OWCP will grant reconsideration and reopen the case for review if appellant can establish clear evidence of error in its hearing representative's October 4, 2010 decision. The request itself is insufficient. The issue of causal relationship is a medical issue, one that must be addressed by rationalized medical opinion evidence.⁸ Appellant's belief is simply immaterial.

OWCP did receive a February 15, 2013 report from Dr. Taubin, a physiatrist. It was her opinion that the seizure appellant suffered in 2009, which resulted in facial injury and loss of teeth, was related to his April 2009 work injury.

On the face of it, this opinion does not show that the October 4, 2010 decision to deny authorization for dental treatment was clearly erroneous. As OWCP's hearing representative discussed, there were medical reasons to doubt that appellant had suffered a seizure. It was the opinion of the attending surgeon that appellant had, in fact, suffered no seizure whatsoever.

Dr. Taubin's assumption that appellant did suffer a seizure and her opinion that this was related to the April 2009 work injury, at best creates a disagreement between his physicians. Even if one were to disregard whether appellant based her opinion on a proper factual and medical history and whether she supported her opinion with sound medical reasoning, the appearance in the case record of a medical opinion supporting causal relationship does not, in the presence of medical opinion evidence to the contrary, show that the denial of authorization for dental treatment was clearly erroneous. 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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. 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.⁹ Her opinion does not meet the difficult standard of proof for an untimely request.

Accordingly, the Board finds that appellant did not meet his burden to establish that his untimely reconsideration request presented clear evidence of error in OWCP's October 4, 2010 decision. The Board will therefore affirm OWCP's September 19, 2013 decision denying his request.

CONCLUSION

The Board finds that OWCP properly denied appellant's reconsideration request.

⁸ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁹ *Dean D. Beats*, 43 ECAB 1153 (1992); *Leana N. Travis*, 43 ECAB 227 (1991). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (March 2011).

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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