

earning capacity as a personnel worker. An OWCP hearing representative affirmed the March 9, 1990 decision on January 2, 1992. In a March 23, 1994 decision, the Board reversed OWCP's decision and reinstated appellant's compensation.¹ OWCP subsequently accepted the conditions of chronic pain syndrome and aggravation of degenerative disc disease at L5-S1. Appellant returned to light duty in July 1999.

On July 30, 2001 appellant filed a claim for benefits based on traumatic injury, alleging that he sustained an injury to his lower back while pushing a heavy mail cart on July 25, 2001.² By decision dated June 25, 2002, OWCP denied his claim. By decision dated November 12, 2003, an OWCP hearing representative affirmed the denial and denied authorization for an August 2002 back surgery.

In a November 10, 2005 decision,³ the Board set aside OWCP's November 12, 2003 decision. The Board found that there was a conflict of medical opinion regarding whether appellant's alleged lumbar sprain was causally related to the July 25, 2001 work incident, whether he sustained a consequential urinary incontinence condition and whether the August 2002 L5-S1 laminectomy was necessitated by the alleged injury. On remand OWCP referred appellant to Dr. R. Peter Mirkin, a Board-certified orthopedic surgeon and impartial medical examiner, to resolve the conflict. Dr. Mirkin opined that appellant's lumbar symptomatology would be the same whether or not the July 25, 2001 incident had occurred. Further, appellant's urinary incontinence condition was not work related and his August 2002 back surgery was performed for a condition which preexisted the July 25, 2001 injury. In a May 12, 2008 decision, OWCP denied appellant's claim, finding that Dr. Mirkin's report represented the weight of the medical evidence.

In a September 24, 2009 decision,⁴ the Board set aside the May 12, 2008 decision, finding that Dr. Mirkin did not provide adequate medical rationale in support of his opinion. The Board remanded to OWCP for referral to a new medical specialist, to resolve the outstanding conflict in the medical evidence. The facts of the case as set forth in the Board's November 10, 2005 and September 24, 2009 decisions are incorporated by reference.⁵

OWCP referred appellant, together with the case record and statement of accepted facts, to Dr. Marvin R. Mishkin, a Board-certified orthopedic surgeon. In a January 5, 2010 report, Dr. Mishkin stated that appellant had no significant objective findings of radiculopathy, sciatica or neurological deficit and his clinical findings were not consistent with diffuse persistent subjective complaints, including back and lower extremity pain. He concluded to a reasonable degree of medical certainty that there was no injury resulting from the July 25, 2001 incident that

¹ Docket No. 93-799 (issued March 23, 1994).

² These claims have been administratively combined.

³ Docket No. 04-1268 (issued November 10, 2005).

⁴ Docket No. 08-2097 (issued September 24, 2009).

⁵ The Board noted that appellant had filed a separate claim for recurrence of disability stemming from the July 25, 2001 work incident, which it considered separately in its decision. The Board denied a claim based on a recurrence of disability as of July 25, 2001.

necessitated the 2002 surgery or his current complaints of pain and discomfort. Dr. Mishkin was unable to explain or determine the cause of appellant's urinary incontinence based on the clinical findings and the MRI scan results as noted in the medical records. He opined that any urinary problems were unrelated to the surgery of August 22, 2002, the August 19, 1987 injury or the July 25, 2001 work incident. Dr. Mishkin further opined, with reasonable medical certainty, that he would not have recommended the back surgery appellant underwent on August 22, 2002, based on his review of the medical records. He asserted that the MRI scan findings, subjective complaints and the lack of objective findings were not consistent with appellant's complaints. Dr. Mishkin concluded that appellant's August 22, 2002 back surgery was not a result of, related to or caused by or necessitated by the August 19, 1987 injury or July 25, 2001 incident.

By decision dated January 29, 2010, OWCP determined that appellant did not sustain a low back injury in the performance of duty on July 25, 2001, that his claimed urological condition was not causally related to any accepted condition and it denied authorization for his August 2002 surgery. It found that Dr. Mishkin's referee opinion represented the weight of the medical evidence. By decision dated October 26, 2010, an OWCP hearing representative affirmed the January 29, 2010 decision. By decision dated January 16, 2013, OWCP denied modification.

In an April 1, 2013 report, Dr. Mary E. Fox, a specialist in family medicine, stated that appellant had complaints of acute and chronic low back pain with right radicular leg pain, left rib pain and mid and upper back pain. She advised that he was involved in a motor vehicle accident on December 16, 2012 which temporarily aggravated his conditions. Appellant underwent physical therapy and received trigger point injections and had since improved. Dr. Fox stated, however, that appellant now reported having new pain in his right lower lumbar area. Sitting or standing more than 15 minutes caused numbness in his right leg. She also advised that he was seeing a psychiatrist for depression and anxiety.

In a December 23, 2013 report, Dr. Fox stated that appellant continued to have complaints of chronic low back pain with right radicular leg pain, left rib pain and mid and upper back pain. She noted that he was involved in another motor vehicle accident on September 5, 2013, which required a cervical discectomy at C3-6. Dr. Fox advised that there was evidence of L5-S1 nerve irritation; she further noted that appellant continued to experience depression and anxiety.

In a January 2, 2014 report, Dr. Scott H. Purvines, a specialist in neurosurgery, stated that appellant had recently undergone a three-level anterior cervical discectomy and fusion as well as evaluation of a new problem related to his back and lower extremity. He advised that appellant was doing well, with increased range of motion. Dr. Purvines noted that appellant had a long history of back and lower extremity problems, going back to his 1987 work injury. Appellant appeared to have a right L5 radiculopathy; which was the reason for his 2001 surgery; and perhaps a disc herniation at the L4-5 level relieved at that time. Dr. Purvines noted a potential neural compressive phenomena occurring in the L5-S1 foramen, though he opined that this was moderate. He stated that it is possible that removing the bone spur or disc herniation would help his pain but would have an unknown effect on his numbness. Dr. Purvines recommended that appellant undergo a computerized axial tomography (CAT) scan to help evaluate whether he

should consider the procedure. He concluded that appellant's injury occurred in 1987 due to the activities of his employment and persisted to the current time.

In a report dated January 16, 2014, Dr. Fox stated that she had treated appellant for chronic low back pain since April 16, 2012. She reviewed his medical history and opined that his August 2002 back surgery should have been accepted as work related. Dr. Fox opined that appellant was dealing with chronic lower back injuries and subsequent development of degenerative disc disease, with persistent chronic inflammation and weakness of the soft tissues of the spine. From the standpoint of his original injury in 1987, it would be expected that he would continue to have progressive degenerative disc disease in his lower spine. She advised that, while his low back pain and radiculopathy persisted after surgery, it was important to note that the acute pain decreased and that his urinary and fecal incontinence resolved within several weeks after his surgery. Dr. Fox concluded that appellant sustained significant lower back injuries in August 1987 and July 2001 while working at the employing establishment and that the August 2002 laminectomy at L5-S1 was directly and temporally related to the July 25, 2001 work injury, which was caused by aggravation of underlying lower back pathology from his original August 19, 1987 work injury. The surgery was appropriate given his clinical findings, which included physical examinations, imaging and nerve conduction studies. She further opined that, while the severe acute low back pain, radicular leg pain and urinary and fecal incontinence he experienced immediately after the July 25, 2001 injury had resolved since his August 2002 surgery. Appellant continued to suffer from failed postlaminectomy syndrome and progressive degenerative disc disease and would become more and more debilitated over time. Dr. Fox advised that he remained totally disabled from these injuries. In a January 22, 2014 report, she reiterated her opinion.

By letter dated January 9, 2014, received by OWCP on January 22, 2014, appellant requested reconsideration.

By decision dated March 11, 2014, OWCP denied appellant's request for reconsideration without a merit review. It found the request was untimely and that he did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ does not entitle an employee to a review of an OWCP decision as a matter of right.⁷ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ As one such limitation, OWCP 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.⁹ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).¹⁰

In those cases where a request for reconsideration is not timely filed, the Board had held however 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.¹¹ 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.¹²

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.¹³ The evidence must be positive, precise and explicit and

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *See Debra McDavid*, 57 ECAB 149 (2005).

¹¹ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011).

¹³ *See Dean D. Beets*, 43 ECAB 1153 (1992).

must be manifested on its face that it committed an error.¹⁴ 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 merely to 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.¹⁵

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.¹⁶ 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.¹⁷

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 begins on the date of the original OWCP decision.¹⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁹ OWCP's procedures as of August 29, 2011 require that, for all merit decisions issued on and after August 29, 2011, the timeliness of a reconsideration request is determined by the date the request is received by OWCP.²⁰ As appellant's January 9, 2014 request for reconsideration was received by OWCP on January 22, 2014, more than one year after the last merit decision of January 16, 2013, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.²¹

The Board finds that appellant's January 22, 2014 request for reconsideration failed to establish clear evidence of error. Appellant submitted reports from Drs. Fox and Purvines. Dr. Fox stated in an April 1, 2013 report that appellant had been involved in a motor vehicle accident on December 16, 2012, which temporarily aggravated his complaints of acute and chronic low back pain with right radicular leg pain, left rib pain and mid and upper back pain. Appellant also had new pain in his right lower lumbar area. In a December 23, 2013 report,

¹⁴ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *R.T.*, Docket No. 14-779 (issued August 22, 2014); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

¹⁶ *G.H.*, 58 ECAB 183 (2006).

¹⁷ *Thankamma Matthews*, 44 ECAB 765 (1983).

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ *Robert F. Stone*, 57 ECAB 393 (2005).

²⁰ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.1602.4(e) (August 29, 2011).

²¹ *Debra McDavid*, 57 ECAB 149 (2005).

Dr. Fox noted that he was involved in another motor vehicle accident on September 5, 2013, which required a cervical discectomy. She stated in a January 22, 2014 report that she treated appellant for his low back pain since April 16, 2012. Based on Dr. Fox's review of his medical history, his August 2002 back surgery should have been accepted as work related. She opined that the surgery was appropriate given his clinical findings, which included physical examinations, imaging and nerve conduction studies. Dr. Fox advised that he continued to experience failed postlaminectomy syndrome and progressive degenerative disc disease and would become more and more debilitated over time. She advised that he remained disabled from these injuries.

Dr. Purvines advised in his January 2, 2014 report that appellant had recently undergone a three-level anterior cervical discectomy and fusion as well as evaluation of a new problem related to his back and lower extremity. He stated that appellant had appeared to be a right L5 radiculopathy which could have been the reason for his 2001 surgery and that perhaps a disc herniation at the L4-5 level was relieved at that time. Dr. Purvines asserted that he had a potential, moderate neural compressive phenomena occurring in the L5-S1 foramen. He opined that appellant's injury occurred in 1987 due to the activities of his employment and had persisted.

The Board finds that these medical reports, while supportive of appellant's claim, are not sufficient to establish clear error by OWCP in the denial of an injury arising from the incident of July 25, 2001, while pushing a cart. The reports of Dr. Fox and Dr. Purvines do not shift the weight of the medical evidence in favor of the claimant or raise a substantial question as to the correctness of OWCP's decision denying the claim. Both Dr. Fox and Dr. Purvines offered opinions based upon appellant's current conditions in 2012 and 2013. The Board has held that medical evidence, such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have required further development of the medical evidence, is not clear evidence of error.²² Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP.

OWCP reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by him on reconsideration is insufficient 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.²³

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in his reconsideration request dated January 22, 2014. Inasmuch as

²² See *D.D.*, 58 ECAB 206 (2006).

²³ The Board notes that appellant submitted additional evidence to the record following OWCP's March 11, 2014 decision. The Board's jurisdiction is limited to a review of evidence which was before OWCP at the time of its final review. 20 C.F.R. § 501(c).

appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on March 11, 2014.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2014
Washington, DC

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

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

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