

FACTUAL HISTORY

On August 12, 1991 appellant, then a 41-year-old aircraft electrician, filed a traumatic injury claim alleging that on August 1, 1991 he injured his head, neck, and lower back in the performance of duty. OWCP accepted his claim for migraines, displacement of cervical and lumbar intervertebral discs, impotence, major depression, a crushing injury of the left shoulder and upper arm, and lumbar postlaminectomy syndrome. Appellant stopped work on August 5, 1991 and returned to limited-duty employment on October 5, 1992.³ He stopped again on March 8, 1996 and received compensation for total disability.⁴

On May 16, 2011 an OWCP hearing representative determined that appellant had received a \$90,747.25 overpayment of compensation because he submitted inaccurate travel vouchers from August 15, 2003 to June 19, 2010. She further found that he was at fault in the creation of the overpayment as he knew or should have known that he could not claim 300 to 400 miles of travel expenses when he was located only 8 to 10 miles from his physician's office. The hearing representative found that OWCP should deduct \$350.00 from continuing compensation to repay the overpayment.

On October 4, 2011 appellant entered into a plea agreement in the U.S. District Court for the Eastern Division of Pennsylvania. He pleaded guilty to 10 counts of making a false statement to obtain workers' compensation benefits under 18 U.S.C. § 1920, 10 counts of mail fraud under 18 U.S.C. § 1341, 1 count of theft of government funds under 18 U.S.C. § 641, and 1 count of making false statements under 18 U.S.C. § 1001.

³ In a decision dated December 11, 1992, OWCP reduced appellant's compensation to zero based on its finding that his actual earnings as a modified aircraft electrical worker effective October 5, 1992 fairly and reasonably represented his wage-earning capacity.

⁴ In decisions dated February 21, 2002, and February 7 and September 3, 2003, OWCP denied appellant's schedule award claim. In a nonmerit decision dated October 10, 2003, it denied his request for reconsideration under 5 U.S.C. § 8128(a) and, in a nonmerit decision dated February 19, 2004, denied his request for an oral hearing. By decision dated November 5, 2004, OWCP granted appellant a schedule award for a 25 percent loss of use of the penis. On October 6, 2005 it found that he was at fault in creation of an overpayment of compensation in the amount of \$1,644.66 because he received a lump-sum payment on his schedule award and continued to receive schedule award benefits. On December 28, 2005 OWCP denied appellant's request to change attending physicians and on August 18, 2006 denied an oral hearing. In a decision dated January 19, 2007, it granted him a schedule award for an 11 percent permanent impairment of the left arm and, on April 30, 2009, granted him a schedule award for a 3 percent permanent impairment of the left lower extremity.

By decision dated October 18, 2011, OWCP terminated appellant's compensation effective October 12, 2011 as he had pleaded guilty to defrauding FECA and thus was not entitled to further compensation under 5 U.S.C. § 8148.⁵

On March 5, 2012 the United States District Court of the Eastern District of Pennsylvania sentenced appellant to five years of probation on each count to run concurrently. It further ordered that he should make restitution of \$82,680.87 to OWCP.

In a decision dated March 28, 2012, an OWCP hearing representative affirmed the October 18, 2011 decision. He discussed appellant's allegation that the U.S. District Court refused to let him change his plea from guilty. The hearing representative noted that the record contained his plea agreement showing that he pleaded guilty to fraud in obtaining workers' compensation and the March 5, 2012 court judgment providing sentencing, which supported OWCP's termination of his compensation under section 8148(a).

On June 3, 2013 appellant appealed to the Board. In an order dismissing appeal dated July 18, 2013, the Board dismissed his appeal as it was not made within 180 days of the March 28, 2012 decision.⁶ The Board noted that on or around June 19, 2012 appellant sent his appeal request to OWCP instead of the Board.

In a report of telephone call dated October 23, 2013, appellant requested that OWCP put him back on compensation so that he could repay the overpayment. The claims examiner recommended that he appeal the decision.⁷

On February 4, 2014 appellant informed OWCP in a telephone call that he wanted "another chance to request reconsideration in this case."

By letter dated February 19, 2014, appellant requested reconsideration.⁸ He asserted that his public defender recommended that he plead guilty and told him that if he did he would not go

⁵ Section 8148(a) states, "Any individual convicted of a violation of section 1920 of Title 18, or any other Federal or State criminal statute relating to fraud in the application for or receipt of any benefit under [FECA] ... shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under [FECA] for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 [forfeiture] or 8129 [recovery of overpayments]. 5 U.S.C. § 8148(a). Section 10.17 of OWCP's implementing federal regulations clarify "When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary's entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial, for any injury occurring on or before the date of such guilty plea or verdict. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary's medical condition. 20 C.F.R. § 10.17.

⁶ *Order Dismissing Appeal*, Docket No. 13-1450 (issued July 18, 2013).

⁷ In a telephone call dated February 3, 2014, appellant related that he could not timely appeal to the Board because he could not read. He argued that his attorney forced him to plead guilty. On June 25, 2013 appellant requested that his senator help return him to workers' compensation. In an October 30, 2013 response to a congressional inquiry, OWCP advised that appellant appealed to the Board on July 20, 2012 but sent the appeal to an incorrect address. The Board did not receive the appeal until June 3, 2013, and thus it was untimely.

⁸ Appellant's wife wrote the reconsideration letter, which was signed by appellant.

to jail and would keep his workers' compensation benefits. Appellant claimed that he was not literate and did not understand the meaning of 18 U.S.C. § 1920 and 18 U.S.C. § 1341 or that he would lose entitlement to disability compensation if he pleaded guilty to violating those sections of the statute. Appellant's wife was ill at the time and he alleged that counsel advised that he "was going to take care of the criminal case first and afterwards he would approach the civil case." Appellant set forth his income and expenses and contended that he was unable to meet the necessities of living. He noted that he agreed at his court hearing that he would pay back the money. Appellant claimed to have sent his appeal to the Board to the wrong address, lost his appeal rights, and is now unable to get insurance coverage for his work injury.

In a decision dated May 22, 2014, OWCP denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error. It noted that his arguments regarding his court hearing and his public defender did not establish error in the March 28, 2012 decision.

On appeal appellant maintains that he should be returned to workers' compensation. He asserts that he was receiving treatment for narcotic dependency resulting from taking pain medication for his work injury. Appellant indicates that his insurance would not pay for treatment due to his employment injury. He and his family are struggling financially.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁹ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. 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.¹⁰

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.¹¹ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.¹²

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ 20 C.F.R. § 10.607.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹² *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

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.¹³ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁴ As appellant's February 19, 2014 request for reconsideration was received on March 28, 2014, more than one year after the last merit decision of record dated March 28, 2012, it was untimely.¹⁵ Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁶

The Board finds that the arguments raised by appellant in support of his request for reconsideration do not raise a substantial question as to the correctness of OWCP's March 28, 2012 decision or shift the weight of the evidence in his favor. OWCP terminated his compensation effective October 12, 2011 as he pleaded guilty to defrauding FECA. In support of his request for reconsideration, appellant argued that his attorney did not properly advise him that he would lose entitlement to compensation if he pleaded guilty to fraud in obtaining workers' compensation benefits. At the time, his wife was ill and unable to advise him and, as he was not literate, he relied upon his attorney's advice. Appellant described his financial difficulty. He sent an appeal to the Board to the wrong address. Appellant's insurance will not pay for medical treatment for his work injury. His contentions, however, do not show that OWCP erred in terminating his compensation under section 8148 based on his guilty plea. There is no evidence that the October 12, 2011 guilty plea was ever reversed, vacated, or set aside. Consequently, appellant's arguments are insufficient to establish clear evidence of error by OWCP.¹⁷

To establish clear evidence of error, it is not sufficient to merely 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.¹⁸ None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. He has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence of record is insufficient to establish clear evidence of error.

On appeal appellant contends that he should again receive workers' compensation. He further indicates that he was being treated for pain medication dependency due to his work injury. Appellant notes that insurance would not pay for his medical treatment. He experienced

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Robert F. Stone, supra* note 12.

¹⁵ *See supra* note 11 at Chapter 2.1602.4 (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

¹⁶ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ *G.H.*, 58 ECAB 183 (2006).

¹⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

severe financial difficulty. The issue, however, is whether OWCP properly terminated appellant's compensation as he pleaded guilty to fraud in obtaining workers' compensation benefits. Appellant's arguments are not pertinent to this issue. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).