

FACTUAL HISTORY

On May 21, 2012 appellant, then a 44-year-old letter carrier, filed an occupational disease claim alleging that he experienced pain and swelling in both his shoulders, arms, and wrists, left knee, right leg, neck, and lower back as a result of his employment duties. He stated that he first became aware of his condition on May 10, 2012 and it worsened on May 18, 2012. Appellant stopped work on May 20, 2012. The employing establishment stated that he had just returned to work on May 10, 2012 after being disabled from a previous injury and only worked 1.60 units before leaving work.²

In a May 10, 2012 report, Dr. Frank H. Gonzales, Board-certified in occupational medicine, noted appellant's medical history regarding his shoulder and upper arm. He related that appellant went back to work under his orthopedic surgeon's restrictions and contended that he suffered an aggravation of his existing condition with swelling to left wrist and pain to right shoulder. Dr. Gonzales conducted an examination and diagnosed shoulder and upper arm rotator cuff strain.

In a May 21, 2012 statement, appellant reported that on May 19, 2010 he suffered an accident on the job that included multiple injuries to the left knee, left arm and wrist, and right shoulder and arm. He alleged that the job duties of a letter carrier had aggravated these body parts since May 10, 2012. Appellant explained that on May 18, 2012 he performed his letter carrier duties which aggravated his previous injuries and caused new injuries to his right leg, left shoulder, upper neck, and lower back. He provided a list of his previous employment-related injuries and subsequent medical treatment.

In reports dated May 30 and June 2, 2012, Dr. Daniel C. Valdez, a Board-certified orthopedic surgeon, noted that appellant had a long history of work injuries relating to his left wrist, shoulder, knee, and back. He related that appellant was forced to return to work based on a second-opinion reviewer. After appellant worked for about a week he alleged a new injury. Dr. Valdez reviewed appellant's history and conducted an examination. He observed swelling of the left wrist, hand, and knee. Dr. Valdez also reported limited range of motion of the right shoulder, left wrist, and cervical spine. He noted lumbar pain with flexion and extension and increased shoulder pain with axial load. Dr. Valdez diagnosed lumbar and cervical strain as new injuries and exacerbation of back and neck sprain, carpal tunnel syndrome, ganglion of the joint of the left hand, and tear of the medial meniscus of the knee.

In a May 30, 2012 duty status report, Dr. Valdez noted that appellant worked as a letter carrier and diagnosed lumbar and cervical strain. He indicated that appellant could not return to work.

By letter dated June 7, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish his occupational disease claim. It requested additional evidence to establish that he sustained a diagnosed condition as a result of his employment duties.

² The record reveals that appellant filed five previous traumatic injury claims for injuries sustained on December 22, 2004 File No. xxxxxx741, January 11, 2008 File No. xxxxxx673, August 29, 2008 File No. xxxxxx282, October 19, 2009 File No. xxxxxx552, and May 19, 2010 File No. xxxxxx817.

In a June 12, 2012 statement, Ernesto Saucedo, appellant's supervisor, reported that when appellant arrived at work on May 10, 2012 he informed everyone that he was still in pain and could not perform his job duties. He explained that for the week or two that appellant was on the job he left work early and only cased about 10 letters. Mr. Saucedo reported that appellant would perform a section of his route and take over four hours even though it would normally take only two hours.

In a June 18, 2012 statement, appellant informed OWCP that he returned to work on May 10, 2012 and continued to receive monthly Veterans Affairs (VA) benefits. He requested a lump-sum payment of his schedule award. Appellant submitted a June 18, 2012 VA summary of benefits and a May 7, 2012 Notice to Report to Work from the employing establishment.

In a July 3, 2012 magnetic resonance imaging (MRI) scan of the lumbar spine, Dr. Padmavathi N. Srinivasan, a Board-certified diagnostic radiologist, stated that appellant had left lateral disc bulge at L2-3, which caused mild left neural foraminal narrowing, left paracentral inferior disc protrusion/extrusion at L5-S1, which encroached upon the left anterolateral recess, diffuse disc bulge, and facet arthrosis at L5-S1, and right lateral osteophyte/disc complex.

In a July 3, 2012 MRI scan of the cervical spine, Dr. Srinivasan stated that appellant's spinal alignment was satisfactory without evidence of compression fracture or spondylolisthesis. Marrow signal was normal and cervical cord was grossly unremarkable. Dr. Srinivasan diagnosed central disc protrusion at C6-7.

In a July 18, 2012 report, Dr. Valdez conducted a follow-up examination of appellant's May 10, 2012 lumbar and cervical injuries. He reviewed appellant's history and conducted an examination. Dr. Valdez diagnosed displacement of thoracic or lumbar and cervical intervertebral disc, neck strain, lumbar strain, left shoulder strain, carpal tunnel syndrome, ganglion of the joint, and tear of medial meniscus cartilage of knee. In a July 18, 2012 duty status report, he noted that appellant could not return to work.

In a decision dated August 6, 2012, OWCP denied appellant's claim finding that the medical evidence was insufficient to establish that he sustained diagnosed conditions causally related to his alleged factors of employment. It specifically pointed out that the evidence failed to address that he had been off work since December 2010 and to explain how he sustained his alleged injuries after returning to work for one day.

On October 23, 2012 OWCP received appellant's request for reconsideration. Appellant alleged that his physician had established fact of injury related to his job. He stated that he was diagnosed with displacement of lumbar and cervical discs due to his employment, which caused him a lot of pain and limited his major life activities. Appellant also contended that his employing establishment failed to comply with current work restrictions.

In a November 17, 2012 statement, appellant noted that he was attaching medical evidence to expedite his claim in the reconsideration process. He stated that Dr. Valdez sent medical evidence that supported "fact of injury."

In reports dated November 14 and December 18, 2012, Dr. Valdez reported that appellant continued to have pain in his neck and lumbar areas. He noted that a November 16, 2012

electromyography and nerve conduction velocity showed cervical and lumbar irritability. Dr. Valdez noted a date of injury of May 10, 2012. He stated that appellant had been off work for injuries involving a left knee meniscus tear with surgery, left wrist traumatic ganglion cyst, carpal tunnel syndrome with surgery, and right shoulder rotator cuff tear with surgery. Dr. Valdez reported that appellant returned to work based on a physician's second opinion and described his duties as loading and lifting trays into vehicles that weigh about 40 pounds each. He stated that there was a "reasonable correlation that lifting 40[-]pound trays repetitively while not in adequate physical condition is the cause of the muscle strain, ligament strain, and tendon strain with resulting lumbar and cervical dysfunction." Dr. Valdez explained that "this causes stress and strain to be passed to and absorbed by the skeletal structure and disc, resulting in the injury of May 10, 2012." He provided findings on examination and diagnosed displacement of lumbar and cervical discs. Dr. Valdez reported that appellant's injury was causally related to the work event as described above.

In a November 14, 2012 duty status report, Dr. Valdez noted that on May 10, 2012 appellant sustained injuries to his left wrist and arm, left knee, and right shoulder and arm while lifting 40 to 70-pound trays, loading vehicles, and driving at work. He diagnosed displacement of cervical and lumbar discs and indicated that appellant was permanently disabled.

By decision dated January 14, 2013, OWCP denied modification of the August 6, 2012 decision finding that the medical evidence was insufficient to establish causal relationship.

Following the decision OWCP received a letter dated October 25, 2012 by Dr. Valdez, which indicated that appellant's appointment had been rescheduled to November 14, 2012. Appellant also resubmitted Dr. Valdez' duty status forms and reports dated July 18 to December 14, 2012.

OWCP also received new medical evidence from Dr. Valdez including February 21 and March 27, 2013 duty status reports, which indicated that appellant should remain out of work due to a May 10, 2012 injury and handwritten progress notes dated January 21 and February 21, 2013.

By letter dated January 13, 2014 and received by OWCP on January 24, 2014, appellant's counsel, requested reconsideration. He stated that he was enclosing a medical report from Dr. Valdez, which explained the work factors that caused appellant's injuries after returning to work on May 10, 2012. Counsel pointed out that Dr. John R. Anderson, the impartial medical adviser in appellant's previous claim, OWCP File No. xxxxxx282, also indicated that appellant would be at high risk for another injury. He alleged that Dr. Valdez' report clearly established the causal relationship between the May 10, 2012 injury and appellant's ongoing injuries.

In a November 25, 2013 narrative report, Dr. Valdez stated that appellant returned to work with a weakened shoulder, wrist, and knee and noted that his duties including lifting and moving boxes of about 40 pounds. He explained that "with the dysfunction of the shoulder, wrist, and knee, the cervical and lumbar spines were forced to work with more strain than would normally occur. This placed increased force at the disc levels and created the cervical and lumbar spine disc displacement." Dr. Valdez reported that he did not draw a direct line of causation in his previous reports because he thought the connection was obvious, but pointed out

that he more clearly outlined his thought process as outlined above. He stated that although there may be other work factors that contributed to appellant's cervical and lumbar injuries, as well as the aggravation of the shoulder, wrist, and knee, it was the lifting of the 40 pounds that was the direct cause.

In a decision dated July 1, 2014, OWCP denied appellant's January 13, 2014 request for reconsideration on the grounds that his request was untimely filed and that he failed to present clear evidence of error on the part of OWCP. It determined that the most recent merit decision on record was the January 14, 2013 decision denying modification of the August 6, 2012 decision. Because appellant's request for reconsideration was not received within one year of the January 14, 2013 decision his claim was untimely filed. OWCP further determined that the evidence submitted after the last merit decision was insufficient to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁵

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁶ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on

³ 20 C.F.R. § 10.607.

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

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 The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

ANALYSIS

The only decision before the Board is the July 1, 2014 nonmerit decision, in which OWCP denied appellant's request for reconsideration on the grounds that his request was untimely filed and failed to establish clear evidence of error. In a decision dated January 14, 2013, OWCP denied modification of the August 6, 2012 decision, which denied his occupational disease claim. In a letter received by OWCP on January 24, 2014, appellant's counsel requested reconsideration. The Board finds that more than one year elapsed from the most recent OWCP merit decision dated January 14, 2013, to appellant's request for reconsideration received on January 24, 2014.¹³ Thus, appellant's request for reconsideration was not timely filed.

The Board also finds that appellant failed to establish clear evidence of error. Along with his request for reconsideration appellant, through his counsel, provided a letter explaining that Dr. Valdez' report set forth the work factors which caused appellant's injuries and provided the causal relationship between his work factors and his diagnosed conditions. He alleged that Dr. Valdez' most recent report clearly established the causal relationship between his injury of May 10, 2012 and his ongoing conditions. The Board finds that appellant's allegations do not raise a substantial question as to the correctness of OWCP's January 14, 2013 decision.

Appellant submitted various reports by Dr. Valdez that were previously of record along with new handwritten progress notes. He also submitted a November 25, 2013 report by Dr. Valdez not previously reviewed by OWCP. Dr. Valdez explained that because of appellant's weakened shoulder, wrist, and knee his task of lifting and moving boxes weighing about 40 pounds would have aggravated his shoulder, wrist, and knee injuries and caused additional strain to his cervical and lumbar spine. The Board notes that while Dr. Valdez' November 25, 2013 report is generally supportive of a causal relationship between appellant's shoulder, wrist, knee, and lumbar conditions and his employment duties as a letter carrier, it does not establish clear error on the part of OWCP in denying his occupational disease claim, nor does it raise a substantial question as to the correctness of OWCP's decision.

⁹ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ Pursuant to OWCP regulations, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought. 20 C.F.R. § 10.607(a).

OWCP 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.¹⁴ In this case, the medical reports appellant submitted in support of his untimely request for reconsideration are insufficient to shift the weight of evidence in favor of his claim or raise a substantial question that OWCP erred by denying his May 21, 2012 occupational disease claim. None of the evidence submitted manifests on its face that OWCP committed an error in denying his claim. Therefore, the Board finds that appellant has not presented clear evidence of error on the part of OWCP.

On appeal, appellant's counsel alleges that Dr. Valdez' reports demonstrated clear evidence of error on the part of OWCP because he provided an accurate history of injury. He contends that, in its denial decision, OWCP improperly found Dr. Valdez' reports to be of little probative value because they were based on an incomplete history even though Dr. Valdez described appellant's work duties as involving loading and lifting trays into vehicles. The Board notes, however, that in the January 14, 2013 decision OWCP does correctly note that Dr. Valdez provided a history of appellant lifting mail trays and driving a vehicle at work. OWCP stated that Dr. Valdez' report had an incomplete history because he failed to note that upon appellant's return to work on May 10, 2012 he only worked partial days on May 10, 14, 15, 18, and 19, 2012 and did not work from May 11 to 13, 2012.¹⁵ Thus, it concluded that Dr. Valdez was not aware of the work appellant actually did from May 10 through 19, 2012. The Board finds, therefore, that appellant failed to demonstrate how Dr. Valdez' reports demonstrated clear evidence of error on the part of OWCP.

Appellant's counsel also alleges that OWCP should have considered the impartial medical report of Dr. Anderson from appellant's previous claim File No. xxxxxx282. The Board notes, however, that counsel fails to explain how this report has any bearing on appellant's current claim for a new occupational disease nor how failure to consider this report constituted clear evidence of error on the part of OWCP.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits as it was untimely filed and failed to show clear evidence of error.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (October 2011).

¹⁵ OWCP specifically notes that appellant worked 1.80 hours on May 10, 2012, 1.66 hours on May 14, 2012, 3.86 hours on May 15, 2012, 6.24 hours on May 18, 2012, and 1.18 hours on May 19, 2012.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2015
Washington, DC

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

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

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