

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

L.L., Appellant)

and)

DEPARTMENT OF AGRICULTURE,)
FOREST SERVICE, CASUAL FIREFIGHTERS,)
Albuquerque, NM, Employer)

Docket No. 15-0931
Issued: December 18, 2015

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 23, 2015 appellant filed a timely appeal from a December 1, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from August 1, 2013, the date of the most recent OWCP merit decision, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.²

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant filed a timely request for oral argument. By order dated October 16, 2015 the Board, after exercising its discretion, denied his request, finding that his arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-0931 (issued October 16, 2015).

FACTUAL HISTORY

On June 19, 2013 appellant, then a 51-year-old forestry technician, filed a Form CA-1, traumatic injury claim, alleging that on June 16, 2013 he sustained cardiac arrest due to physical exertion and possible high altitude while hiking to a fire at Rocky Mountain National Park. He stopped work on June 16, 2013.

By letter dated June 20, 2013, OWCP advised appellant of the type of factual and medical evidence needed to establish his claim and requested that he submit such evidence, particularly requesting that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

Appellant submitted witness statements from Tim Murphy and Jose Gonzales, fellow firefighters, who noted on June 16, 2013 their crew was hiking to a fire at Rocky Mountain National Park at an elevation of 10,000 feet. During this hike appellant had several seizures and was slouched against a tree. Mr. Murphy and Mr. Gonzales performed coronary pulmonary resuscitation until the medics arrived. Appellant was subsequently transported to a hospital.

Appellant submitted hospitalization records where he was treated by Dr. Peter Dixon Riley, a Board-certified internist, from June 16 to July 3, 2013, for cardiac arrest. Dr. Dixon noted that appellant was a firefighter in Estes Park and experienced mild shortness of breath which he attributed to the altitude. Appellant reported hiking to a worksite on June 16, 2013 and then he slumped over and had minor convulsions. Dr. Riley noted that appellant was found to have no pulse and was shocked, intubated, and then transferred to the hospital. He diagnosed cardiac arrest at Rocky Mountain Park, possible seizure activity, acute respiratory failure, encephalopathy, anoxic, elevated liver function tests with a normal echocardiogram. On June 27, 2013 appellant underwent an urgent coronary artery bypass performed by Dr. Allan Brants, a Board-certified thoracic surgeon, who diagnosed severe coronary artery disease, left ventricle ejection fraction measured at 40 percent, no significant valvular heart disease pursuant to an echocardiogram, presentation with myocardial infarction and cardiac arrest suffered out of hospital and hypertension. A discharge summary prepared by Dr. Barry Ray Smith, a Board-certified cardiologist, dated July 3, 2013, diagnosed cardiac arrest and three vessel coronary artery disease. Dr. Smith noted that appellant underwent a multi-vessel bypass surgery after cardiac catheterization and implantation of an implantable cardioverter-defibrillator (ICD).

In a decision dated August 1, 2013, OWCP denied appellant's claim, finding that he had failed to submit sufficient medical evidence establishing that the medical condition was causally related to the work event.

In an appeal request form dated July 25, 2014, but received by OWCP on September 5, 2014, appellant requested reconsideration.³

Appellant submitted duplicate copies of his hospital admission reports from June 16 to July 3, 2013. He came under the treatment of Dr. Thampi K. John, a Board-certified cardiologist, on July 31, 2013, for coronary artery disease, cardiac arrest, and history of ICD

³ Appellant initially faxed the appeal request form to his employing establishment on July 25, 2014, but did not send it to OWCP at that time.

implantation. Dr. John noted that appellant had recently been treated for cardiac arrest. Appellant reported being a firefighter who worked in the Rocky Mountain National Park where he had a cardiac arrest. He subsequently underwent a cardiac workup which included cardiac catheterization and coronary artery bypass surgery. Dr. John diagnosed coronary artery disease status post bypass surgery, ventricular tachyarrhythmia and hypertension. In a July 9, 2014 report, he diagnosed coronary artery disease status post bypass surgery and cardiac arrest. Dr. John noted that appellant had cardiac arrest when he was working as a firefighter. He noted that appellant's cardiac arrest and myocardial infarction was most probably precipitated by strenuous activity in which he was engaged as a firefighter.

By decision dated December 1, 2014, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

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.”⁴

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁶

To show clear evidence of error, 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.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹² As appellant's request for reconsideration was not received by OWCP until September 5, 2014, more than one year after issuance of the August 1, 2013 merit decision, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its August 1, 2013 decision denying his claim for compensation.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In his September 15, 2014 reconsideration request, appellant disagreed with OWCP's decision denying his claim for compensation.

In support of his reconsideration request, appellant resubmitted copies of reports from his hospital admission from June 16 to July 2, 2013. OWCP had previously considered this evidence and in submitting these documents appellant did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. It is not apparent how resubmission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, these reports are insufficient to establish clear evidence of error.

Appellant submitted a July 31, 2013 report from Dr. John who treated him for cardiac arrest. He reported being a firefighter who worked in Rocky Mountain National Park when he suffered cardiac arrest. Dr. John diagnosed coronary artery disease status post bypass surgery, ventricular tachyarrhythmia and hypertension. On July 9, 2014 he noted that appellant had cardiac arrest when he was working as a firefighter. Dr. John noted that appellant's cardiac arrest and myocardial infarction were most probably precipitated by the strenuous activity he engaged in as a firefighter at that time. He diagnosed coronary artery disease status post bypass surgery and history of cardiac arrest. While this evidence does support appellant's claim, it is not enough to raise a substantial question as to the correctness of OWCP's August 1, 2013 decision. This evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error. The Board notes that clear evidence of error is intended to represent

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² 20 C.F.R. § 10.607(a).

a difficult standard. The Board has found that the submission of 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 sufficient to establish clear evidence of error.¹³

Thus, the Board finds that appellant has not established clear evidence of error by OWCP in its August 1, 2013 decision.

On appeal, appellant reiterates assertions that he made before OWCP indicating that he had submitted sufficient medical evidence to support that his myocardial infarction was causally related to the work incident of June 16, 2013. He also asserted that OWCP erred in not finding clear evidence of error as he submitted critical information from his cardiologist concerning causal relationship. However, as noted, the Board does not have jurisdiction over the merits of the claim. As explained, appellant has not established clear evidence of error by OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

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

Issued: December 18, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹³ *D.G.*, 59 ECAB 455 (2008).