

FACTUAL HISTORY

On February 22, 2010 appellant, then a 59-year-old transportation supervisor, filed a traumatic injury claim alleging injury to his back on February 17, 2010 when the wheel of his desk chair rolled into worn tile and jarred his back. OWCP accepted the claim for sprain of back, lumbar region.³

On May 25, 2010 appellant filed a Form CA-7, claim for wage-loss compensation, for the period April 27 to May 20, 2010. Following further development, by decision dated August 16, 2010, OWCP denied the wage-loss claim as the evidence of record failed to support that the claimed period of disability was due to the accepted work injury.

On September 1, 2010 OWCP received appellant's August 23, 2010 request for an oral hearing before an OWCP hearing representative. A telephonic hearing was held on December 8, 2010 and additional medical evidence was received.

By decision dated February 23, 2011, the OWCP hearing representative affirmed OWCP's August 16, 2010 decision as there was insufficient rationalized medical evidence of record to support that appellant's disability was causally related to the accepted work injury.⁴

On June 4, 2014 OWCP received a May 28, 2014 request for reconsideration from appellant's counsel.⁵ Counsel argued that while OWCP's decision identified a lack of a causal connection between appellant's employment and a personal injury sustained in the performance of duty, the evidence supported that a workplace hazard caused appellant's back injury. Furthermore, she argued that appellant's physicians agreed that appellant's injury was directly related to his employment. Thus, counsel contended that there was clear evidence of error in the denial of the wage-loss claim. She further requested that the accepted conditions of appellant's injury be upgraded based on the March 4, 2014 second opinion examination of Dr. Peter J. Yeh, a Board-certified neurologist, who indicated that the work-related injury on February 17, 2010 was identified as a low back sprain, but was in fact a rather more serious condition of herniated disc.

On October 27, 2014 OWCP received appellant's July 30, 2014 form requesting reconsideration.

By decision dated November 21, 2014, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to present clear evidence of error.

³ The record indicates that appellant stopped work on February 18, 2010 and utilized sick leave for his absence.

⁴ Appellant also has an accepted January 23, 2004 claim under file number xxxxxx406, slipped and fell off a platform onto the floor injuring his back, tailbone, and neck.

⁵ On March 27, 2014 OWCP acknowledged that Kimberly D. Moss, Esq., was appellant's authorized counsel.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.⁶ 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, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoumpment hearing decisions.⁷

Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

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 OWCP committed an error. Evidence that 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 to merely 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. To show clear evidence of error, the evidence submitted 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.¹⁰

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

⁶ 20 C.F.R. § 10.607(a) (2011).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

⁸ *Supra* note 6 at § 10.607(b); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁹ *See Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

evidence of error.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

OWCP issued its most recent merit decision on February 23, 2011, affirming a prior OWCP decision which found that there was no detailed, rationalized medical evidence to support that appellant's claim for disability for the period April 27 to May 20, 2010 was causally related to the accepted February 17, 2010 work injury. Appellant's request for reconsideration by his counsel, dated May 28, 2014 was received June 4, 2014, more than a year after the February 23, 2011 merit decision, and was, therefore, untimely filed. Similarly, appellant's July 30, 2014 request for reconsideration, received by OWCP on October 27, 2014, was also untimely filed. Appellant must therefore establish clear evidence of error in OWCP's February 23, 2011 decision.

The Board finds that appellant has not established clear evidence of error in OWCP's February 23, 2011 decision. Appellant's counsel argued that the evidence supported a workplace hazard where appellant was injured and pointed to causation of appellant's back injury. Furthermore, she argued that appellant's physicians agreed that appellant's injury was directly related to his employment. OWCP has accepted that the February 17, 2010 injury occurred as alleged. Appellant's claim for wage loss had been denied as there was no detailed, rationalized medical evidence submitted to establish that he was disabled for the period April 27 to May 20, 2010 causally related to the accepted February 17, 2010 work injury. Counsel's arguments do not establish clear evidence of error in OWCP's February 23, 2011 decision.

Counsel also argued that the medical evidence supports that appellant sustained a herniated disc, rather than a lumbar sprain. However, since OWCP has only accepted that appellant sustained a lumbar sprain, this argument does not show clear evidence of error in OWCP's February 23, 2011 decision, which only decided whether appellant had established disability during the period April 27 to May 20, 2010.

The evidence and arguments submitted on reconsideration do not raise a substantial question as to the correctness of OWCP's decision in denying appellant's claim for disability for the period April 27 to May 20, 2010. Consequently, the Board finds that OWCP properly found that the untimely reconsideration request did not establish clear evidence of error.

On appeal, appellant's counsel contends that the second opinion specialist confirmed that appellant required back surgery and the accepted lumbar strain condition needed to be upgraded. However, she is arguing the merits of the case, of which the Board does not have jurisdiction.¹³ Counsel further contended that clear evidence of error was established based on the voluminous

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹² *Nancy Marcano*, 50 ECAB 110 (1998).

¹³ 20 C.F.R. § 501.2(c).

documentation of appellant's medical history. As noted above, appellant has not shown clear evidence of error in OWCP's February 23, 2011 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 29, 2015
Washington, DC

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

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

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