

ISSUE

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

FACTUAL HISTORY

On March 17, 2010 appellant, then a 29-year-old customer service representative, filed a traumatic injury claim indicating that on March 11, 2010 he was "assaulted" when his manager grabbed/groped his left shoulder, causing him to turn his neck suddenly. He alleged a left trapezius muscle strain and secondary laceration of right fifth finger "due to the drowsiness effect of his prescribed flex meds." The employing establishment controverted the claim. Further development followed.

In support of his claim, appellant submitted notes from the employing establishment health unit. In a note dated March 13, 2010, Frank Aguayo, a physician assistant, related that appellant was seen for left trapezius muscle pain, after his boss grabbed him by the shoulder two days prior. OWCP also received an unsigned report from the Cleveland Veterans Affairs Medical Center, dated March 16, 2010, which noted that appellant had been seen for laceration of the fifth finger.

By decision dated April 29, 2010, OWCP denied the claim. It found that the March 11, 2010 claimed event supported that the manager grabbed appellant's shoulder; however, there was no medical evidence which provided a diagnosis in connection to the event. OWCP further found that he failed to describe how the finger injury was sustained and, thus, fact of injury was not established.

On June 2, 2010 OWCP received appellant's May 27, 2010 request for reconsideration. Appellant explained that medication he was taking as a result of his assault caused him to become "woozy" and lose his balance. When he lost his balance his right hand then went through a window and caused a laceration of the right finger. Appellant resubmitted medical evidence of record.

By decision dated August 17, 2010, OWCP denied modification of its April 29, 2010 decision. It found the evidence on file clearly established that appellant's supervisor placed his hand on appellant's left shoulder to gain his attention on March 11, 2010; however, there was insufficient medical evidence on file to establish that a medical condition arose from that incident. OWCP also found that the evidence submitted was insufficient to establish that the injury to his right fifth finger occurred as reported.

On September 25, 2014 OWCP received another request for reconsideration. Appellant contended that he was disabled at the time of the filing of his workers' compensation claim due to his physical and mental conditions and requested that time limitations pertaining to his claim be waived. He submitted a March 26, 2013 favorable decision from the Social Security Administration which found that he had severe impairments, which included a left shoulder injury, degenerative disc disease, depression and post-traumatic stress disorder, which were disabling as defined in the Social Security Act as of March 13, 2010.

By decision dated December 19, 2014, OWCP denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error.

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.³ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁵

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 *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.⁶

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.⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.⁸

³ *Id.* at § 10.607(a) (2011).

⁴ *Id.* at § 10.607(b) (2011); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁵ *See Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *Robert G. Burns*, 57 ECAB 657 (2006).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent OWCP merit decision in this case was issued on August 17, 2010. Appellant did not request reconsideration until September 25, 2014, more than one year after the August 17, 2010 merit decision. Therefore, his reconsideration request was not timely filed. While appellant has requested that the time limitation be waived due to his physical and mental condition, he has not submitted any medical evidence to substantiate that he was incompetent and incapable of filing a request for reconsideration during the year following August 17, 2010.⁹ Consequently, he must demonstrate clear evidence of error by OWCP in denying his request for a merit review of his claim.

The Board finds that appellant has not established clear evidence of error in OWCP's December 19, 2014 decision. As noted, the occurrence of the March 11, 2010 work incident is not in dispute. The claim was denied because the medical evidence did not establish that the March 11, 2010 incident caused an injury or that appellant sustained a laceration secondary to the March 11, 2010 work incident.

In support of his untimely request for reconsideration, appellant submitted a March 26, 2013 decision from the Social Security Administration which found that he met the medical requirements for social security disability benefits as of March 13, 2010. Although the Social Security Administration decision noted a left shoulder condition, as well as degenerative disc disease, depression, and post-traumatic stress disorder, it is insufficient to establish clear evidence of error. The Board has reviewed a similar case, *B.U.*,¹⁰ wherein appellant alleged that a Social Security Administration decision regarding a claim for disability benefits, established her FECA claim. The Board held that entitlement to benefits under another statute does not establish entitlement to benefits under FECA. Thus, the Social Security Administration decision was not relevant to the underlying issue and was not of sufficient probative value to shift the weight of the evidence or raise a substantial question as to the correctness of OWCP's decision.¹¹

The Board therefore finds that the March 26, 2013 Social Security Administration decision that appellant submitted in support of his reconsideration request did not establish clear evidence of error. Appellant has not established clear evidence of error in August 17, 2010 decision which denied his claim.

CONCLUSION

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

⁹ See *D.B.*, Docket No. 10-976 (issued December 1, 2010).

¹⁰ Docket No. 10-721 (issued October 25, 2010).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 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