

FACTUAL HISTORY

On February 19, 2013 appellant, then a 45-year-old work/life consultant, filed a traumatic injury claim alleging that on February 4, 2013 he injured his lower back when he slipped and fell on an icy walkway.

In a February 6, 2013 report, Dr. John M. Harris, a treating physician, related that appellant was seen that day for complaints of pain which began two days prior. Appellant stated that he had slipped and fallen on ice at work. A physical examination revealed posterior spinal and coccyx tenderness with no paravertebral spasm, edema, or abnormality. Review of an x-ray interpretation of the sacrum and coccyx showed no fracture. Dr. Harris diagnosed a tailbone injury.

In an April 1, 2013 report, Ronnie L. Reese, a certified physician assistant, reported that appellant was seen for back pain and that appellant has a history of chronic low back pain. Appellant stated that he has had increased low back pain since February 4, 2013 when he slipped on ice, landed on his tailbone, and then fell flat onto his back. He also informed Mr. Reese that he continued working following the incident. Complaints included lumbosacral moderate back pain which was worsening. Appellant related that his pain radiated to the left leg and that it was exacerbated by bending. A physical examination of the low back revealed no palpable spasm, decreased range of motion due to pain, and diffuse lumbar spine tenderness. Mr. Reese diagnosed low back pain which had been exacerbated by the fall on February 4, 2013.

In a follow-up visit on May 15, 2013, Mr. Reese diagnosed low back pain. Physical examination findings included low back diffuse tenderness which was mostly muscular, decreased range of motion due to pain, and some left sciatic tenderness.

In a July 8, 2014 report, Dr. Wesley L. Smeal, an examining Board-certified physiatrist, diagnosed lumbar strain, lumbar radiculitis, and low back pain radiating into the left leg. Under history of illness, he related that appellant had intermittent buttock and leg symptoms and back pain following a February 4, 2013 slip and fall on ice at work. A physical examination revealed some L1-2 discomfort and at the lumbosacral joint going into the buttock.

By letter dated July 23, 2013, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised as to the medical and factual evidence required and given 30 days to submit this information.

In a July 29, 2013 attending physician's form report (Form CA-20), Dr. Larry L. Brown, a treating Board-certified internist, diagnosed acute and chronic low back pain which had been aggravated by the February 4, 2013 slip and fall at work.

By decision dated September 5, 2013, OWCP denied appellant's claim for traumatic injury finding that he had not submitted sufficient medical evidence to establish a causal relationship between his diagnosed condition and the February 4, 2013 incident. It also noted that the medical evidence failed to establish any aggravation of a preexisting condition and explained the evidence required to support an aggravation.

On September 16 and 22, 2014 OWCP received appellant's September 12, 2014 request for reconsideration. In support of the reconsideration request, appellant submitted a September 12, 2014 report from Dr. Smeal, who related that he first saw appellant on July 8, 2013 for a February 4, 2013 slip and fall at work. Dr. Smeal related that prior to the February 4, 2013 incident appellant stated that he had a history of low back pain. He then related the treatment provided to appellant for his significant increase in symptoms following the February 4, 2013 incident. In concluding, Dr. Smeal opined that appellant's preexisting lumbar condition had been exacerbated by the slip and fall on February 4, 2014 based on appellant's description of the incident and increased musculoskeletal and discogenic low back pain.

By decision dated November 25, 2014, OWCP denied appellant's request for reconsideration as it was untimely and failed to establish clear evidence of error on the part of OWCP. It stated that the September 12, 2014 request for reconsideration was not received within one year from the September 5, 2013 decision and was not received and imaged until September 22, 2014 and are therefore, untimely. OWCP further found that the evidence submitted with the untimely request for reconsideration did not establish clear evidence of error and was not sufficient to require it to reopen appellant's claim for consideration of the merits.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.² 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.³

OWCP, however, may not deny an application for review solely because the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁴ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise, and explicit and must

² 20 C.F.R. § 10.607(a).

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

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011). OWCP procedures further provide 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. *Id.* at Chapter 2.1602.5(a).

⁶ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

manifest on its face that OWCP committed an error.⁷ OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but 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.¹²

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated November 25, 2014 in which it declined to reopen appellant's case on the merits because the request was not timely filed, and did not show clear evidence of error. OWCP denied appellant's traumatic injury claim as there was insufficient medical evidence to establish that his February 4, 2013 employment incident resulted in an injury as alleged. In its September 5, 2014 decision, it specifically noted that there was no medical evidence based on a proper factual background which established that his preexisting back condition had been aggravated by the February 4, 2013 incident. Appellant submitted a request for reconsideration received by OWCP on September 16 and 22, 2014. As the received date is more than one year following OWCP's September 5, 2014 merit decision, the Board finds that appellant's reconsideration request is untimely.

The Board also finds that appellant failed to show clear evidence of error. With his request for reconsideration, he submitted additional medical evidence from Dr. Smeal opining that his preexisting lumbar condition had been exacerbated by the slip and fall on February 4, 2014 based on his description of the incident and increased musculoskeletal and discogenic low back pain. However, this report is insufficient to establish clear evidence of error. To establish clear evidence of error, it is not enough merely to 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. The submission of a detailed well-rationalized medical report, which, if

⁷ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁸ 20 C.F.R. § 10.607.

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *supra* note 7.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 3.

submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³ This evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error. Consequently, the Board finds that Dr. Smeal's report submitted on reconsideration is insufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error by OWCP in its November 25, 2014 decision.

On appeal, counsel argued that OWCP was too stringent in the September 5, 2014 decision regarding appellant's burden of proof and whether the February 4, 2013 incident aggravated his preexisting back condition. He argued that as appellant was asymptomatic prior to the incident that the fact that he became symptomatic following the slip and fall on February 4, 2013 supports a finding of aggravation. In addition, counsel argues that Dr. Smeal's September 12, 2014 report establishes the fact that appellant's preexisting back condition had been aggravated by the February 4, 2013 incident. Contrary to appellant's contention the mere fact that he was asymptomatic prior to the February 4, 2013 incident is insufficient, without sufficient rationale, to establish a causal relationship between his preexisting back condition and aggravation.¹⁴ Furthermore, as explained above, Dr. Smeal's report is insufficient to establish clear evidence of error.

The Board finds that in its November 25, 2014 decision, OWCP properly declined to reopen appellant's claim on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute an abuse of discretion.

CONCLUSION

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

¹³ *D.G.*, 59 ECAB 455 (2008); *Joseph R. Santos*, 57 ECAB 554 (2006); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹⁴ *Michael S. Mina*, 57 ECAB 379 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 25, 2014 is affirmed.

Issued: June 12, 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