

FACTUAL HISTORY

OWCP accepted that on August 1, 2004 appellant, then a 48-year-old air traffic controller, sustained aggravation of lumbar strain/sprain due to twisting his lumbar spine when he leaned backward in a chair, and the back of the chair moved suddenly.² He stopped work on August 1, 2004 and received disability compensation beginning November 1, 2004 on the daily rolls.³

Appellant received treatment for his low back condition from several attending physicians, including Dr. Conrad Williams, a Board-certified internist. He also participated in physical therapy sessions. In a July 18, 2008 report, Dr. Williams reported physical examination findings and provided an opinion that appellant was partially disabled due to his accepted work injuries.

OWCP referred appellant for further evaluation to Dr. David P. Nichols, a Board-certified orthopedic surgeon, for a second opinion. In a November 12, 2008 report, Dr. Nichols indicated that his physical examination of appellant did not reveal any objective evidence that he continued to have residuals of his accepted work injuries. He stated that appellant could work as an air traffic controller without restrictions.

OWCP determined that there was a conflict in the medical opinion evidence regarding whether appellant continued to have residuals of his accepted work injuries and referred him to Dr. James J. White, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter.

In a July 13, 2009 report, Dr. White discussed appellant's medical history and reported his findings on physical examination. He indicated that appellant exhibited no back spasms and that straight leg testing was normal in both lower extremities. Dr. White diagnosed disc degeneration of the lumbar spine at multiple levels and noted that this condition was not work related. He determined that appellant had no residuals of his accepted work conditions and that no further medical treatment was necessary. Appellant could return to his regular work as an air traffic controller.

In a letter dated November 8, 2010, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits based on its determination that he ceased to have residuals of his accepted work injuries. It indicated that its proposed action was justified by the opinion of Dr. White, the impartial medical specialist. OWCP provided appellant 30 days to submit evidence and argument challenging its proposed action.

In letters received on November 30 and December 3, 2010, appellant challenged OWCP's proposed termination action. He argued that the opinion of Dr. White did not provide an adequate basis to terminate his wage-loss compensation and medical benefits. Appellant

² The record reveals that in 1994 appellant slipped on ice at work and injured his lower back by striking it on a curb. He was out of work for approximately 35 days due to this injury.

³ Appellant received disability compensation beginning December 26, 2004 on the periodic rolls.

asserted that, due to the medications he currently took, he could not receive medical certification to work as an air traffic controller.⁴

By decision dated December 16, 2010, OWCP terminated appellant's wage-loss compensation and medical benefits effective December 19, 2010 because he had no residuals of his accepted work injuries after that date. It found that the weight of the medical evidence regarding work-related residuals rested with the opinion of Dr. White. OWCP addressed appellant's argument regarding the use of medications and explained that Dr. White explicitly stated that he did not require any further medical treatment.⁵

On March 2, 2015 OWCP received a form, dated February 23, 2015, in which appellant requested reconsideration of its December 16, 2010 decision. In a letter dated February 23, 2015 and received on March 2, 2015, appellant stated that he was requesting reconsideration of OWCP's December 16, 2010 decision. He asserted that it had not been acknowledged that he formerly was prescribed Oxycontin and that he currently was prescribed Oxycodone. Appellant indicated that one could not take these medications and work as an air traffic controller. He stated, "Therefore, your decision to terminate my benefits is not valid because I could not and would not be allowed to work taking these medications."⁶

In a March 16, 2015 decision, OWCP denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. It determined that his reconsideration request was untimely because it was received on March 2, 2015, *i.e.*, more than one year after the issuance of its December 16, 2010 decision. OWCP indicated that it had previously considered and rejected appellant's argument that his use of medications evidenced his continuing work-related disability.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP 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.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁸

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, OWCP must

⁴ Appellant submitted a list of medications that he took on a regular basis.

⁵ In a May 11, 2011 decision, OWCP determined that appellant received a \$5,534.15 overpayment of compensation due to receiving dual payments for the period September 1 to 30, 2010. It found that he was not at fault in the creation of the overpayment, but that he had not shown that he was entitled to waiver of recovery of the overpayment.

⁶ Appellant indicated that he was enclosing a letter from an attending physician, but he did not submit any evidence in support of his reconsideration request.

⁷ 20 C.F.R. § 10.607(a).

⁸ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁹ OWCP regulations and procedure 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.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵

ANALYSIS

In its March 16, 2015 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant’s reconsideration request was received on March 2, 2015, more than one year after OWCP’s December 16, 2010 decision, and therefore he must demonstrate clear evidence of error on the part of OWCP in issuing this decision.¹⁶

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its December 16, 2010 decision. He did not submit evidence or argument which manifests on its

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedures further provide, “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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent, but the award was not paid at the augmented rate. 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.”

¹¹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹² 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ See *supra* note 9. OWCP regulations at 20 C.F.R. § 10.607(a) establish a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought for merit decisions issued on or after August 29, 2011. See *supra* note 10 at Chapter 2.1602.4 (October 2011). Appellant’s reconsideration request was filed on March 2, 2015 because it was received by OWCP on that date.

face that OWCP committed an error in that decision. Appellant argued that OWCP improperly terminated his wage-loss compensation and medical benefits effective December 19, 2010 because he was taking prescribed medications that he could not take and still work as an air traffic controller.¹⁷ However, he previously made this argument and OWCP previously considered and rejected it. Appellant's argument does not have any probative value on the medical issue of this case. OWCP explained in its December 16, 2010 decision that the medical evidence showed that he ceased to have wage loss or need for medical care after December 19, 2010 due to his accepted work injuries.¹⁸

For these reasons, the argument submitted by appellant does not raise a substantial question concerning the correctness of OWCP's December 16, 2010 decision and OWCP properly determined that he did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹⁷ Appellant presented the same argument on appeal to the Board.

¹⁸ In his letter requesting reconsideration, appellant indicated that he was enclosing a letter from an attending physician, but he did not submit any evidence in support of his reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2015
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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