

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely and insufficient to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated December 30, 2009, the Board affirmed June 19, August 20, and October 15, 2008 nonmerit OWCP decisions denying appellant's requests for a review of the written record and a July 16, 2008 nonmerit decision denying his request for reconsideration as untimely and insufficient to establish clear evidence of error.⁵ By decision dated December 11, 2013, the Board affirmed a May 10, 2013 decision denying his request for a review of the written record.⁶ The Board further affirmed an August 9, 2013 decision terminating appellant's authorization for medical benefits effective February 13, 2013 as he had no further need for treatment due to his August 6, 2001 employment injury.⁷ The Board found that the opinion of Dr. Douglas Hein, a Board-certified orthopedic surgeon and OWCP referral physician, constituted the weight of the evidence and established that appellant had no residuals of his accepted work injury of lumbar sprain. The Board considered the opinion of Dr. Jeffrey A. Fried, the treating Board-certified orthopedic surgeon, that appellant's work injury aggravated preexisting spondylolisthesis but found that his opinion was not supported by rationale and thus of diminished probative value. The facts and the circumstances as set forth in the prior decisions are incorporated by reference.

On December 7, 2013 appellant filed a claim for a recurrence of a medical condition on December 6, 2012 causally related to his August 6, 2001 work injury. By letter dated March 21, 2014, OWCP informed him that as it had terminated his authorization for medical benefits, it could not need to adjudicate a claimed recurrence. It advised appellant to follow the appeal rights accompanying the December 12, 2013 Board decision.

Appellant appealed the March 21, 2014 OWCP letter to the Board. In an order dated November 12, 2014, the Board dismissed the appeal after finding that the March 21, 2014

⁵ Docket No. 09-321 (issued December 30, 2009). On April 28, 2008 the Board issued an order dismissing appeal as there was no adverse decision within its jurisdiction. *Order Dismissing Appeal*, Docket No. 07-1313 (issued April 28, 2008). On September 29, 2008 the Board dismissed an appeal on appellant's request so that he could request reconsideration before OWCP. *Order Dismissing Appeal*, Docket No. 08-1575 (issued September 29, 2008).

⁶ Docket No. 13-1953 (issued December 11, 2013). OWCP accepted that on August 6, 2001 appellant, then a 46-year-old heavy mobile mechanic, sustained lumbar strain in the performance of duty. Dr. J. Kenneth Burkus, a Board-certified orthopedic surgeon, released appellant to resume work on April 29, 2002 without restrictions due to his work injury. He noted that appellant had preexisting lumbar spondylosis and stenosis.

⁷ In its February 13 and August 9, 2013 decisions, OWCP indicated that it was terminating appellant's entitlement to medical benefits and any future wage-loss compensation. As appellant was not receiving compensation for his August 6, 2001 injury, the Board adjudicated the issue as to whether OWCP met its burden to prove to terminate authorization for medical benefits.

correspondence from OWCP did not constitute a final adverse decision over which it could exercise jurisdiction.⁸

On an appeal request form received by OWCP on May 8, 2015, appellant requested reconsideration. He maintained that he was entitled to benefits for his August 6, 2001 employment injury. Appellant further contended that OWCP should issue a final adverse decision on the issue of further benefits in accordance with the Board's November 12, 2014 order.

In support of his reconsideration request, appellant submitted additional medical evidence.

In a report dated January 16, 2013, Dr. Fried indicated that appellant's lumbar sprain due to his August 6, 2001 employment injury had not resolved. He also diagnosed progressive L5-S1 spondylolisthesis.

On July 17, 2013 Dr. Fried diagnosed cervical disc displacement, acquired spondylolisthesis, right carpal tunnel syndrome, right contracture of the little finger, bursitis of the left elbow, and right shoulder joint pain. He advised that appellant had 23 percent whole person impairment due to cervical radiculitis.

A September 17, 2013 magnetic resonance imaging (MRI) scan study revealed anterolisthesis of L4 over L5 as a result of advanced facet arthrosis and mild-to-moderate bilateral neural foraminal stenosis at L2 through L5.

The evidence also included a January 23, 2012 report from Dr. Fried already of record. Dr. Fried had diagnosed cervical disc displacement, right carpal tunnel syndrome, right contracture of the little finger, acquired spondylolisthesis, and left elbow bursitis.

On December 19, 2014 Dr. Hein filed a motion in state court to dismiss appellant's action for damages for alleged medical negligence. He also filed a motion in state court to extend the time for discovery.

On March 19, 2015 Dr. Fried noted appellant's history of an August 6, 2001 injury. He advised that he had a "previous quiescent back condition, which was aggravated by the accident and has not returned to its baseline state. Therefore, I believe the spondylolisthesis should be considered a work-related condition."

By decision dated June 25, 2015, OWCP denied appellant's request for reconsideration as it was not timely and failed to demonstrate clear evidence of error.

On appeal appellant's argues that OWCP improperly failed to adjudicate his December 7, 2013 claim for recurrence.

⁸ *Order Dismissing Appeal*, Docket No. 14-1301 (issued November 12, 2014).

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁹ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP decision for which review is sought.¹⁰ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹¹

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.¹² 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 it committed an error.¹³

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 within one year of the date of OWCP’s decision for which review is sought.¹⁴ As appellant’s request for reconsideration was not received by OWCP until May 9, 2015, more than one year after issuance of the last merit decision dated December 11, 2013, it was untimely. Consequently, he must demonstrate clear evidence of error in OWCP’s decision to terminate medical benefits effective February 13, 2013.¹⁵

In his May 8, 2015 reconsideration request, appellant contended that OWCP should issue a final decision regarding his recurrence claim. Because OWCP has not issued a final decision regarding the alleged recurrence of a medical condition, the Board has no jurisdiction over this

⁹ *Supra* note 3.

¹⁰ *Id.* at § 10.607(a). 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 OWCP’s decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

¹¹ *Id.* at § 10.607(b).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹³ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Id.* at § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

matter.¹⁶ Appellant's argument is not relevant to the issue of whether OWCP improperly terminated his authorization for medical benefits and thus is insufficient to demonstrate clear evidence of error.¹⁷

Appellant also alleged that he was entitled to benefits for his August 6, 2001 employment injury. While he expressed disagreement with OWCP's termination of his benefits, his general allegation does not establish error in the OWCP's decision.¹⁸

The underlying issue is whether OWCP properly terminated appellant's entitlement to medical benefits as he had no residuals of his accepted lumbar strain. This issue is medical in nature. On reconsideration, appellant resubmitted a report from Dr. Fried dated January 23, 2012. In resubmitting this report, he did not explain how this evidence revealed that OWCP had committed an error in terminating his medical benefits. The resubmission of this evidence does not raise a substantial question as to the correctness of OWCP's decision and thus does not establish clear evidence of error.¹⁹

Appellant further submitted a January 16, 2013 report from Dr. Fried. Dr. Fried opined that the lumbar sprain due to appellant's August 6, 2001 work injury lumbar sprain had not resolved. He additionally diagnosed L5-S1 spondylolisthesis. While Dr. Fried's report is generally supportive of appellant's claim that he had residuals of his lumbar sprain, this is not sufficient to show clear evidence of error, which is intended to represent a difficult standard. 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 clear evidence of error.²⁰

On July 17, 2013 Dr. Fried diagnosed cervical disc displacement, acquired spondylolisthesis, right carpal tunnel syndrome, right contracture of the little finger, bursitis of the left elbow, and right shoulder joint pain. He advised that appellant had 23 percent whole person impairment due to cervical radiculitis. An MRI scan study dated September 17, 2013 showed anterolisthesis of L4 over L5 as a result of advanced facet arthrosis and mild-to-moderate bilateral neural foraminal stenosis at L2 through L5. Dr. Fried's July 17, 2013 report, the September 17, 2013 MRI scan study, and the motions submitted in state court by Dr. Hein do not address the relevant issue of whether appellant had further need for medical treatment due to his lumbar sprain. Evidence which is irrelevant to the issue which was decided by OWCP does not establish clear evidence of error.²¹

¹⁶ *Id.* at §§ 501.2(c) and 501.3.

¹⁷ To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See R.C.*, Docket No. 15-0097 (issued August 21, 2015).

¹⁸ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁹ *See H.R.*, Docket No. 14-0964 (issued December 17, 2014); *J.J.*, Docket No. 13-1363 (issued November 6, 2013).

²⁰ *See B.W.*, Docket No. 15-0892 (issued August 26, 2015); *D.G.*, 59 ECAB 455 (2008).

²¹ *E.M.*, Docket No. 14-0667 (issued May 7, 2014); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

On March 19, 2015 Dr. Fried opined that appellant's August 6, 2001 work injury aggravated a preexisting back condition and that the aggravation continued. He further found that OWCP should accept spondylolisthesis as employment related. Again, as discussed, clear evidence of error is a difficult standard. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.²² Dr. Fried's report is insufficient to show clear error by OWCP in its termination of appellant's medical benefits.

As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of OWCP's last merit decision, he has not established clear evidence of error.²³

On appeal appellant requests that OWCP issue a merit decision on his recurrence of a medical condition. As previously discussed, OWCP has not issued a final decision on this issue. The Board notes, however, that a claimant can establish entitlement to continuing medical benefits notwithstanding the prior termination decision if the medical evidence substantiates that he requires further medical treatment due to his accepted employment injury.²⁴ Upon return of the case record, OWCP should adjudicate whether appellant sustained a recurrence of a medical condition beginning December 6, 2012 causally related to his August 6, 2001 employment injury.

CONCLUSION

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

²² See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²³ See *Veletta C. Coleman*, 48 ECAB 367 (1997).

²⁴ See *J.F.*, Docket No. 12-0955 (issued April 11, 2013).

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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