

FACTUAL HISTORY

On January 19, 2004 appellant, then a 42-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his lower back due to lifting and carrying a heavy bag for a baggage recheck. OWCP accepted the claim for lumbar back sprain, aggravation of lumbar radiculopathy, aggravation of lumbar disc displacement, thoracic or lumbosacral neuritis, lumbar intervertebral disc displacement without myelopathy, and other joint derangement.

On June 13, 2011 OWCP received appellant's undated claim for a schedule award (Form CA-7).

In a June 14, 2011 report, Dr. Louis J. Provenza, a Board-certified neurosurgeon, diagnosed cervical radiculitis, lumbar region pain and chronic pain syndrome, and neck pain. A physical examination revealed negative bilateral Spurling's maneuver, negative straight leg raising, and normal cervical and lumbar lordosis.

By decision dated August 9, 2011, OWCP denied appellant's schedule award claim, as the record was devoid of medical evidence supporting entitlement to a schedule award.

Dr. Provenza, in an August 25, 2011 report, reiterated examination findings and diagnoses from his June 14, 2011 report.

In a letter dated September 2, 2011, appellant's counsel requested a telephone hearing before an OWCP hearing representative, which was held on January 13, 2012. In support, appellant submitted reports dated October 20 and December 21, 2011, in which Dr. Provenza provided similar physical findings and diagnoses from his prior reports.

In February 16, 2012 report, Dr. Provenza detailed the history of appellant's injury and medical treatment provided. He noted that he had prepared a report in January 2005 where he concluded that appellant had 30 percent whole person permanent impairment rating. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) he determined that appellant had 20 percent right upper extremity impairment, 5 percent left upper extremity impairment, 20 percent right lower extremity impairment, and 20 percent left lower extremity impairment, or a combined 25 percent upper extremity permanent impairment and a combined 40 percent lower extremity permanent impairment.

By decision dated March 30, 2012, an OWCP hearing representative set aside the August 9, 2011 decision and remanded the case to OWCP to obtain review by an OWCP medical adviser to determine whether appellant was entitled to a schedule award.

On April 4, 2012 an OWCP medical adviser reviewed Dr. Provenza's impairment rating and medical reports from August to December 2011. He noted that no neurological deficits were detailed in any of the reports by Dr. Provenza. The medical adviser concluded that appellant was not entitled to a schedule award as the extremity impairment ratings found by Dr. Provenza were unsupported by any documentation of a spinal nerve root injury or findings which would

constitute radiculopathy. Thus, he concluded that appellant had zero percent permanent impairment of the lower and upper extremities.

By decision dated April 30, 2012, OWCP denied appellant's schedule award claim as it found no ratable impairment due to the accepted employment conditions.

On May 30, 2012 appellant requested an oral hearing before an OWCP hearing representative, which was held on October 16, 2012. OWCP subsequently received treatment notes from Dr. Provenza, which contained no change in examination findings or diagnoses.

By decision dated January 2, 2013, an OWCP hearing representative affirmed the April 30, 2012 decision.

Following the January 2, 2013 decision, Dr. Provenza submitted treatment notes covering the period January 23, 2013 to January 22, 2014 containing examination findings and diagnoses unchanged from prior reports.

In a letter dated and received on December 31, 2013, appellant's counsel requested reconsideration. He argued that OWCP erred in relying upon the opinion of the OWCP medical adviser instead of appellant's treating physician when determining that appellant was not entitled to a schedule award.

On March 5, 2014 an OWCP medical adviser reviewed the medical evidence and determined that the evidence was insufficient to establish proof of radiculopathy. Thus, the medical adviser concluded that appellant was not entitled to a schedule award as there was zero percent permanent impairment of the lower and upper extremities.

By decision dated March 10, 2014, OWCP denied modification of its prior decision.

Following the March 10, 2014 decision, OWCP received treatment notes from Dr. Provenza for the period September 25, 2013 to November 25, 2014. The diagnoses and examination findings were unchanged.

In a letter dated March 6, 2015 and received by OWCP on March 11, 2015, appellant's counsel again requested reconsideration.²

On March 11, 2015 OWCP received an undated report³ from Dr. Provenza detailing appellant's treatment and providing an explanation of his impairment findings. Dr. Provenza stated that he had considered the sixth edition of the A.M.A., *Guides* and that he believed the peripheral nerve tables failed to provide an accurate means to evaluation appellant's

² The Board notes that the actual date of the request for reconsideration was March 6, 2013. However, this appears to be a typographical error as counsel was requesting reconsideration of a March 10, 2014 OWCP decision.

³ A fax date of February 16, 2012 is noted at the top of the page. The report appears to be a duplicate of a prior report but with a correct noting that appellant was last seen by Dr. Provenza on December 21, 2011.

impairments. Thus, he concluded that appellant had 20 percent right upper extremity impairment, 5 percent left upper extremity impairment, resulting in a total combined 25 percent bilateral upper extremity impairment. Next, Dr. Provenza determined that appellant had 20 percent left lower extremity impairment and 20 percent right lower extremity impairment, resulting in a total combined 40 percent bilateral lower extremity impairment. Lastly, he concluded that appellant had 25 to 30 percent whole body impairment and that he expected appellant's condition to deteriorate.

By decision dated March 27, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed. As appellant's March 6, 2015 request for reconsideration had been received on March 11, 2015, it found the request untimely since it had been received more than one year after the March 10, 2014 decision. OWCP also found that he had failed to establish clear evidence of error.

In a letter dated April 8, 2015, received on April 14, 2015 appellant's counsel again requested reconsideration and argued that the March 6, 2015 reconsideration request was timely filed as attempted mail delivery first occurred on March 7, 2015, with successful delivery on March 9, 2015 in London, Kentucky. The delivery was signed for by S. Collett at 3:33 p.m. on March 9, 2015.

By decision dated May 28, 2015, OWCP denied appellant's request for reconsideration as it had been untimely filed and did not establish clear evidence of error. It noted that to be timely, a request for reconsideration must be received within one year of the last merit decision. OWCP further noted that the USPS website form submitted by counsel to establish that the reconsideration request had been timely received provided no proof of appellant's name, case number, or any other identifying information showing that the document was in fact related to this case.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁴ 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.⁵

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁶ 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

⁴ 20 C.F.R. § 10.607(a).

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

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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.¹³

OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provides 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.¹⁴

ANALYSIS

Appellant's counsel submitted a March 6, 2015 letter requesting reconsideration, which OWCP received on March 11, 2015. By decision dated March 27, 2016, OWCP denied reconsideration, finding that the request was untimely filed and failed to establish clear evidence of error. By letter dated April 8, 2015, received on April 14, 2015, appellant's counsel again requested reconsideration. He argued that the March 6, 2015 reconsideration request was timely as it had been delivered to OWCP prior to March 11, 2015. By decision dated May 28, 2015, OWCP denied appellant's April 8, 2015 request as it was untimely filed and failed to establish

⁷ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(c) (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).

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁴ 20 C.F.R. § 10.607.

clear evidence of error. The Board finds that OWCP properly determined that appellant's requests for reconsideration were untimely.

Effective August 29, 2011,¹⁵ section 10.607 of the regulations provides that the date of reconsideration for timeliness purposes is the date the request was received by OWCP.¹⁶ The request for reconsideration must be received by OWCP within one year of the last merit decision for which review is sought.¹⁷ In this case, OWCP issued its last merit decision on March 10, 2014. Therefore, appellant had one year from March 10, 2014 to submit a timely request for reconsideration. As appellant's March 6, 2015 reconsideration request was received into Integrated Federal Employees' Compensation System on March 11, 2015, more than one year after the date of the last merit decision of record, it was untimely filed.

Accompanying the March 6, 2015 reconsideration request was an undated report from Dr. Provenza. The underlying issue in this case is whether OWCP properly denied appellant's schedule award claim as it found no ratable impairment due to the accepted conditions. The Board finds that Dr. Provenza's report finding 20 percent right lower extremity impairment, 20 percent left lower extremity impairment and 25 to 30 percent whole body impairment does not establish clear evidence of error. This evidence does not provide an impairment rating in conformance with A.M.A., *Guides* as Dr. Provenza failed to provide any explanation for his impairment rating or note what tables he relied upon in reaching his impairment rating. In addition, this report is duplicative of Dr. Provenza's prior impairment rating reports.¹⁸ To be eligible for a schedule award, medical evidence must establish a permanent impairment to a schedule member based on the A.M.A., *Guides*.¹⁹ As Dr. Provenza's report is not based on the A.M.A., *Guides* and is repetitive of his prior reports, it is insufficient to establish clear evidence of error in OWCP's March 10, 2014 decision.

The Board also finds that appellant's April 8, 2015 reconsideration request is untimely as it was received more than one year following the March 10, 2014 merit decision. Counsel argued in the request for reconsideration that, based on a USPS tracking sheet, the March 6, 2015 request for reconsideration was timely filed as it showed that it was signed by S. Collett and delivered to OWCP London, Kentucky on March 9, 2015. However, this does not establish error in OWCP's March 10, 2014 merit decision.

The term clear evidence of error is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise and explicit evidence which

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

¹⁶ 20 C.F.R. § 10.607.

¹⁷ *Supra* note 14.

¹⁸ See *A.F.*, Docket No. 11-1297 (issued December 20, 2011); *D.K.*, 59 ECAB 141 (2007) (evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case).

¹⁹ See *J.G.*, Docket No. 09-1128 (issued December 7, 2009); *James R. Hill, Sr.*, 57 ECAB 583 (2006) (an estimate of permanent impairment is irrelevant and of diminished probative value where it is not based on the A.M.A., *Guides*).

manifested on its face that OWCP committed an error.²⁰ As the evidence and argument submitted are insufficient to raise a substantial question as to the correctness of the March 10, 2014 OWCP decision denying appellant's claim for a schedule award, appellant has not established that OWCP committed error by its March 27 and May 28, 2015 decisions.²¹ The Board, therefore, finds that OWCP properly found that appellant failed to demonstrate clear evidence of error in its March 10, 2014 decision.

CONCLUSION

The Board finds appellant's requests for reconsideration were untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 28 and March 27, 2015 are affirmed.

Issued: April 25, 2016
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

²⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

²¹ *Nancy Marciano*, 50 ECAB 110 (1998).