

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances surrounding the prior appeal are incorporated by reference. Those relevant to the instant appeal will be set forth.

OWCP accepted that on December 22, 1995 appellant, then a 34-year-old motor vehicle operator, sustained cervical and lumbosacral strain in a motor vehicle accident in the performance of duty. He resumed his usual employment on January 8, 1996.

On July 26, 1996 appellant underwent a lumbar medial branch neurotomy at L2-3, L3-4, L4-5, and L5-S1 to treat a bilateral herniated disc.

On October 17, 1996 appellant filed a recurrence of disability claim (Form CA-2a) beginning July 24, 1996 causally related to his December 22, 1995 employment injury. He indicated that he was scheduled for another surgery on his disc in two weeks. Appellant underwent a repeat lumbar medial neurotomy at L2 through S1 on January 9, 1997.

In a decision dated August 29, 1997, OWCP found that appellant's January and July 1996 bilateral lumbar medial branch neurotomies at L2-3, L3-4, and L4-S1 were not medically necessary due to his December 22, 1995 employment injury.

On November 6, 1997 appellant requested reconsideration. In a decision dated November 18, 1997, OWCP denied his request as he had not submitted evidence or raised an argument sufficient to warrant reopening his case for further merit review under 5 U.S.C. § 8128(a). Appellant again requested reconsideration on December 2, 1997. By decision dated December 9, 1997, OWCP denied his request to reopen his case for further merit review under section 8128(a).

Appellant appealed to the Board. In a decision dated April 18, 2000, the Board affirmed the November 18 and December 9, 1997 OWCP decisions denying his request to reopen his case for further review of the merits of his claim under section 8128(a).⁴ The Board found that the medical evidence was insufficient to show a causal relationship between the lumbar surgeries or that he had sustained a recurrence of disability due to his December 22, 1995 employment injury.

On June 30, 2000 OWCP noted that appellant had received a third-party recovery in the amount of \$350,000.00. It advised him that the recovery would be used to offset any further medical expenses or disability.

⁴ Docket No. 99-0149 (issued April 18, 2000). On October 30, 2000 the Board denied appellant's petition for reconsideration of its April 18, 2000 decision. *Order Denying Petition for Reconsideration*, Docket No. 99-0149 (issued October 30, 2000).

On January 19, 2001 appellant requested reconsideration of OWCP's August 29, 1997 decision. He argued that he required multiple surgeries as a result of his December 22, 1995 work injury. Appellant maintained that he had disc problems at the time he resumed his regular work on January 8, 1996.

OWCP, by decision dated February 13, 2001, denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.⁵

In a letter dated June 25, 2015, appellant advised that he was not receiving workers' compensation. He requested back pay.

Appellant resubmitted an October 12, 1998 report from Dr. K.E. Vogel, a Board-certified neurosurgeon. Dr. Vogel attributed his lumbar surgeries in July 1996, January 1997, and February 1998 to his December 22, 1995 work injury.

On August 6, 2015 appellant filed a claim (Form CA-7) requesting compensation from December 22, 1995 to May 5, 2004. In an August 12, 2015 response, OWCP informed him of the evidence required to establish a recurrence of disability.

On August 18, 2015 Dr. Jacques Whitecloud, a Board-certified physiatrist, discussed appellant's history of back surgeries and indicated that his office provided pain management for his lumbosacral neuritis.

Dr. Vogel, in an undated report received August 26, 2015, reviewed appellant's history of lumbosacral, cervical, left leg, and left arm pain after a December 22, 1995 motor vehicle accident. He noted that appellant did not have an intervening injury and related, "In all medical probability [appellant's] signs and symptoms are causally related to the incident of December 1995." Dr. Vogel further opined that appellant's need for surgery resulted from the December 22, 1995 employment injury.

By letter dated August 26, 2015, OWCP advised appellant to follow the appeal rights from its prior decisions. It noted that it had previously denied his request for compensation based on its finding that his surgeries and resulting disability from employment were not related to his December 22, 1995 work injury.

Appellant, on August 26, 2015, requested reconsideration. He related that the physician who released him to return to work was not a specialist. Dr. Vogel examined appellant subsequent to his return to work and found that he had to have three surgeries due to his work injury. Appellant maintained that he was totally disabled from 1995 to May 5, 2000 as a result of his employment injury.

On September 22, 2015 appellant submitted an August 26, 2003 report from Dr. Roberta Bell, a neuropsychologist. She obtained a history which revealed appellant's inability to function cognitively after the December 22, 1995 employment injury, such that he missed a filing deadline to apply for retirement benefits. Dr. Bell found that appellant had an intellectual

⁵ On May 4, 2004 the Office of Personnel Management approved appellant's application for disability retirement.

and academic disability severe enough “to interfere with his ability to complete an application for retirement in a timely manner.”

In a letter received by OWCP on September 28, 2015, appellant again requested reconsideration. He related that he had submitted clear evidence that he could not timely file for his workers’ compensation benefits as a result of a mental handicap. Appellant advised that his counsel did not tell him about appeals.

In a report dated September 28, 2015, Dr. Karita Kewalramani, a Board-certified internist, discussed appellant’s history of a motor vehicle accident on December 22, 1995, two medial branch neurotomies, and a cage fusion at L3-4. She diagnosed lumbar disc syndrome, lumbar mechanical dysfunction at L5-S1, and right L4 and S1 lumbar radiculopathy. Dr. Kewalramani indicated in November 9, 2015 note that appellant was totally and permanently disabled from employment.

On November 18, 2015 Dr. Vogel examined appellant for lumbosacral pain. He reviewed his history of surgeries in 1996, 1997, and 1998. Dr. Vogel related, “In all medical probability, [appellant’s] signs and symptoms at that time and the three subsequent surgeries were necessitated by the motor vehicle injury while at work on December 22, 1995. He reports [that] he has been unable to return to work since the December 22, 1995 injury.”

By decision dated December 23, 2015, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant contends that he timely filed for workers’ compensation as he had appointments with Dr. Bell prior to February 27, 2002.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁶ 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.⁷ 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.⁸

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

⁶ *Supra* note 2.

⁷ *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 the 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).

⁸ 20 C.F.R. § 10.607(b).

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.⁹ To demonstrate 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.¹⁰

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹² As appellant's August 26, 2015 request for reconsideration was submitted more than one year after the last merit decision of record dated August 29, 1997, it was untimely.¹³ Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁴

On appeal appellant argues that he obtained medical treatment from Dr. Bell prior to February 27, 2002. The issue, however, is whether he requested reconsideration within one year of the last merit decision dated August 29, 1997. Appellant contended that he was not competent to file a timely request for reconsideration. The time limitation provisions of FECA do not run against an individual while he is incompetent and has no duly appointed legal representative.¹⁵ In a report dated August 26, 2003, Dr. Bell noted that appellant complained that he was not able to cognitively function after his work injury. She advised that he was intellectually and academically disabled such that it would impact his ability to timely submit an application for retirement. Dr. Bell did not, however, specifically address the period of the impairment or find that he was incapable of requesting reconsideration within the relevant time period. Appellant, therefore, has not submitted sufficient medical evidence to meet his burden of proof to establish mental incompetence.¹⁶

The Board further finds that appellant has not demonstrated clear evidence of error. Appellant contended that he initially saw a physician who was not a specialist. Dr. Vogel, who

⁹ *Supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹⁰ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹¹ 20 C.F.R. § 10.607(a).

¹² *Robert F. Stone*, *supra* note 10.

¹³ For OWCP decisions issued before August 29, 2011, a request for reconsideration had to be sent within one year of the date of the OWCP decision. 20 C.F.R. § 10.607(a) (1999).

¹⁴ *Id.* at § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ 5 U.S.C. § 8122(d)(2); *supra* note 7 at *Time*, Chapter 2.801.8(b) (March 1993).

¹⁶ *See Alicia Kelly*, 53 ECAB 244 (2001) (mental incompetence must be established through the submission of medical evidence).

was a specialist, found that appellant's surgeries were due to his work injury. Appellant argued that he was totally disabled from 1995 to 2000 due to his December 22, 1995 employment injury. His lay opinion on his condition and need for surgery is not is not relevant as the Board has held that lay individuals are not competent to render a medical opinion.¹⁷ Consequently, appellant's contentions are insufficient to demonstrate clear evidence of error by OWCP.

On reconsideration appellant submitted new reports from Dr. Vogel. In a report received August 26, 2015, Dr. Vogel discussed appellant's complaints of lumbar, cervical, left leg, and left arm pain after a December 22, 1995 work injury. He opined that appellant's symptoms and need for surgery resulted from the accepted employment injury. On November 18, 2015 Dr. Vogel attributed appellant's condition and back surgeries to the December 22, 1995 work injury. He asserted that appellant was totally disabled from the date of his employment injury. While Dr. Vogel's reports provide some support for causal relationship, the standard is whether the evidence is sufficient to show clearly that OWCP erred in finding that he his surgeries were unrelated to his work injury. Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁸ Dr. Vogel's reports are insufficient to shift the weight of the evidence in favor of appellant and thus do not raise a substantial question as to the correctness of OWCP's decision.

On August 18, 2015 Dr. Whitecloud indicated that he was treating appellant for lumbosacral neuritis. He did not address the relevant issue of the causal relationship between appellant's surgeries and resulting disability and his work injury. In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁹

Dr. Kewalramani, in a report dated September 28, 2015, discussed appellant's history of the December 22, 1995 employment-related motor vehicle accident and subsequent surgeries. She diagnosed lumbar disc syndrome, lumbar mechanical dysfunction at L5-S1, and right L4 and S1 lumbar radiculopathy. On November 9, 2015 Dr. Kewalramani found that appellant was totally disabled. She did not address causation, the relevant issue in this case, and thus her report is not pertinent to the issue at hand.

Appellant additionally resubmitted an October 12, 1998 report from Dr. Vogel relating his surgeries in 1996, 1997, and 1998 to his December 22, 1995 employment injury. He did not, however, explain how the resubmission of the report was positive, precise, and explicit in manifesting on its face that OWCP had committed an error in its merit decision.²⁰ Repetitive or

¹⁷ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁸ *See D.G.*, 59 ECAB 455 (2008).

¹⁹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

²⁰ *See B.C.*, Docket No. 15-0550 (issued January 28, 2016).

cumulative evidence is insufficient to shift the weight of evidence in claimant's favor and demonstrate clear evidence of error.²¹

To demonstrate clear evidence of error, it is insufficient 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. None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim.²² Appellant has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ See *D.E.*, 59 ECAB 438 (2008).

²² See *J.R.*, Docket No. 13-1284 (issued September 16, 2013).