

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim because his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 29, 2013 appellant, then a 42-year-old inspector, filed a traumatic injury claim (Form CA-1) alleging that he injured his right shoulder on August 19, 2013 due to a fall while running as a part of the employing establishment's approved physical training program. The employing establishment challenged the claim noting that the claimed injury did not occur in the performance of duty because appellant was not on duty or participating in an approved physical training program at the time of the August 19, 2013 incident. An employing establishment official indicated that appellant initially reported that the injury was not work related and did not report the injury as work related until 10 days after the fact.

In a statement dated August 30, 2013, a supervisor indicated that appellant called him on August 19, 2013 and let him know that he was at a park with his son when he fell on his right shoulder and that he would be out of work for a few days. He noted that appellant advised him on August 20, 2013 that he would be out of work for a few weeks on sick leave. The supervisor asserted that appellant did not mention in either conversation that he was injured in the performance of duty. In a statement dated September 4, 2013, another supervisor indicated that on August 20, 2013 appellant responded "no" when asked if his August 19, 2013 injury was an "on-the-job injury."

By decision dated October 17, 2013, OWCP denied appellant's claim because he did not establish that he sustained an injury in the performance of duty on August 19, 2013. It indicated, "Your agency has provided a statement claiming you were not in [the] performance of duty at the time of your injury and you have not provided any other evidence that the off-duty physical activities you were engaged in at the time of your injury were being performed under the auspices of any agency[-]sponsored fitness program."

Appellant requested a telephone hearing with an OWCP hearing representative. During the hearing held on May 14, 2014, he testified that before he left work on August 19, 2013 he entered on the employing establishment's electronic eDiary that he would be working out by running that day. Appellant explained that his son's team was training for cross country and holding informal workouts in the park and that he planned on running there with his son. He indicated that while wrapping up his run he fell and landed on his right shoulder. Appellant testified that he was allowed up to three hours per week to exercise under the employing establishment's physical fitness program and that these were paid hours. He asserted that he did call his supervisor and report he was injured while running, but the supervisor did not ask him if the injury was work related.

After the hearing, appellant submitted a copy of the eDiary for August 19, 2013, the initial hospital treatment record dated August 19, 2013, administrative documents relating to the physical fitness program, and other medical evidence. In the August 19, 2013 report from the

Johnson Memorial Medical Center, an emergency room nurse noted, “[Patient] was running relays and fell landing on [right] shoulder.” The eDiary entry for August 19, 2013 indicated that appellant would be participating in physical fitness activity that day.

The employing establishment continued to challenge appellant’s claim and provided a June 13, 2014 statement from a supervisor reiterating that she asked appellant if his injury was an “on-the-job injury” and he stated “no.” The supervisor further advised appellant did not tell her that it occurred while he was running. In a June 16, 2014 statement, another employee noted that appellant initially told him he fell while at the park with his son and that he did not report he was running or participating in the employing establishment’s physical fitness program.

In a decision dated August 21, 2014, the OWCP hearing representative affirmed OWCP’s October 17, 2013 decision. She noted that the evidence in the case record supported that appellant was enrolled in the employing establishment’s physical fitness program, but that the evidence did not clearly show that he was participating in this approved physical fitness program at the time of his claimed August 19, 2013 injury.

In a letter dated August 19, 2015 and received on August 24, 2015, counsel requested reconsideration of OWCP’s August 21, 2014 decision. He argued that appellant sustained an injury in the performance of duty on August 19, 2013 because his right shoulder injury occurred while he was participating in a physical fitness program approved by the employing establishment. Counsel noted that appellant had testified that he was participating in the employing establishment’s approved physical fitness program when he was running with his son’s middle school cross country team at the time of the August 19, 2013 injury. He indicated that this was supported by the initial August 19, 2013 report from the Johnson Memorial Medical Center which noted, “Patient was running relays and fell landing on right shoulder.” Counsel asserted that an eDiary entry for August 19, 2013 indicated that appellant would be participating in the activity type of physical fitness, and that the physical-fitness type that was checked off was jogging.

Appellant submitted copies of the initial August 19, 2013 report from the Johnson Memorial Medical Center and of the eDiary entry for August 19, 2013 which was already of record. Appellant also submitted an undated statement in which his son indicated that on August 19, 2013 both he and appellant participated in a run attended by adults and their middle school aged children. Appellant’s son noted that, as the run was wrapping up, he observed appellant trip, fall and injure his shoulder.

In an October 7, 2015 decision, OWCP denied appellant’s request for further review of the merits of his claim because his request was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant’s request for reconsideration of its August 21, 2014 decision was untimely as it was not received until August 24, 2015, *i.e.*, more than one year after the issuance of the August 21, 2014 decision. OWCP determined that the argument and evidence submitted by appellant did not show clear evidence of error in its August 21, 2014 decision which found that he had not established an injury in the performance of duty on August 19, 2013.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.⁴

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁸ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁰ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹¹

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence including that he or she sustained an injury in the performance of duty.¹² With regard

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447, 450 (2008).

to recreational activities, the Board has held that such activities arise in the course of employment when: (1) they occur on the premises during a lunch or recreational period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the service of the employee, brings the activity within the orbit of employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.¹³ OWCP's procedures address "Employing Agency Physical Fitness Programs" and provides that "employees enrolled in a physical fitness program are in the performance of duty for FECA purposes while doing authorized physical fitness program exercise, including off-duty exercises."¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁵ As appellant's request for reconsideration was not received by OWCP until August 24, 2015, more than one year after issuance of its August 21, 2014 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its August 21, 2014 decision.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its August 21, 2014 decision. In the untimely reconsideration request, counsel argued that appellant sustained an injury in the performance of duty on August 19, 2013 because his right shoulder injury occurred while he was participating in a physical fitness program approved by the employing establishment. He indicated that this was supported by the initial August 19, 2013 report from the Johnson Memorial Medical Center in which it was noted, "Patient was running relays and fell landing on right shoulder." Counsel asserted that an eDiary entry for August 19, 2013 indicated that appellant would be participating in the activity type of physical fitness, and that the physical fitness-type was jogging.¹⁶ The Board notes that OWCP has already considered the same evidence and argument and concluded that they did not establish that appellant sustained an injury in the performance of duty on August 19, 2013. In denying appellant's claim, OWCP had noted various inconsistencies in reporting the claimed August 19, 2013 injury and found that the evidence did not show that appellant was participating in an approved physical fitness program at the time of the injury on August 19, 2013. The evidence and argument submitted by appellant on reconsideration does not address such inconsistencies or

¹³ See *Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993).

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.18 (March 1994).

¹⁵ See *supra* note 4. On appeal, counsel argued that appellant actually filed a timely reconsideration request. However, he did not explain how the evidence of record supported this argument.

¹⁶ Appellant submitted copies of these documents which were already of record.

otherwise manifest on its face that OWCP committed error when finding that he was not in the performance of duty on August 19, 2013.¹⁷

The Board notes that clear evidence of error is intended to represent a difficult standard and the evidence and argument submitted by appellant, most of which had been previously considered, does not reach this standard.¹⁸ For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's August 21, 2014 decision and OWCP properly determined that appellant 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 because his request was untimely filed and failed to demonstrate clear evidence of error.

¹⁷ See *supra* note 5. Appellant also submitted an undated statement in which his son indicated that on August 19, 2013 both he and appellant participated in a run attended by adults and their middle school aged children. However, it has not been disputed that appellant engaged in physical activity on August 19, 2013. Rather, OWCP found that appellant has not established participation in an approved physical fitness program on that date.

¹⁸ See *supra* notes 6 through 8.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 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