

**United States Department of Labor
Employees' Compensation Appeals Board**

C.W., Appellant
and
U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer

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**Docket No. 16-1478
Issued: December 23, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 18, 2016 appellant filed a timely appeal from a March 14, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated January 18, 2011 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

On appeal appellant contends that OWCP erred in that it overlooked factual and medical history in support of his claim.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 24, 1992 appellant, then a 35-year-old maintenance laborer, filed a traumatic injury claim (Form CA-1) alleging that on July 23, 1992 he was on an elevator that jumped a floor and then jammed halfway between two floors. He related that this incident caused upper and lower back injuries. By decision dated October 27, 1992, OWCP accepted that appellant sustained thoracic and lumbar strain and sprain as a result of the July 23, 1992 employment incident.

Appellant stopped work on the date of the incident and returned to full-time limited-duty work on May 23, 1994. He claimed a recurrence of disability on August 25, 1999, and this recurrence claim was denied by OWCP in a decision dated December 6, 1999. OWCP determined that appellant failed to demonstrate a causal relationship between the claimed recurrence of disability on August 25, 1999 and the accepted employment injury of July 23, 1992. Appellant requested a hearing before an OWCP hearing representative on January 2, 2000. On November 6, 2000 an OWCP hearing representative affirmed the denial of the recurrence claim and found that appellant had not demonstrated a new injury.

On September 9, 2009 OWCP's Branch of Hearings and Review received an undated letter in which appellant related that he was exercising his appeal rights from the November 6, 2000 decision. OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing before an OWCP hearing representative in a decision dated December 10, 2009. Appellant thereafter filed an appeal with the Board on December 15, 2009. In a decision dated October 29, 2010, the Board set aside the December 15, 2009 decision and remanded the case after determining that appellant actually requested reconsideration by OWCP, and not a hearing before an OWCP hearing representative.³

In a decision dated January 18, 2011, OWCP reviewed appellant's case on the merits, but denied modification of its earlier decision because appellant had not provided a well-reasoned and rationalized physician's opinion that supported that the alleged recurrence on August 25, 1999 was causally related to the employment injuries. Appellant again requested reconsideration on October 5, 2011. On December 21, 2011 OWCP denied reconsideration, finding that the evidence was insufficient to warrant further review. Appellant again filed an appeal with the Board on February 6, 2012 and the denial of his request for reconsideration was affirmed by the Board in a decision dated September 18, 2012.⁴

² Docket No. 10-484 (issued October 19, 2010); Docket No. 12-677 (issued September 18, 2012).

³ Docket No. 10-484 (issued October 19, 2010).

⁴ Docket No. 12-677 (issued September 18, 2012).

Appellant again requested reconsideration on August 19, 2014. OWCP denied appellant's August 19, 2014 request for reconsideration, in a decision dated December 17, 2015, as his request was untimely filed and failed to demonstrate clear evidence of error.

On December 21, 2015 appellant again requested reconsideration before OWCP and a schedule award.⁵ He related his own summarization of the medical evidence of record. In support of his reconsideration request, appellant submitted numerous documents and decisions that were already part of his claim. He resubmitted reports by Dr. Richard H. Kaplan, a Board-certified physiatrist, dated February 7, April 8, and October 14, 1996; and December 6, 1999. The previously submitted reports also included an October 8, 1993 report by Dr. Frank A. Mattei, a Board-certified orthopedic surgeon; a report by Dr. Kevin Mansmann, a Board-certified orthopedist, and diagnostic studies dated December 3, 1999.

In addition, appellant resubmitted a January 17, 2012 report wherein Dr. Randall Smith, a Board-certified orthopedic surgeon, indicated that appellant had a low back disc problem that was originally caused by a 1991 injury, aggravated significantly by the July 23, 1992 employment injury and then somewhat by the 1993 and 1999 injuries. He noted that the damage to the disc was done either in the 1991 or 1992 incident, and caused the tearing of the annular ligament which allowed the disc to herniate and thus lead to appellant's chronic lumbar intractable pain condition with sciatica. Dr. Smith opined that as a result, appellant remained disabled which needed ongoing treatment.

Appellant also resubmitted a March 14, 2012 report wherein Dr. Kaplan noted that he has been treating appellant along with Dr. Smith. Dr. Kaplan noted that although appellant was originally able to return to work after the July 23, 1992 employment injury, in the later portion of that decade his repeat diagnostic evaluations indicated significant disc pathology, multiple disc herniations, advancing degenerative changes in the lumbar spine, and that these conditions ultimately led to chronic, intractable lumbar low back pain with associated sciatica and radicular symptoms. He noted that when he last saw appellant in December 1999 he was still symptomatic and experiencing persistent back and leg pain which began originally with the 1992 accident. Dr. Kaplan noted that appellant returned to his office on March 14, 2012 and was still symptomatic and disabled. He noted that appellant's advancing years have not allowed him to recover and that he continues to suffer from the disabling effects of the 1992 employment injury. Dr. Kaplan opined that appellant remained disabled as a result of the injuries he sustained in the elevator accident of July 23, 1992.

By decision dated March 14, 2016, OWCP denied appellant's claim for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁶

⁵ OWCP has not issued a final decision regarding appellant's request for a schedule award.

⁶ 20 C.F.R. § 10.607(a).

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.⁷ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁸

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁹ 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 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 demonstrate 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 demonstrate 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 To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate 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.¹⁶

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

⁸ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

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 2.1602.5 (February 2016).

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

¹² *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

¹⁴ *Supra* note 12.

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

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 7.

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant's claim for reconsideration of the merits as the request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

Since more than one year elapsed from the date of issuance of the January 18, 2011 merit decision and the date of appellant's December 21, 2015 request for reconsideration, the Board finds that OWCP properly found that it was untimely filed.

The Board further finds that OWCP properly denied appellant's untimely request for reconsideration as he failed to demonstrate clear evidence of error. OWCP initially denied appellant's claim for a recurrence of his July 23, 1992 employment injury on August 25, 1999. It determined that appellant had not demonstrated a recurrence of disability on August 25, 1999 causally related to his accepted employment injury. Accordingly, in order to demonstrate clear evidence of error, appellant must submit evidence demonstrating clear evidence of error in OWCP's determination that the medical evidence did not demonstrate a causal relationship between appellant's accepted injury of July 23, 1992 and the alleged recurrence on August 25, 1999.

Appellant requested reconsideration on multiple occasions. His most recent request for reconsideration was filed on December 21, 2015. At that time, appellant resubmitted multiple items of evidence. All of these items were previously in the record, including the medical reports of Dr. Kaplan dated February 7, April 8, and October 14, 1996 and December 6, 1999; the December 3, 1999 report by Dr. Mansmann, the January 17, 2012 report by Dr. Smith, the October 8, 1993 report by Dr. Mattei, and the diagnostic studies conducted on December 3, 1999. The Board notes that the January 17, 2012 report by Dr. Smith and the March 14, 2012 report by Dr. Kaplan were submitted subsequent to the last merit review of the evidence, but before the previous December 17, 2015 decision denying reconsideration under the clear evidence of error standard. Therefore, no new medical evidence was submitted with appellant's current request for reconsideration, filed on December 21, 2015. As the medical reports submitted on reconsideration were duplicative of reports previously of record, appellant has not explained how the resubmission of these reports raise a substantial question concerning the correctness of OWCP's decision.¹⁷ Furthermore, none of the medical reports were sufficient to shift the weight of the evidence in appellant's favor and do not demonstrate clear evidence of error.¹⁸ The Board notes that clear evidence of error 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.¹⁹

¹⁷ *G.B.*, Docket No. 16-0319 (issued April 6, 2016).

¹⁸ *Id.*

¹⁹ *D.G.*, 59 ECAB 455 (2008).

On appeal, appellant argues the merits of his claim, contending that OWCP overlooked medical evidence, medical complications, and noting his concerns regarding a job switch. As previously noted, the Board does not have jurisdiction over the merits of the claim. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 14, 2016 is affirmed.

Issued: December 23, 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