

On appeal, through counsel, appellant contends that the claim was improperly denied due to administrative errors on the part of OWCP. He also contends that appellant's request for reconsideration was timely filed.

FACTUAL HISTORY

On December 2, 2011 appellant, then a 38-year-old deputy marshal, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2011 while returning to the office after a late night prisoner transport, he was stopped at a red-light traffic signal and the government vehicle he was driving was rear-ended by a drunk driver. He alleged that, as a result of this accident, he sustained lower back pain.

By letter dated January 12, 2012, OWCP instructed appellant to submit information with regard to the third party who may have caused the accident. In another letter of the same date, it informed him that he had not submitted evidence to support his claim, and afforded him 30 days to supply the necessary evidence. Both of these letters contained appellant's OWCP file number. Appellant did not file a timely response to either of OWCP's letters.

By decision dated February 16, 2012, OWCP denied appellant's claim as he had submitted no medical evidence in support of his claim.

By letter dated January 15, 2013, appellant requested that his case be reopened. He contended that, after he completed the claim form, he initially decided to wait and see if the pain in his back resolved before seeking medical treatment. Appellant noted that he was informed by the district OWCP liaison that his paperwork would be maintained in the event that he sought medical care in the future. He indicated that he attempted to seek treatment four weeks later, but that he was told that he needed a workers' compensation claim number in order to make an appointment. Appellant notified the district liaison, who told him that he should contact OWCP's liaison for the employing establishment. He noted that when he went home that evening he received a letter from OWCP stating that his case was under review and required supplemental documentation. Appellant stated that the following day the liaison told him that she had researched the issue and, because the paperwork had been prematurely sent to OWCP and due to the case status, he would be unable to secure a workers' compensation number. He argued that this created an untenable situation in that no doctor would allow him to make an appointment without the workers' compensation number, his motor vehicle insurance would not cover an appointment because he was injured in a government-owned vehicle, and his private health insurance would not cover an appointment because it was for a work injury. Appellant stated that he has tried in vain over the past year to find a doctor who would accept a workers' compensation claim without an OWCP claim number. He also submitted a copy of the New Jersey Police Crash Investigation Report.

By decision dated July 29, 2014, OWCP denied appellant's request for reconsideration without conducting a merit review of the claim.

On December 9, 2014 appellant again requested reconsideration. He submitted new medical evidence that he alleged established the medical diagnoses and established a causal relationship between the diagnosed condition and his traumatic injury claim. In support thereof,

appellant submitted a report by Dr. Ryan McCormick, a Board-certified family practitioner, wherein he stated that on July 28, 2014 appellant presented to his office with bilateral leg pain and paresthesias of both legs and feet. He noted that the recent magnetic resonance imaging (MRI) scan results showed rather severe degenerative changes most likely related to his motor vehicle accident of November 29, 2011 and the injuries sustained therein. Dr. McCormick discussed the accident and noted that appellant indicated that he was unable to get medical attention due to administrative errors with the processing of his workplace injury claim.

Dr. McCormick noted that appellant had been his patient for 10 years, that he had previously had an MRI scan on February 9, 2006 for testicular pain to rule out additional pathology from the back, and that the new MRI scan of appellant's spine obtained on July 30, 2014 showed extensive degenerative injuries and compressive lesions of the lumbar sacral spine. He noted that appellant now has severe foraminal stenosis at L5-S1, associated synovial cyst formation, multilevel bulging discs of the lumbar spine, multilevel foraminal stenosis, and multilevel degenerative joint disease. Because of the severity of the degenerative disease, Dr. McCormick explained that the foraminal stenosis and synovial cyst formation could be attributed to sequelae of the motor vehicle accident. He opined that appellant had some underlying issues with his back, but that the injuries sustained in the 2011 motor vehicle accident significantly accelerated the degenerative process in his lumbar spine, leading to the formation of multiple new synovial cysts, multilevel foraminal stenosis, bulging discs, and the development of additional levels of severe degeneration such as the L5-S1 region in particular. Dr. McCormick noted that appellant needed to follow up with an orthopedic surgeon and physical therapy.

Appellant also submitted results of the MRI scan taken on February 10, 2006 and the MRI scan taken on July 30, 2014 by Dr. Jonathan Jaksha, a Board-certified radiologist. Dr. Jaksha interpreted the July 30, 2014 MRI scan as showing scoliosis complex left with changes of Schumann's disease, multilevel degenerative disc disease, severe at L1-2 and L2-3, facet degenerative joint disease that is severe at L5-S1, marrow edema in the left L5 and S1 pedicles that is likely degenerative and less likely stress reaction, 15-millimeter (mm) cyst posterior to the left L5-S1, L2-3 disc bulge with right lateral extension and mild right foraminal narrowing, mild L3-4 disc bulge, L4-5 disc bulge with foraminal narrowing that is more pronounced on the left, and severe left L5-S1 foraminal narrowing with an 8 x 3 mm synovial cyst extending into the foramen.

By decision dated March 2, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for review must be received by OWCP within one year of the date of that decision.³ 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.⁴ The

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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.⁵

OWCP, however, may not deny an application for review solely because the application was untimely 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 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP decision.¹³

⁵ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

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

⁷ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (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. *See also* at Chapter 2.1602.5a.

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 supra* note 9.

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

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

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant's claim for reconsideration of the merits as the request was untimely filed and did not establish clear evidence of error.

Appellant most recently requested reconsideration on December 9, 2014. As this request for reconsideration was received more than one year after the last merit decision, dated February 16, 2012, the Board finds that the request for reconsideration was untimely.

The Board finds that appellant has not established clear evidence of error on the part of OWCP in denying his claim. Appellant did not submit any medical evidence until he submitted the July 28, 2014 report of Dr. McCormick. Dr. McCormick's report was written over two and one-half years after the November 29, 2011 employment-related motor vehicle accident. He reached his conclusion that the motor vehicle accident had significantly accelerated the degenerative process in appellant's spine after comparing a July 30, 2014 MRI scan to an earlier MRI scan taken prior to the accident on February 10, 2006. Dr. McCormick does not discuss any other possible contributing factors in the eight years between the MRI scans. He indicated that he had been appellant's physician for 10 years, but there is no evidence that he saw appellant after the accident, or at any time until July 28, 2014. There is no evidence of bridging symptoms between the date of accident and the date of Dr. McCormick's report. Accordingly, Dr. McCormick's report is not rationalized. Furthermore, the Board notes that the term clear evidence of error is intended to represent a difficult standard. Even evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have required further development of the evidence, does not constitute clear evidence of error.¹⁴

On appeal, appellant's counsel argues that administrative errors made by OWCP and others caused appellant's failure to file timely medical evidence. Counsel contends that appellant initially could not get a medical opinion because his claim was prematurely filed, that when he attempted to get medical care he did not have a claim number, and that his claim was administratively denied prior to the February 15, 2012 decision denying his claim. This argument finds no support in the record. Appellant signed his claim form on December 2, 2011. On January 12, 2012 OWCP sent appellant two letters with regard to his claim and both contained his claim number. Appellant admitted that he received these two letters. Furthermore, his claim was not administratively denied prior to February 16, 2012. Appellant had a claim number and was provided with instructions as to how to submit medical evidence and was given 30 days to submit such evidence. However, he did not submit medical evidence in support of his claim for over two and one-half years. Therefore, appellant's assertions do not raise a substantial question as to the correctness of OWCP's decision.

Accordingly, the Board finds that OWCP properly denied appellant's untimely reconsideration request. The Board will affirm OWCP's March 2, 2015 decision.

¹⁴ *D.G.*, 59 ECAB 455 (2008); *see also D.C.*, Docket No. 15-0293 (issued September 11, 2015).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 2, 2015 is affirmed.

Issued: January 4, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board