

FACTUAL HISTORY

This case has previously been before the Board. OWCP accepted that on February 12, 2000 appellant, then a 46-year-old systems accountant, sustained an aggravation of cervical stenosis with myelopathy when he fell, striking his back and the back of his head, in the performance of duty. He was attending a mandatory wellness activity while on temporary duty. Appellant stopped work on March 6, 2000 and was placed on the periodic disability rolls.

On March 29, 2000 Dr. Thomas Ducker, an attending Board-certified neurosurgeon, performed cervical laminar decompression surgery at C3 through 7, cervical microplate reconstruction laminoplasty and local autograft for laminoplasty. The surgery was authorized by OWCP.

Appellant received treatment for his cervical problems from Dr. Daniel W. Alexander, an attending chiropractor. In numerous notes dated beginning in April 2000, Dr. Alexander detailed the findings of treatment sessions, including range of motion findings, for the cervical spine. In January 2001, OWCP expanded the claim to include Brown-Sequard Syndrome and myelomalacia of his cervical spine due to his February 12, 2000 work injury.

In 2012, appellant claimed that he also had sustained a spinal subluxation due to his February 12, 2000 work injury. In an undated report received on February 28, 2012, Dr. Alexander noted that he had examined appellant at the request of Dr. Ducker. He stated:

“In April 2000, [appellant] was noted to have subluxations at C2, T2-3, increased neuromusculoskeletal disorders and a loss in cervical spinal range of motion due to past surgical effects. The findings were noted from [his] symptoms, palpation, and x-ray findings, which were reviewed with Dr. Ducker on April 25, 2000. To the best of my knowledge during that call we talked about the x-rays, surgery and no need for a neck brace.”

In a May 11, 2012 decision, OWCP denied appellant’s claim for a work-related spinal subluxation, noting that the submitted evidence did not clearly establish that a subluxation had been demonstrated by x-rays to exist. Dr. Alexander’s report was found to lack probative value as it was vague with respect to the x-rays he reviewed.

In a May 21, 2012 letter, appellant requested reconsideration. He argued that the Board’s decision in *Christopher Smith*, Docket No. 95-2631 (issued February 18, 1998), was consistent with the facts in his case.

In a June 6, 2012 decision, OWCP denied appellant’s request for merit review of his claim, as his argument did not meet the criteria for reopening the case for a merit review.

On June 11, 2012 appellant requested reconsideration. He submitted a June 11, 2012 report from Dr. Thomas Sievert, an attending chiropractor, who provided the diagnoses of cervical disc degeneration, cervicobrachial syndrome, and spasms. Dr. Sievert noted that appellant was totally disabled from work.

In a July 23, 2012 decision, OWCP denied appellant's request for further merit review of his claim, finding that the evidence submitted was irrelevant as it had not been submitted by a physician.

By decision dated June 13, 2013,² the Board affirmed OWCP's May 11, June 6, and July 23, 2012 decisions. The Board found that appellant had not submitted sufficient evidence to establish a spinal subluxation as a result of his February 12, 2000 work injury. The Board noted that the reports of the chiropractors would constitute medical evidence only if they diagnosed subluxation as demonstrated by x-rays to exist.³ The Board indicated that, although Dr. Alexander had noted in his February 2012 report that appellant had spinal subluxations, he did not clearly diagnose these subluxations through x-ray. The Board found that the cervical spine x-ray testing from February 12, 2000 did not show a spinal subluxation and Dr. Alexander had diagnosed these subluxations some 12 years after the accepted incident in this case.

In a letter dated May 3, 2014, appellant requested reconsideration of his claim and, in a decision dated July 21, 2014, OWCP determined that he had not submitted sufficient evidence to establish spinal subluxations as a result of his February 12, 2000 work injury.

In January 20 and 21, 2016 letters, received on February 2, 2016, appellant again requested reconsideration of his claim. In his reconsideration letters, he provided extensive discussion of his belief that the evidence of record, including Dr. Alexander's 2012 report, established spinal subluxations within the meaning of FECA. Appellant's arguments were similar to those previously presented to OWCP and the Board. He resubmitted a copy of *Christopher Smith*, Docket No. 95-2631 (issued February 18, 1998), and again argued that the facts were consistent with the facts in his case.

In a February 17, 2016 decision, OWCP denied appellant's request for further review of the merits of his claim as his request was untimely filed and failed to demonstrate clear evidence of error. It found that his reconsideration request was untimely because it was received on February 2, 2016 more than one year after the issuance of the last merit decision on July 21, 2014. OWCP further found that the evidence and argument submitted by appellant in connection with his reconsideration request did not demonstrate clear evidence of error in the July 21, 2014 decision.

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 or her 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

² Docket No. 13-0128 (issued June 13, 2013).

³ See 5 U.S.C. § 8102(2).

⁴ *Id.* at § 8128(a).

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 establish 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 submitted clear evidence of error on the part of OWCP.¹¹

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.¹² As appellant's request for reconsideration was not received by OWCP until February 2, 2016, more than one year after issuance of its July 21, 2014 merit decision, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its July 21, 2014 decision.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its July 21, 2014 merit decision.

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 *See supra* note 5.

In his reconsideration letters, appellant discussed his belief that the evidence of record, including the report of Dr. Alexander from 2012, established spinal subluxations. He resubmitted a copy of *Christopher Smith*, Docket No. 95-2631 (issued February 18, 1998) and again argued that it was consistent with the facts in his case. The Board finds that appellant's application for review does not show on its face that OWCP committed error when it found in its July 21, 2014 decision that he had not established his claim for a subluxation condition.¹³ The Board notes that clear evidence of error is intended to represent a difficult standard. Other than simply reiterating his previous argument, appellant has not met this standard in the present case.¹⁴

According, the Board finds the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's July 21, 2014 merit decision and OWCP properly denied the claim.

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.

¹³ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009). Appellant presented similar arguments on appeal to the Board.

¹⁴ See *supra* notes 6 through 9.

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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