

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

R.K., Appellant)

and)

**DEPARTMENT OF THE NAVY, NAVAL
FACILITIES ENGINEERING COMMAND
PROGRAM, San Diego, CA, Employer**)

**Docket No. 16-0355
Issued: June 27, 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

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 18, 2015 appellant filed a timely appeal from a June 25, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed since the last merit decision dated June 12, 2014 and 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 the date of the letter requesting reconsideration rather than the date it was received by OWCP should be the date used to determine timely filing of a

¹ 5 U.S.C. § 8101 *et seq.*

request for reconsideration. He also contends that the medical evidence demonstrated clear evidence of error and that OWCP should consider the reports of nurse practitioners and physician assistants as medical evidence.

FACTUAL HISTORY

On March 20, 2014 appellant, then a 62-year-old environmental protection specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 20, 2013 he was climbing down a metal rung ladder that was welded to the end of a 40 cubic yard bin, that he had his right foot on the bottom rung, but he mistakenly believed his left foot was on the ground, so when he released his hold he fell to the ground.

By decision dated June 12, 2014, OWCP denied appellant's claim. It determined that appellant had established that the incident occurred as alleged and that the medical evidence established medical diagnoses of bilateral L5-S1 facet arthropathy, bilateral carpal tunnel syndrome, cervical radiculopathy and other disc disorder cervical region, and cervical spondylosis with myelopathy. However, OWCP denied appellant's claim as he failed to establish that the diagnosed medical conditions were causally related to the accepted employment incident of November 20, 2013.

By request dated June 9, 2015, but received by OWCP on June 16, 2015, appellant requested reconsideration of the June 12, 2014 decision. Appellant submitted new evidence in support of his reconsideration request.

In a September 29, 2014 progress report, Dr. Manprit K. Dhillon, appellant's treating Board-certified neurosurgeon, listed appellant's diagnosis as cervical spondylosis with myelopathy. He noted that appellant's magnetic resonance imaging scan from August 1, 2014 revealed good decompression of the cord at C4-5 and C5-6. Dr. Dhillon noted that appellant had a stable right C6-7 disc bulge with the canal diameter of 9 millimeter (mm). In an April 1, 2015 attending physician's report, he diagnosed spondylosis with myelopathy, and indicated that it was likely caused by the fall at work.

Appellant also submitted a note from a site safety manager at the employing establishment indicating that appellant was no longer to take any more HAZWASTE samples because he had not undergone a current HAZMAT physical, and that he also was precluded from other positions including those which required that he operate a forklift or crane.

By decision dated June 25, 2015, OWCP denied reconsideration as appellant's reconsideration request 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.² The Board has found that the imposition of the one-year limitation does not constitute an abuse

² 20 C.F.R. § 10.607(a).

of the discretionary authority granted OWCP under section 8128(a) of FECA.³ The one-year time limitation begins to run on the date following the date of the original decision.⁴

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁵ 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 demonstrates clear evidence of error on the part of OWCP.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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 establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP decision.¹²

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 did not demonstrate clear evidence of error. The only decision over which the Board has jurisdiction is

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

⁴ See S.T., Docket No. 15-382 (issued April 3, 2015); J.J., Docket No. 14-746 (issued October 17, 2014); C.B., Docket No. 13-1732 (issued January 28, 2014).

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ Id. at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (October 2011).

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona D. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 3.

the June 25, 2015 nonmerit decision wherein OWCP denied reconsideration as appellant's request was untimely filed and failed to demonstrate clear evidence of error.

Appellant's request for reconsideration was received by OWCP on June 16, 2015, more than one year after the June 12, 2014 decision. Therefore, his reconsideration request was untimely filed. Appellant argues on appeal that his letter was dated and mailed prior to the one-year deadline. However, OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provides that the date for timeliness of a reconsideration request is no longer the date the request was mailed, but rather the date the request was received by OWCP.¹³ Accordingly, appellant's argument is without merit.

The Board further finds that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error. The last merit decision denied appellant's claim as he failed to establish a causal relationship between the accepted employment incident of November 20, 2013 and his medical diagnoses of bilateral L5-S1 facet arthropathy, bilateral carpal tunnel syndrome, cervical radiculopathy and other disc disorder cervical region, and cervical spondylosis with myelopathy. Appellant has not submitted evidence demonstrating clear evidence that this decision was in error.

The note from the site safety manager addressing appellant's inability to perform certain work assignments is irrelevant to the issue of causal relationship, which is medical in nature. The only medical report submitted on reconsideration that addresses causal relationship is the April 1, 2015 attending physician's report wherein Dr. Dhillon indicated that appellant's spondylosis with myelopathy was likely caused by the fall at work. The Board notes that Dr. Dhillon's report provides speculative support for causal relationship as the physician qualifies his support by noting that appellant's employment "likely" caused the condition.¹⁴ The Board notes that clear evidence of error is intended to represent a difficult standard. Even the submission of a detailed well-rationalized 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.¹⁵

The Board notes that appellant also argues on appeal that OWCP should consider the reports of physician assistants and nurse practitioners to be medical evidence. This argument appears to address evidence that was submitted before the initial decision. The Board has long held that a probative medical report must be from a physician under FECA. FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law.¹⁶ As to medical evidence from a physician assistant or nurse practitioner, this does not

¹³ 20 C.F.R. § 10.607; *see also A.T.*, Docket No. 15-1896 (issued April 25, 2016).

¹⁴ *C.K.*, Docket No. 16-0291 (issued April 20, 2016).

¹⁵ *B.W.*, Docket No. 15-0892 (issued August 26, 2015).

¹⁶ 5 U.S.C. § 8101(2).

constitute competent medical evidence under FECA.¹⁷ Accordingly, appellant's argument does not demonstrate clear evidence of error.

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 June 25, 2015 is affirmed.

Issued: June 27, 2016
Washington, DC

Christopher J. Godfrey, 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

¹⁷ See V.C., Docket No. 16-0642 (issued April 19, 2016).