

FACTUAL HISTORY

The case has previously been before the Board. Appellant, then a 36-year-old mail processor, filed a traumatic injury claim (Form CA-1) on August 10, 2000 alleging that he sustained right shoulder injury, clavicle strain, and right rotator cuff injury on August 9, 2000 when a coworker tapped him on the shoulder, causing him to “go to his knees.”³ By merit decisions dated November 22, 2000 and April 22, 2002, OWCP denied the claim on the grounds that the medical evidence did not establish that the diagnosed conditions were causally related to the August 9, 2000 employment incident.

In a decision dated December 21 2005, the Board affirmed an August 27, 2004 OWCP decision finding that appellant’s request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.⁴ In a decision dated August 17, 2007, the Board dismissed the appeal as there was no final decision issued by OWCP within one year of the filing of the appeal.⁵ By decision dated June 20, 2008, the Board affirmed an October 12, 2007 OWCP decision, holding that appellant’s application for reconsideration was untimely filed and failed to demonstrate clear evidence of error.⁶ In a decision dated December 17, 2009, the Board affirmed OWCP’s February 13, 2009 decision finding appellant’s application for reconsideration was untimely filed and failed to demonstrate clear evidence of error.⁷ In a decision dated August 16, 2011, the Board affirmed an August 3, 2010 OWCP decision, finding appellant’s application for reconsideration was untimely filed and failed to demonstrate clear evidence of error.⁸ By decision dated February 5, 2013, the Board affirmed a June 21, 2012 OWCP decision, again finding appellant’s reconsideration request was untimely filed and failed to demonstrate clear evidence of error.⁹ The last Board decision of record is a November 24, 2014 decision, affirming a June 4, 2014 OWCP decision finding that appellant’s reconsideration request was untimely filed and failed to demonstrate clear evidence of error.¹⁰ The history of the case as contained in the Board’s prior decisions and orders are incorporated herein by reference.

On June 22, 2015 OWCP received a letter from appellant’s representative dated June 17, 2015, requesting reconsideration. Appellant’s representative argued that there was evidence that

³ The record indicates that appellant had a May 3, 2000 claim (OWCP File No. xxxxxx590) accepted for right shoulder strain and a September 18, 1991 claim accepted for left elbow lateral epicondylitis, left shoulder adhesive capsulitis, left brachial plexus lesions, left tenosynovitis of the hand/wrist and sprain/strains of the right shoulder, upper arm and acromioclavicular joint. The September 18, 1991 claim has been established as a master file (OWCP File No. xxxxxx559) with both the May 3, 2000 and the current August 9, 2000 claim on appeal as subsidiary files.

⁴ Docket No. 04-2283 (issued December 21, 2005).

⁵ Docket No. 07-0978 (issued August 17, 2007).

⁶ Docket No. 08-0271 (issued June 20, 2008).

⁷ Docket No. 09-1027 (issued December 17, 2009).

⁸ Docket No. 10-2378 (issued August 16, 2011).

⁹ Docket No. 12-1749 (issued February 5, 2013).

¹⁰ Docket No. 14-1589 (issued November 24, 2014).

appellant had “appealed the April 22, 2002 decision timely.” In addition, the representative argued that as of April 22, 2002 there was evidence of an acromioclavicular strain as a result of the May 3, 2009 employment injury. In a letter dated October 21, 2015, she argued that, if a reconsideration decision is delayed beyond 90 days and jeopardizes a merit review, OWCP should issue a merit decision. Appellant resubmitted a September 18, 2000 report from Dr. Gary Gartsman, a Board-certified orthopedic surgeon, regarding right shoulder pain, and an August 23, 2000 treatment note from Dr. Gartsman. He also resubmitted an October 16, 2000 statement regarding the August 9, 2000 employment incident.

By decision dated February 16, 2016, OWCP found the reconsideration request was untimely filed and failed to demonstrate clear evidence of error. It indicated that the reconsideration request was received on June 22, 2015 and was untimely, with no probative evidence establishing clear evidence of error by OWCP.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.¹¹ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”¹²

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.¹³ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁴ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹⁵ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.¹⁶ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁷

To demonstrate 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

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.605 (2012).

¹³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁴ Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

¹⁵ *Supra* note 1.

¹⁶ 20 C.F.R. § 10.607 (2012).

¹⁷ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

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.¹⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.²¹

ANALYSIS

The last OWCP decision on the merits of the claim was April 22, 2002. The reconsideration request was received on June 22, 2015. The request is therefore untimely. As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP to be entitled to a merit review of the claim.

The factual history of the case indicates the claim has been before the Board on numerous appeals under the clear evidence of error standard. The April 22, 2002 OWCP merit decision was a denial of the claim for injury on August 9, 2000. The Board has previously considered appellant's arguments that he had timely requested reconsideration of the merits of the claim, that OWCP had not properly developed the record, and had improperly denied the August 9, 2000 claim for injury because it had not properly considered the evidence. As the Board indicated in its last appeal, issues that have been addressed and decided by the Board are *res judicata* and will not be readjudicated.²² The Board previously reviewed arguments with respect to a September 18, 2000 report from Dr. Gartsman and found it had properly been considered.²³ Appellant's representative also refers to a delay in issuing a reconsideration decision that jeopardizes a merit review.²⁴ It is unclear what decision is being referred to, and there is no evidence that appellant's right to a merit decision by the Board was jeopardized by an OWCP delay in issuing a decision on reconsideration.

The Board finds appellant has not demonstrated clear evidence of error in this case. On appeal, appellant reiterates arguments previously raised on prior appeals. The Board again finds that appellant has not met the clear evidence of error standard in this case.

¹⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

²⁰ *Id.*

²¹ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

²² *See also J.V.*, Docket No. 14-0788 (issued October 19, 2015).

²³ *See supra* note 6.

²⁴ If a decision on a reconsideration request is delayed beyond 90 days and jeopardizes the right to a merit review by the Board, a merit review should be conducted. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(a) (October 2011).

CONCLUSION

The Board finds appellant's reconsideration request 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 February 16, 2016 is affirmed.

Issued: June 10, 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