

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim as his request was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant contends that he has submitted the evidence necessary to establish his claim.

FACTUAL HISTORY

On December 17, 2011 appellant, then a 52-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that a patient struck him in the left jaw with a fist. He listed the nature of the injury as discoloration, pain, and swelling to his lower left jaw. Appellant submitted no evidence with his claim, and did not timely respond to OWCP's request that he submit evidence within 30 days. Accordingly, in a decision dated June 18, 2012, OWCP denied appellant's claim as he did not submit medical evidence to establish fact of injury causally related to the accepted December 17, 2011 employment incident.

On November 8, 2012 appellant requested reconsideration. Evidence submitted by appellant since OWCP's June 18, 2012 decision included a December 17, 2011 note from Dr. William D. Padamadan, a Board-certified internist. Dr. Padamadan indicated that appellant had been struck on the left side of the jaw a few hours prior to his examination. He noted no visible swelling or ecchymoses and that appellant's gum and teeth were intact. Dr. Padamadan noted no contraindication for appellant going back to his regular duties, and noted that his prognosis was excellent.

Appellant also submitted a nursing note from Penny Callis, a registered nurse, of the same date. In a July 16, 2012 note, Dr. Jeremy Crabtree, a dentist, indicated that appellant was under his care. He related that on May 4, 2012 appellant had root canal therapy on his lower left second bicuspid, and that the tooth was crowned on June 27, 2012. Dr. Crabtree opined that this treatment was required because of an injury to appellant's tooth that was caused by a blow to appellant's jaw.

By decision dated January 15, 2013, OWCP denied modification of its prior decision. It found that the facts of the claim were not in dispute. OWCP was clear that on December 17, 2011 appellant was struck on the left side of his jaw by a patient. However it also found that the medical evidence was totally devoid of an opinion explaining why appellant required dental treatment in May 2012 causally related to the event of December 17, 2011.

By letter dated March 19, 2013 and received by OWCP on March 27, 2013, appellant, through his representative, requested reconsideration. The representative argued that there was evidence in the record that appellant saw a private dentist after being struck on the left side of the face while in the performance of his duties.

By decision dated August 16, 2013, OWCP denied modification of its prior decision.

By letter dated June 2, 2015 and received by OWCP on June 9, 2015 appellant, through his representative, requested reconsideration and submitted medical evidence.

In an April 30, 2013 report, Dr. Crabtree indicated that appellant was currently under his care for treatment of his lower left cuspid, that the tooth had to be surgically extracted on April 22, 2013, that the tooth was ankylosed and had external resorption as a result of trauma suffered at the employing establishment. He explained that the ideal treatment for replacement of the tooth was socket preservation and placement of an implant and implant crown. In an August 27, 2014 report, Dr. Crabtree noted that appellant's tooth was traumatized two and a half years ago in an incident at work, and that the injury resulted in external resorption and severe bone loss on tooth number 22. He indicated that he had been advised by appellant's periodontist, Dr. Ira Levenson, that an implant was contraindicated and that a bridge from tooth number 21 to 23 was to be placed. Dr. Crabtree noted that there was possible future loss of teeth 21 and 23 due to bone loss from the trauma to the area. Appellant also resubmitted Dr. Crabtree's July 16, 2012 report, Dr. Padamadan's note of December 17, 2011, and the nurse's note of December 17, 2011.

OWCP also received an undated statement wherein registered nurse Kaye Smith indicated that appellant was on duty on December 17, 2011 when he was hit in his lower left jaw by a patient, and was immediately seen by the urgent care physician who returned him to work. Ms. Smith noted that the next day appellant had a dark purple/blue bruise on his lower left jaw in the area where the hit had occurred, and the bruise lasted for weeks after the injury had occurred and had impacted his teeth. Identical statements were signed by registered nurses Belinda Walter and Laura Hollis, licensed practical nurse Scott Eichenlaub, nursing assistant Patricia Leon, and Linda Lawson.

By decision dated August 26, 2015, OWCP denied appellant's request 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, OWCP must receive a request for reconsideration 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 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

³ 20 C.F.R. § 10.607(a).

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

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

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.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 demonstrates 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 demonstrate 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 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's decision.¹³

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.

As previously stated, the Board does not have jurisdiction over the last merit decision, issued on August 16, 2013. The only decision over which the Board has jurisdiction is the August 26, 2015 nonmerit decision wherein OWCP denied reconsideration as appellant's request

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

⁷ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (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. *Id.* at Chapter 2.1602.3c.

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 *Leona D. Travis*, *supra* note 9.

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

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

for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. Appellant, through his representative, most recently requested reconsideration by a letter dated June 2, 2015. As this request was received by OWCP on June 9, 2015, more than one year after the last merit decision, is was untimely filed.

The Board further finds that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error. The last merit decision affirmed OWCP's denial of appellant's claim as he had not established a causal relationship between the accepted December 17, 2011 employment incident and appellant's dental treatment commencing May 2012. In support of his reconsideration request, appellant submitted new reports, dated April 30, 2013 and August 27, 2014, wherein Dr. Crabtree discussed appellant's dental treatment. Dr. Crabtree's reports are insufficient to demonstrate clear evidence of error. These reports are largely repetitive of Dr. Crabtree's earlier report of July 16, 2012 and do not raise a substantial question as to the correctness of OWCP's merit decision.¹⁴ The term clear evidence of error is intended to represent a difficult standard. Appellant must present evidence which on its face shows that OWCP made an error.¹⁵

Appellant also submitted on reconsideration other reports from Dr. Crabtree, Dr. Padamadan's report of December 17, 2011, and nurse's note of December 17, 2011. As previously noted evidence that duplicates or repeats evidence already in the case record does not raise a substantial question as to the correctness of OWCP's merit decision.¹⁶

While appellant also submitted a number of statements from nurses verifying the December 17, 2011 incident, this evidence does not demonstrate clear evidence of error in the denial of appellant's dental treatment as of May 2012.

Accordingly, the Board finds that OWCP properly denied appellant's untimely reconsideration request. The Board will affirm OWCP's August 26, 2015 decision.

CONCLUSION

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

¹⁴ See *T.M.*, Docket No. 15-1571 (issued November 5, 2015).

¹⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁶ See *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2015 is affirmed.

Issued: May 26, 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