

FACTUAL HISTORY

On October 14, 2014 appellant, then a 50-year-old helper trainee of ship inactivation and dismantling, filed an occupational disease claim (Form CA-2) alleging that he developed two herniated discs as a result of his federal employment duties. He notified his supervisor, first received medical care, and stopped work on October 1, 2014. On the reverse side of the form, the employing establishment challenged the claim stating that the cause of injury was unclear as appellant was only hired on August 18, 2014.

By letter dated October 22, 2014, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was afforded 30 days to respond. OWCP requested appellant to describe in detail the employment-related activities which he believed contributed to his back condition, how often he performed the activities described, the length and period of the described activities, when he first noticed his condition, the symptoms he experienced, what treatment he had done, prior orthopedic injuries to his back, whether he had ever undergone surgery for these injuries, any diagnosis or treatment for a prior back condition, and activities he engaged in outside of his federal employment.

In support of his claim, appellant submitted a Notification of Personnel Action (Form SF-50) for a helper trainee, an official position description, and a U.S. Office of Personnel Management Certificate of Medical Examination which provided a description of employment duties for ship inactivation and dismantling.

In an October 1, 2014 urgent care discharge sheet, Dr. Andrew R. Hamilton, Board-certified in family medicine, diagnosed musculoskeletal pain and ataxia. Medical work restrictions dated October 2, November 12, and 14, 2014 were also provided.

By letter dated November 3, 2014, the employing establishment controverted the claim arguing that appellant's herniated discs were not causally related to his October 1, 2014 injury as he failed to establish fact of injury, causal relationship, and that the injury occurred in the performance of duty.

In a November 17, 2014 medical report, Dr. Bruce R. Christen, Board-certified in occupational medicine, reported that appellant was a ship dismantler and presented for assignment of temporary work limits and accommodations due to his October 6, 2014 spinal surgery for T4-5 discectomy and fusion. He diagnosed thoracic radiculopathy and released appellant to work with restrictions.

By decision dated November 25, 2014, OWCP denied appellant's claim finding that the evidence of record failed to establish that the occupational exposure occurred as alleged. It noted that appellant failed to establish fact of injury because he did not respond to the questions provided in its October 22, 2014 development letter.

In an October 18, 2015 narrative statement, appellant described his employment duties at the employing establishment, which entailed dismantling and recycling ships and submarines. He reported that on September 3 through 5, 2014, he was tasked with shoveling up linoleum and

cement grout flooring material which he bagged, labeled, and moved to the staging area approximately 75 feet. Appellant described other employment duties he was required to perform and stated that the work activities of September 3 through 5, 2014 caused his back problems. He concluded that his work was physically demanding while his home life was sedentary with no physically excessive hobbies.

In a November 17, 2014 memorandum to employee, the employing establishment advised appellant that his medical work limitations expired on December 17, 2014 and he was required to resume work on that date.

In an undated narrative statement received on November 30, 2015, appellant noted that he was writing this statement in direct response to correspondence he received from Ms. Sandra Knivilla-Ritchie and statements he received from two of his supervisors. He explained that his letter was being submitted to refute and clarify his assigned work duties at the employing establishment as fact of injury and causal relationship were denied based on statements from his assigned supervisors. Appellant provided a detailed description of his assigned work duties. He noted that he passed a rigorous physical examination to qualify working for the employing establishment and as such, his back injury was caused by his employment duties. Appellant further discussed his medical treatment and reports submitted in support of his claim.

By letter dated December 1, 2015, Ms. Knivilla-Ritchie, a Department of Navy Human Resources Specialist, noted that the employing establishment received appellant's November 30, 2015 letter and refuted his statements *via* an attached statement from his Resource Manager refuting his statements.

On January 20, 2016 appellant's representative, Rachel Montoy, submitted a facsimile to OWCP noting that its office received a copy of appellant's reconsideration packet on November 30, 2015. She provided appellant's undated narrative statement previously received by OWCP on November 30, 2015.

By decision dated January 28, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

In a February 25, 2016 note, appellant's representative argued that appellant timely filed his reconsideration request with accompanying documents on October 30, 2015 which was submitted to the employing establishment compensation office. An appeal request form dated October 29, 2015 was submitted documented by a stamp stating, "FECA RECEIVED October 30, 2015." In support of his claim, appellant submitted evidence previously of record as well as medical reports dated October 2, 2014 through October 18, 2015 documenting treatment for his back. A November 24, 2015 email correspondence from appellant's supervisor was also submitted. The supervisor described appellant's employment duties and stated that his work was not strenuous, nor was he required to move beyond the designated weight limits.

By decision dated March 2, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's 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 of the discretionary authority granted OWCP under section 8128(a) of FECA.³

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit and it must manifest on its face that OWCP committed an error.⁴

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 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.⁵

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.⁹

ANALYSIS

In its March 2, 2016 decision, OWCP denied appellant's request for reconsideration of the November 25, 2014 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error. The Board finds that OWCP properly determined that his request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

² 20 C.F.R. § 10.607(a).

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

⁴ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

OWCP's procedures were changed effective August 29, 2011.¹⁰ Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹¹ OWCP issued its most recent merit decision, denying appellant's occupational disease claim, on November 25, 2014. The one-year time limitation for reconsideration began to run on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹² Therefore, appellant had one year from November 25, 2014 to submit a timely request for reconsideration. The time for requesting reconsideration of OWCP's November 25, 2014 decision ended on November 25, 2015.

The Board notes initially that on November 6, 2015 OWCP received appellant's October 18, 2015 narrative statement, in which he described his employment duties in response to the October 22, 2014 development letter. This statement however did not contain a discernable request for reconsideration of the November 25, 2014 decision.¹³

Appellant's undated narrative statement disputing OWCP's denial was not received until November 30, 2015.¹⁴ His representative did not notify OWCP of a request for reconsideration until January 20, 2016 when she submitted a copy of appellant's reconsideration packet received in her office on November 30, 2015. As OWCP did not receive appellant's request for reconsideration by November 25, 2015, it properly found that the request was untimely filed.¹⁵ It proceeded to deny appellant's request for reconsideration utilizing the clear evidence of error standard.

On appeal appellant argues that his request for reconsideration with supporting documents was timely submitted to his employing establishment. He argues that his representative was told not to submit directly to OWCP as it could create more work and could be submitted to his employing establishment's FECA office. Appellant further argued that his reconsideration request was given to Ms. Knivila-Ritchie on October 30, 2015, and thus, was timely filed. In a February 25, 2016 note, appellant's representative argued that on October 30, 2015 appellant timely filed his reconsideration request with accompanying documents to the

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, 2.1602.4 (October 2011).

¹¹ 20 C.F.R. § 10.607 (2011).

¹² *Supra* note 11.

¹³ While no special form is required to request reconsideration, and the word reconsideration need not be used, the request must be in writing, be signed and dated by the claimant or the authorized representative, and be accompanied by relevant new evidence or argument not considered previously. The request should also identify the decision and the specific issue(s) for which reconsideration is being requested. *See M.D.*, Docket No. 15-0811 (issued August 20, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (February 2016).

¹⁴ *See M.H.*, Docket No. 13-1901 (issued January 8, 2014); *Debra McDavid*, 57 ECAB 149, 150 (2005); *Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000); *Gary J. Martinez*, 41 ECAB 427, 427-28 (1990).

¹⁵ *P.R.*, Docket No. 14-300 (issued May 12, 2014).

PSNS compensation office. An appeal request form dated October 29, 2015 was submitted documented by a stamp stating, “FECA RECEIVED October 30, 2015.”

As noted above, the application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.¹⁶ The November 25, 2014 decision issued to appellant was accompanied with FECA Appeal Rights and Appeal Request Form. The Appeal Request Form notified appellant that his reconsideration request must be signed, dated, and received by OWCP within one-calendar year of the date of the decision, state the grounds upon which reconsideration was being requested, and include relevant new evidence or legal argument not previously made.¹⁷ It instructed him to mail his reconsideration request to DOL DFEC Central Mailroom, P.O. Box 8300, London, KY, 40742. Appellant’s representative argued that the request was timely filed as evidenced by the October 30, 2015 stamp on the appeal request form. However, appellant’s representative confirmed that the appeal was submitted to the employing establishment and not OWCP as instructed. While appellant argues that he timely submitted his reconsideration request to the employing establishment, OWCP properly followed its procedures by providing appellant his appeal rights with the November 25, 2014 decision.¹⁸ It is appellant’s responsibility to submit the proper documents and request for reconsideration to OWCP as designated in the FECA Appeal Rights and Appeal Request Form. As the record before the Board does not establish that OWCP received appellant’s reconsideration request by November 25, 2015, one year after the date of the last merit decision of record on November 25, 2014, it was untimely.¹⁹ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim.²⁰

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP. In support of his reconsideration request, appellant resubmitted his narrative statements and medical reports previously of record. In resubmitting these documents, appellant did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. It is not apparent how

¹⁶ *Supra* note 11.

¹⁷ 20 C.F.R. § 10.606(b)(3) of OWCP’s regulations provide that an application for reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

¹⁸ All formal decisions and disallowances require appeal rights. The claims examiner (CE) must attach proper appeal rights and the appeal request form to both the Notice of Decision and the Letter Decision, whether the claim is denied in full or in part. Most decisions (initial decisions, awards, or *de novo* decisions) afford three avenues of appeal: reconsideration, hearing before the Branch of Hearings and Review (oral hearing or written review), or an appeal to the Employees’ Compensation Appeals Board (ECAB). As noted in 20 C.F.R. § 10.600, for each appeal method there are time limitations and other restrictions that may apply. FECA Procedure Manual, Part 2 -- Claims, *Case/Disability Management, Disallowances*, Chapter 2.1400.3(f) (February 2013).

¹⁹ *S.W.*, Docket No. 13-1618 (issued December 12, 2013).

²⁰ See *Debra McDavid*, 57 ECAB 149 (2005).

resubmission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision.²¹

Appellant also submitted a November 4, 2015 email correspondence from his supervisor. This document is insufficient to establish that OWCP committed clear evidence of error as the statements made do not provide support for appellant's occupational disease claim. While appellant's November 30, 2015 narrative statement detailed his employment duties and factors he contributed to his injury, this additional evidence is also insufficient to establish that OWCP erred in its denial of appellant's claim.²² The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report or detailed narrative statement, which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.²³

Appellant further submitted new medical reports dated October 2, 2014 through October 18, 2015 documenting treatment for his back. The underlying issue on appeal involved fact of injury, namely whether the occupational exposure occurred as alleged within the performance of duty. While the new medical evidence has some connection to his claim, the reports are irrelevant to the issue for which OWCP denied appellant's claim, the failure to establish occupational exposure and factors of employment that he has alleged caused him injury.²⁴ Therefore, these documents are insufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP's decision regarding fact of injury, *i.e.*, that appellant was exposed to employment factors which caused him injury.²⁵ Thus, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.²⁶

While appellant addressed his disagreement with OWCP's denial of his claim and submitted additional factual details, his general allegations do not demonstrate clear evidence of error because his arguments do not raise a substantial question as to the correctness of OWCP's decision. He did not submit the type of positive, precise, and explicit evidence that manifests on its face that OWCP committed an error.²⁷ Thus, appellant did not demonstrate clear evidence of error in the denial of his occupational disease claim.²⁸

²¹ *J.J.*, Docket No. 13-1363 (issued November 6, 2013).

²² *See W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²³ FECA Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

²⁴ *David J. McDonald*, 50 ECAB 185 (1990).

²⁵ *L.B.*, docket No. 12-1592 (issued December 5, 2012).

²⁶ *Id.*

²⁷ *J.T.*, Docket No. 10-313 (issued February 24, 2010).

²⁸ *B.B.*, Docket No. 08-232 (issued August 7, 2008).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 28, 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