United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 16-1001**
	)	**Issued: September 8, 2016**
DEPARTMENT OF THE AIR FORCE, CONNECTICUT AIR NATIONAL GUARD, Middletown, CT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 11, 2016 appellant filed a timely appeal of an October 14, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the most recent merit decision dated May 21, 2014, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 7, 2014 a traumatic injury claim (Form CA-1) was filed on appellant's behalf. The employing establishment indicated that on April 4, 2014 appellant, then a 50-year-old

[1] 5 U.S.C. § 8101 *et seq.*

human resources specialist suffered a heart attack as he was walking to his car after running and engaging in his allowed physical training. Appellant stopped work that day.

In an April 6, 2014 report, Dr. Timothy Lehmann, a Board-certified thoracic and cardiac surgeon, advised that appellant was admitted after having cardiac arrest. He noted that appellant had a history of hypertension and indicated that physical examination revealed 130/80 blood pressure, no soft masses, femoral and pedal pulses 2+, and no murmur. Dr. Lehmann recommended a coronary artery bypass.

The employing establishment authorized medical treatment in an April 7, 2014 Authorization for Examination and/or Treatment (Form CA-16). In an accompanying April 11, 2014 attending physician's report, Dr. Lehmann assessed myocardial infarction and coronary artery disease. He checked the boxed marked "yes" to indicate that appellant's condition was caused by an employment activity and noted that he was totally disabled from April 11 through July 1, 2014.

By letter dated April 15, 2014, OWCP advised appellant of the type of evidence needed to establish his claim. In another April 15, 2014 letter, it also requested that the employing establishment provide additional information.

In an April 7, 2014 surgery report, Dr. Lehmann diagnosed coronary artery disease and ventricular fibrillation arrest. He noted that appellant underwent a coronary artery bypass and grafting times four.

An April 7, 2014 work capacity evaluation advised that appellant underwent a quadruple bypass on April 7, 2014 and was unable to work until July 7, 2014.

In an April 21, 2014 statement, James Quagliaroli, the deputy director of human resources, advised that "a maximum of three hours per week may be authorized for personal physical fitness and exercise training in order to promote better health and welfare and to help meet the standards for annual physical fitness testing." He noted that appellant was authorized to perform physical fitness training activity on the date of injury. Multiple witness statements were submitted. The statements indicated that appellant collapsed after running on the track at Bradley Air National Guard Base. They noted that cardiopulmonary resuscitation (CPR) was administered and that an automated external defibrillator was used until the first responders arrived.

In an April 24, 2014 attending physician's report (Form CA-20), Dr. Lehmann checked the box marked "yes" to indicate that appellant's condition was caused by an employment activity. He explained that appellant's cardiac arrest occurred at work while running. Dr. Lehmann diagnosed severe triple vessel disease and noted that appellant had undergone a quadruple coronary artery bypass which rendered him unable to work until July 7, 2014.

By decision dated May 21, 2014, OWCP denied appellant's claim because the medical evidence of record was insufficient to establish causal relationship between his medical condition and the accepted work event.

Appellant continued to submit evidence. In an April 4, 2014 emergency department report, Dr. Daniel Perl, Board-certified in family medicine, advised that appellant had a history

of hypertension, high cholesterol, and a family history of cardiac disease. He noted that appellant sustained a syncopal episode after completing a one and a half mile run. Dr. Perl noted that appellant was unresponsive and bystanders performed CPR and administered a defibrillator shock. Physical examination revealed a normal neurologic and respiratory examination. He advised that appellant would be placed on continuous cardiac monitoring.

Multiple diagnostic reports were submitted. In an April 4, 2014 diagnostic report, Dr. Pupinder Jaswal, a Board-certified diagnostic radiologist, advised that a computerized tomography (CT) scan of the head revealed mild hyper-dense hemorrhagic edema in the upper part of the right parietal scalp. Dr. Clifford Freling, a Board-certified diagnostic radiologist, advised that a computerized tomography angiography (CTA) revealed no evidence of pulmonary embolus. In an April 7, 2014 diagnostic report, Dr. Michael Twohig, a Board-certified diagnostic radiologist, advised that a chest x-ray revealed a left endotracheal tube, central venous pressure (CVP) line in good position, no pneumothorax, no infiltrates, and no effusions. In an April 8, 2014 diagnostic report, Dr. Michael Firestone, a Board-certified diagnostic radiologist advised that a chest x-ray revealed stable postoperative appearance, visual left chest tube, no pneumothorax, stable heart and lungs, and a removed endotracheal tube. Several electrocardiography (ECG) reports were submitted.

In an April 5, 2014 report, Dr. Aneesh Tolat, Board-certified in internal medicine and cardiovascular disease, advised that appellant experienced syncope and cardiac arrest after completing a one-and-a-half-mile practice run with the employing establishment. He noted that appellant related that he felt winded after the run and fell when he walked back to his truck. Dr. Tolat advised that appellant indicated that he ran and exercised three to five times a week and smoked one pack of cigarettes a day. He diagnosed coronary artery disease, related ischemia, smoking-related vasospasm, or some other form of structural heart disease.

By letter dated May 18, 2015 and received by OWCP on May 26, 2015, appellant requested reconsideration. Appellant argued that medical evidence was sufficient to establish his claim as Dr. Lehmann indicated that he sustained cardiac arrest at work while running. He contended that Dr. Lehmann did not merely "check a box" to establish causal relation as he provided an explanation as requested. Appellant submitted reports previously considered by OWCP.

In an April 24, 2014 report, Dr. Lehmann advised that appellant was doing well with no complaints following an April 7, 2014 coronary artery bypass surgery.

In a June 5, 2015 report, Dr. Murthappa Prakash, Board-certified in internal medicine and cardiovascular disease provided the history of the April 4, 2014 incident. He opined that appellant's "cardiac arrest was precipitated by the activity of physical exercise, given appellant's underlying condition of severe coronary artery disease." Dr. Prakash indicated that cardiac arrest could occur with exercise or independent of exercise and noted that appellant's cardiac arrest was possibly reflected a ruptured plaque that led to an acute ischemic event and manifested as ventricular fibrillation resulting in cardiac arrest.

By decision dated October 14, 2015, OWCP denied appellant's request for reconsideration 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 must file his or her application for review within one year of the date of that decision.[2] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.[3]

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.[4] OWCP regulations and procedures provide that it 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.[5]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[6] The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10]

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent OWCP merit decision in this case was issued on May 21, 2014. Appellant's request for reconsideration was not received by OWCP until May 26, 2015, more than one year after the May 21, 2014 merit decision. Therefore, it was untimely

[2] 20 C.F.R. § 10.607(a).

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

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

[5] *Id*.; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (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. 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.

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

[7] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[8] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[9] *See supra* note 9.

[10] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in the denial of his traumatic injury claim. The evidence submitted by appellant did not raise a substantial question concerning the correctness of OWCP's decision.

In support of reconsideration, appellant argued that medical evidence was sufficient to establish his claim as Dr. Lehmann indicated that he sustained cardiac arrest at work while running. He contended that Dr. Lehmann did not merely "check a box" to establish causal relation as he provided an explanation as requested. As noted, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] Appellant's argument does not raise a substantial question as to the correctness of OWCP's decision.

Appellant also submitted several diagnostic reports. However, these reports do not provide an opinion on causal relationship. As a result, these reports do not raise a substantial question as to the correctness of OWCP's decision in its denial of appellant's claim.

In his April 4, 2014 report, Dr. Perl advised that appellant had a history of hypertension, high cholesterol, and a family history of cardiac disease. He noted that appellant had a syncopal episode after completing a one and a half mile run. In his April 5, 2014 report, Dr. Tolata advised that appellant experienced syncope and cardiac arrest after completing a one and a half mile practice run with the employing establishment. He noted that appellant related that he felt winded after the run and fell when he walked back to his truck. In his April 24, 2014 report, Dr. Lehmann advised that appellant was doing well with no complaints following an April 7, 2014 coronary artery bypass surgery. Although these reports provide a history of the injury, they do not raise a substantial question as to the correctness of OWCP's denial of appellant's claim.

In his June 5, 2015 report, Dr. Prakash opined that appellant's "cardiac arrest was precipitated by the activity of physical exercise, given the underlying condition of severe coronary artery disease." He indicated that cardiac arrest could occur during exercise or independent of exercise and noted that appellant's cardiac arrest soon after exercising possibly reflected a ruptured plaque that led to an acute ischemic event and manifested as ventricular fibrillation resulting in cardiac arrest. Although Dr. Prakash's report provides some support for causal relationship, it does not raise a substantial question as to the correctness of OWCP's denial of appellant's claim. The term clear evidence of error is intended to represent a difficult standard. 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.[12]

Appellant resubmitted several documents previously considered by OWCP. However, he has not sufficiently explained how resubmission of this evidence is sufficient to raise a

[11] *See supra* note 7.

[12] *D.G.*, 59 ECAB 455 (2008); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

substantial question as to the correctness of OWCP's decision. Thus, this resubmitted evidence is insufficient to demonstrate clear evidence of error.

On appeal appellant argued the merits of his claim. However, the Board does not have jurisdiction over the merits of the claim. As explained, appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board