

On appeal appellant argues that his request for reconsideration was sent in a timely manner.

FACTUAL HISTORY

On September 15, 2000 appellant, then a 43-year-old vehicle maintenance technician, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment since 1996 had caused severe tendinitis and swelling in both elbows and forearms. By decision dated April 17, 2001, OWCP accepted his claim for bilateral medial and lateral epicondylitis. Appellant initially received compensation benefits on the supplemental roll. As of May 18, 2003, he received benefits on the periodic rolls.

Based upon a May 29, 2007 report from appellant's treating physician, Dr. Leo Hise, a Board-certified orthopedic surgeon, which provided work restrictions, appellant was referred for vocational rehabilitation services. Appellant was provided rehabilitation and placement assistance. On February 24, 2009 OWCP advised appellant that it proposed to reduce his compensation benefits as the selected position of Supervisor, Engine Repair, was medically and vocationally suitable and represented his wage-earning capacity. By decision dated March 25, 2009, OWCP finalized the proposed reduction of appellant's compensation benefits.

On April 10, 2009 appellant requested a review of the written record by an OWCP hearing representative. By decision dated December 17, 2009, the OWCP hearing representative reversed the March 25, 2009 reduction of appellant's benefits, finding that OWCP had not established that the position of Engine Repair Supervisor existed in sufficient quantities to be reasonably available.

On May 9, 2012 OWCP proposed a reduction of appellant's compensation benefits based upon his capacity to earn wages in the selected position of Automobile Repair-Service Estimator.

On July 11, 2012 OWCP finalized a proposed reduction of compensation, based upon appellant's completion of vocational rehabilitation and the rehabilitation counselor's finding that the position of Automobile Repair-Service Estimator was medically and vocationally suitable, and fairly and reasonably represented his wage earning capacity.

On August 6, 2012 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated November 28, 2012, a hearing representative affirmed OWCP's July 11, 2012 decision. She noted that appellant had developed new conditions since his work-related injury. The hearing representative noted new conditions occurring after the work injury were not to be considered in evaluating the suitability of a selected position, and that appellant had not presented medical evidence sufficient to establish that he was unable to work the selected positions, due to preexisting or accepted conditions. She further noted that the rehabilitation counselor reasonably determined that appellant had sufficient skills for the selected position, and that the position was reasonably available.

On January 3, 2013 appellant requested reconsideration. He argued that he was in worse physical condition than he was when he stopped work and stated that he would undergo a functional capacity evaluation (FCE).

By decision dated April 4 2013, OWCP reviewed the merits of appellant's claim and affirmed the November 28, 2012 decision. It noted that there was no evidence of a material worsening of his conditions attributable to his federal employment.

On December 2, 2013 appellant again requested reconsideration. He enclosed several medical reports from his treating physicians along with physical therapy notes.

By decision dated February 21, 2014 OWCP reviewed the merits of appellant's claim and affirmed the April 4, 2013 decision. It noted that the reports received had referenced bilateral shoulder pain along with his accepted conditions, which OWCP found to be insufficient to establish that he was incapable of performing the selected position.

On July 8, 2014 appellant again requested reconsideration. He enclosed an FCE evaluation with his request, along with several reports and a narrative statement.

By decision dated December 18, 2014 OWCP reviewed the merits of appellant's claim and affirmed the February 21, 2014 decision. It noted that appellant's contention that the vocational rehabilitation efforts had been inadequate had already been addressed in an earlier decision. OWCP further noted that the FCE indicated that he was capable of working within the physical requirements of the selected position.

Appellant continued to resubmit medical evidence previously of record. On November 16, 2015 OWCP received a November 9, 2015 report from Dr. Michael Mollen, a family practitioner, who related that appellant had requested that he prepare a note regarding the current status of appellant's bilateral chronic epicondylitis and repetitive strain injury. Dr. Mollen related that he examined appellant last week, but had known appellant for many years from his previous practice. He further noted that he had reviewed appellant's FCE of June 4, 2014 and, based on his current examination, he concluded that appellant's status was unchanged.

On December 21, 2015 appellant again requested reconsideration. With his request, appellant enclosed a narrative statement, noting that he had recently undergone knee replacement surgery, that the symptoms in his knees had prevented him from undertaking daily activities, and that he knew the "cut-off time" for reconsideration was close.

By decision dated March 17, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. OWCP noted that the decision for which appellant requested reconsideration was dated December 18, 2014, but that it had not received his request for reconsideration until December 21, 2015.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of

OWCP's decision for which review is sought.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

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes 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 shows clear evidence of error on the part of OWCP.⁶

To establish 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 establish 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

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹² In order to establish 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

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 *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 2.1602.5(a) (February 2016). OWCP's procedure further provides, "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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent, but the award was not paid at the augmented rate."

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

⁸ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

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

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

¹² *See Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

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

In its March 17, 2016 decision, OWCP properly determined that appellant failed to file a timely application for review. Although the request was dated December 15, 2014, OWCP regulations provide that the request must be received within one-year time of the date of the original OWCP decision.¹⁴ OWCP's imaging system recorded the receipt of appellant's request on December 21, 2015, which was more than one year after OWCP's December 18, 2014 decision. Therefore, appellant must demonstrate clear evidence of error.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its wage-earning capacity decision. He did not submit the type of positive, precise, and explicit evidence manifesting on its face that OWCP committed an error.¹⁵

Following the December 18, 2014 merit decision, appellant continued to resubmit medical evidence previously of record. He also submitted the November 9, 2015 report from Dr. Mollen wherein he related that appellant's status was unchanged. The medical reports submitted on reconsideration were duplicative of reports previously of record. Appellant has not explained how the resubmission of these reports raise a substantial question concerning the correctness of OWCP's decision. None of these medical reports were sufficient to shift the weight of the evidence in appellant's favor and do not demonstrate clear evidence of error.¹⁶ The Board notes that clear evidence of error is intended to represent a difficult standard. Even the submission of 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.¹⁷

With his December 21, 2015 request for reconsideration, appellant also enclosed a narrative statement. He noted that he had recently undergone knee replacement surgery, that the symptoms in his knees had prevented him from undertaking daily activities, and that he knew the "cut-off time" for reconsideration was close. The basis for appellant's reduction of compensation was appellant's completion of vocational rehabilitation and the counselor's finding of positions that were medically and vocationally suitable and fairly and reasonably represented his wage earning capacity.

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Supra* note 6.

¹⁶ *C.W.*, Docket No. 16-1478 (issued December 23, 2016); *see also G.B.*, Docket No. 16-0319 (issued April 6, 2016).

¹⁷ *D.G.*, 59 ECAB 455 (2008).

While appellant addressed his disagreement with OWCP's decision 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.¹⁸

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's December 18, 2014 decision, and OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.

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 March 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See A.S., Docket No. 16-0902 (issued September 28, 2016).