

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 28, 1995 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 2, 1995 he injured his back while turning as he was descending steps of a customer's house. He stopped work on September 26, 1995. Appellant retired on Office of Personal Management (OPM) disability, effective April 25, 1997.

OWCP initially denied the claim by decision dated October 10, 1996 finding that the evidence of record failed to establish that the injury occurred as alleged. Appellant requested reconsideration and by decision dated March 19, 1997 OWCP denied modification of its prior decision. He subsequently appealed to the Board. By decision dated July 6, 1999, the Board set aside the October 10, 1996 and March 19, 1997 OWCP decisions and remanded the case to OWCP.³ On remand, OWCP accepted appellant's claim for L5-S1 herniated nucleus pulposus.⁴

Appellant then filed a claim for a schedule award (Form CA-7), which was denied by decision dated April 3, 2001. He then requested reconsideration and by October 25, 2001 nonmerit decision, OWCP denied further merit review of the claim. Appellant appealed to the Board and by decision dated August 23, 2002, the Board affirmed the April 3 and October 25, 2001 OWCP decisions.⁵

In a December 3, 2003 report, Dr. Ivy V. McGee-Reed, a treating physician specializing in family medicine, noted appellant's medical history, medication, and examination findings. She noted diagnoses from x-ray interpretations and magnetic resonance imaging scans from 1995 to 2003 and opined that he was totally disabled due to his motor impairment.

On February 5, 2004 appellant filed a claim for a recurrence of disability (Form CA-2a) due to his accepted September 2, 1995 employment injury. He noted that his last day of work for the employing establishment was September 26, 1995. On the reverse side of the form, the employing establishment noted that appellant had not returned to work following his injury.

In an August 31, 2004 attending physician's report (Form CA-20), Dr. McGee-Reed noted the accepted September 2, 1995 employment injury and diagnosed lumbar radiculopathy and lumbar disc disorder. She indicated that appellant was totally disabled from work beginning September 2, 1995 to the present.

² Docket No. 97-1944 (issued July 6, 1999); Docket No. 02-0663 (issued August 23, 2002) *Order Denying Petition for Reconsideration*, Docket No. 02-0663 (issued January 27, 2003).

³ Docket No. 97-1944 (issued July 6, 1999).

⁴ The record does not reflect that appellant received FECA disability wage-loss benefits after the acceptance of his claim.

⁵ Docket No. 02-0663 (issued August 23, 2002).

On April 10, 2006 appellant filed a claim for a schedule award (Form CA-7). By decision dated July 26, 2007, OWCP granted a schedule award for 24 percent right lower extremity permanent impairment and 28 percent left lower extremity permanent impairment. The period of the award ran from March 19, 2007 to January 30, 2010.

On April 24, 2008 OWCP received appellant's occupational disease claim (Form CA-2) dated April 18, 2008 alleging that his post-traumatic stress disorder had been aggravated by factors of his employment. Appellant alleged that he first became aware of this condition and the relationship to his federal employment on September 2, 1995.⁶

On August 23, 2011 OWCP referred appellant for a second opinion evaluation with Dr. John Sklar, a Board-certified physiatrist, for an opinion regarding appellant's accepted condition and his work capacity.

In a September 20, 2011 report, Dr. Sklar, based upon a review of the medical evidence, statement of accepted facts (SOAF), and physical examination, opined that appellant had fully recovered from his accepted work injury and that his current disability was due to nonemployment-related conditions.

In a November 30, 2011 report, Dr. John P. Sandifer, a treating physician specializing in orthopedic surgery, noted his disagreement with Dr. Sklar's report and conclusions.

On January 3, 2012 OWCP referred appellant to Dr. David Sanderson, Board-certified, in orthopedic to resolve the conflict in the medical opinion evidence between Dr. Sklar and Dr. Sandifer as to whether appellant was disabled from work due to his accepted employment injury.

In a February 8, 2012 report, Dr. Sanderson, based upon a review of the medical opinion evidence, SOAF, injury history, and physical examination, diagnosed status post L5-S1 discectomy with partial laminectomy, noncompensable lower extremities shrapnel wounds, and noncompensable post-traumatic stress disorder. He opined that appellant had been disabled up to his OPM retirement date. Dr. Sanderson explained that appellant's disability thereafter was due to his nonwork-related conditions. He opined that the accepted condition had resolved without residuals or disability as he found no lower extremity muscle weakness or sensory deficits due to the accepted back injury.

On August 16, 2012 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing May 15, 1996 causally related to the accepted September 2, 1995 employment injury.

In an August 22, 2012 report, Dr. Sandifer noted that appellant was seen for his annual physical and that he was last seen in March 2011. Diagnoses included moderate bilateral knee degenerative joint disease and status postsurgery for herniated disc with bilateral radiculopathy, and chronic back and lower extremity pain. Dr. Sandifer attributed all of appellant's medical

⁶ The record does not reflect that OWCP issued a formal decision accepting or denying this claim.

conditions to appellant's accepted September 2, 1995 work injury. He concluded that appellant was not a good candidate for any type of gainful employment.

In a September 5, 2012 letter, OWCP informed appellant that the evidence of record was insufficient to establish his recurrence claim and noted that he had retired from the employing establishment, effective April 25, 1997. It advised him regarding the medical and factual evidence required to establish his claim and afforded him 30 days to provide the requested information.

By decision dated November 21, 2012, OWCP denied appellant's claim for a recurrence of disability commencing January 31, 2010, the date his schedule award terminated, causally related to his accepted September 2, 1995 employment injury.

On November 26, 2012 appellant requested an oral hearing before an OWCP hearing representative, which was held on March 11, 2013.

By decision dated April 18, 2013, an OWCP hearing representative affirmed the denial of appellant's claim for a recurrence of disability. She found that the weight of the medical opinion evidence rested with the opinion of the impartial medical examiner, Dr. Sanderson, that appellant's disability from work was due to nonwork-related factors.

In an October 22, 2012 report, Dr. Milan G. Mody, a treating Board-certified orthopedic surgeon, diagnosed lumbar radiculitis, lumbar spondylosis, lumbago, cervicgia, unbalanced gait, and acquired spondylolisthesis. Under history, he noted a September 2, 1995 twisting injury and fall at work.

Dr. Mody in reports dated December 19, 2012 and January 17 and November 16, 2013, provided examination findings and diagnoses of gait abnormality, neck pain, low back/back pain, acquired spondylolisthesis, and thoracic or lumbar radiculitis.

In a letter dated February 28, 2014, recorded March 6, 2014, appellant requested reconsideration. He argued that there was no conflict in the medical opinion evidence and that both Dr. Sklar and Dr. Sanderson opined that appellant continued to have residuals from his accepted work injury.

In a decision dated April 2, 2014, OWCP denied modification. It found the evidence and argument insufficient to establish appellant's claim for recurrence of disability.

By form dated March 20, 2015 and received on April 2, 2015, appellant again requested reconsideration.

By decision dated April 13, 2015, OWCP denied reconsideration as he submitted no new evidence, nor raised a substantive new legal argument.

In a letter dated December 20, 2015 and received on December 28, 2015, appellant again requested reconsideration. He argued that he was entitled to a merit review due to the delay in OWCP's processing his request for reconsideration and the processing of his claim. Appellant also argued that OWCP did not provide any appeal rights with its decision and the Board should

remand the case for OWCP to issue a proper decision with appeal right. He noted that he was submitting new evidence in support of his claim that he was entitled to wage-loss compensation. Appellant also presented arguments regarding the lack of light-duty work, his fitness-for-duty evaluation, and whether the verbal offer of a light-duty job complied with OWCP's regulations. He also argued the medical evidence he submitted and the employing establishment's approval of his disability retirement established that he was permanently disabled from performing his job as a letter carrier due to his back condition.

In support of his request for reconsideration, appellant submitted new evidence. He also resubmitted a January 8, 1996 report from Dr. Carl G. Goodman, an examining Board-certified orthopedic surgeon, progress notes covering the period January 10, to November 6, 1996,⁷ and an undated and unsigned duty status form (Form CA-17) with restrictions

In a January 15, 1996 progress note, Dr. Goodman, an examining Board-certified orthopedic surgeon, reported that appellant was under his care for a back condition and indicated that appellant was capable of performing light-duty work. He wrote that appellant was not capable of carrying mail.

A January 16, 1996 routing slip from the Homer Postmaster certified that no light-duty assignments were available.

In a February 9, 1996 report, Dr. Anil Nanda, a treating Board-certified neurosurgeon, diagnosed a L5-S1 herniated disc and recommended surgery. He opined that it was possible that the diagnosed condition had been caused by appellant's employment injury.

The record contains a second page from a surgeon's dictation regarding a May 15, 1996 operation which Dr. Nanda signed on May 17, 1996.⁸

Dr. Goodman, in a July 22, 1996 letter, wrote that appellant had been seen for leg and low back pain which was consistent with a lumbar disc herniation. He opined that appellant's twisting injury while carrying mail caused his lumbar disc herniation and subsequent lumbar surgery.

On August 19, 1996 Dr. Goodman diagnosed a large L5 disc herniation based on review of a computerized axial tomography scan.

On November 20, 1996 the employing establishment requested that a fitness-for-duty examination be conducted as appellant had been off work for 14 months due to back problems.

On December 20, 1996 the employing establishment requested that Dr. Tony Allerman, Board-certified in occupational medicine, perform a fitness-for-duty examination. On January 30, 1997 Dr. Allerman submitted a report following his examination of appellant. He concluded that appellant was capable of performing light-duty work with restrictions.

⁷ These notes do not contain any identification that a physician wrote them.

⁸ The Board notes that the record contains a previously submitted May 17, 1996 operative report from Dr. Nanda.

A January 21, 1997 functional capacity evaluation (FCE) report provided work restrictions based on testing performed.

A February 13, 1997 medical assessment form completed by Dr. Anthony J. Bouligny, an employing establishment physician specializing in internal medicine, recommended that a specialist evaluate appellant. He also noted appellant's restrictions.

OWCP also received a February 19, 1997 letter from the postmaster which informed appellant that light-duty work within his restrictions was not available.

Notes dated April 21, 2015, provided examination findings and opined that appellant was totally disabled from work.⁹ Diagnoses included moderate bilateral knee degenerative joint disease, chronic back pain from progressive lumbar degenerative disc disease, and status postsurgery for herniated disc with bilateral radiculopathy worse in the left leg.

By decision dated December 14, 2016, OWCP denied appellant's December 28, 2015 request for reconsideration. It found that he had submitted an untimely request for reconsideration and failed to demonstrate clear evidence of error in the denial of his recurrence claim.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.¹⁰ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.¹¹ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.¹² Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,¹³ if the claimant's application for review shows clear evidence of error on the part of OWCP.¹⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁵

⁹ The signature for the physician's last name is illegible.

¹⁰ See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹¹ 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

¹² *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹³ 20 C.F.R. § 10.607.

¹⁴ See *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁶ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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.¹⁷

OWCP's procedures note 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.¹⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁹

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.²⁰ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²¹ As appellant requested reconsideration on December 28, 2015, more than one year after the last merit decision, dated April 2, 2014, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for a recurrence of disability.²²

The Board finds that appellant has not demonstrated clear evidence of error. The underlying claim for compensation was denied as appellant had not established his alleged recurrence of disability, as of January 31, 2010, the date his schedule award terminated. He

¹⁶ *F.R.*, Docket No. 09-0575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁷ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 14.

¹⁸ *Supra* note 11 at Chapter 2.1602.5(a) (February 2016); *James R. Mirra*, 56 ECAB 738 (2005).

¹⁹ *See M.L.*, *supra* note 14; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

²⁰ 20 C.F.R. § 10.607(a).

²¹ *Robert F. Stone*, 57 ECAB 292 (2005).

²² 20 C.F.R. § 10.607(b); *see Robert G. Burns*, *supra* note 14.

subsequently did not submit substantial evidence to shift the weight of the evidence of record and establish that the denial was in error.²³

Appellant submitted a January 15, 1996 progress note from Dr. Goodman opining that appellant was disabled from carrying mail. Also submitted were February 9, 1996 report diagnosing a L5-S1 herniated disc and recommending surgery and a second page of May 17, 1995 operative report by Dr. Nanda. Dr. Goodman in a July 22, 1996 report opined that appellant's lumbar surgery and lumbar disc herniation to a twisting injury while delivering mail and diagnosed a large L-5 disc herniation in an August 19, 1996 report. A January 30, 1997 fitness-for-duty report by Dr. Allerman finding that appellant was capable of working with restrictions. A February 13, 1997 medical assessment form completed by Dr. Bouligny, an employing establishment physician, noting restrictions and requesting a specialist examination. None of these reports specifically address how the accepted L5-S1 herniated nucleus pulposus caused a recurrence of disability on and after January 31, 2010 and how OWCP erred in issuing its decision. The record also contains an April 21, 2015 report from a physician with an illegible signature opining that appellant was totally disabled from work. As the author cannot be identified as a physician, it is of no probative value.²⁴

Appellant also submitted a January 16, 1996 routing slip from the postmaster stating no light-duty assignments were available, a January 21, 1997 FCE report, and a February 19, 1997 letter from the postmaster that no light-duty jobs were available within his work restrictions. He argued that light duty was not properly offered to him. None of this evidence or argument discusses whether the restrictions or lack of light-duty jobs was for restrictions due to appellant's accepted employment injury. Further, appellant does not explain how this evidence addresses a recurrence of disability on and after January 31, 2010 causally related to the accepted L5-S1 herniated nucleus pulposus.

The Board has held that even a report such as a detailed, well-rationalized medical report, which if submitted before the denial was issued would have created a conflict in medical evidence requiring further development, is not sufficient to demonstrate clear evidence of error.²⁵ OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.²⁶ The Board finds that none of the evidence appellant submitted is sufficient to demonstrate clear evidence of error in the denial of his recurrence claim.

On appeal appellant argues the merits of his claim, contending that OWCP erred in finding a conflict in the medical opinion evidence, that the employing establishment failed to submit medical evidence, and OWCP relied on stale medical evidence. As previously noted, the Board does not have jurisdiction over the merits of the claim and appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

²³ *I.S.*, Docket No. 08-1020 (issued September 16, 2008); *James R. Mirra, supra* note 18.

²⁴ *See Merton J. Sills*, 39 ECAB 572, 575 (1988); *see also C.H.*, Docket No. 17-1568 (issued October 26, 2017).

²⁵ *A.R.*, Docket No. 15-1598 (issued December 7, 2015); *James R. Mirra, supra* note 18.

²⁶ *See G.V.*, Docket No. 14-1270 (issued February 1, 2016); *James R. Mirra, id.*

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 decision of the Office of Workers' Compensation Programs dated December 14, 2016 is affirmed.

Issued: December 12, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy 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