

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in prior Board decisions are incorporated herein by reference. On January 14, 1992 appellant, then a 49-year-old construction representative, sustained injuries to his neck and back when he slipped on a wet dock at work. He stopped work on January 16, 1992 and did not return. Effective August 9, 1992, appellant elected a disability retirement annuity from the Office of Personnel Management (OPM). OWCP accepted the claim for cervical and lumbosacral sprains and paid compensation benefits until the election of OPM benefits.

On February 27, 2006 appellant filed a claim for compensation (Form CA-7) for disability commencing August 9, 1992. On January 5, 2007 he elected to receive wage-loss compensation from OWCP retroactive to August 9, 1992, in lieu of OPM benefits. Appellant asserted that his disability from work was due to his accepted condition.

On June 1, 2007 OWCP denied appellant's claim for compensation due to insufficient medical evidence to establish his claim. After a reconsideration request it conducted a merit review, but denied modification of the claim on September 27, 2007. Appellant appealed to the Board. On May 13, 2008 the Board issued an order remanding the case to OWCP for proper assemblage of the record and a *de novo* decision as the case record was missing materials from August 4, 1995 through December 14, 2004.³

After determining no records were missing, OWCP reissued its decision on December 1, 2008 denying wage-loss compensation commencing August 9, 1992. Appellant appealed to the Board. By decision dated October 22, 2009, the Board affirmed the December 1, 2008 decision, finding that appellant had not met his burden of proof to establish wage-loss compensation beginning August 9, 1992.⁴

Appellant requested reconsideration. In decisions dated January 14, 2011 and April 4, 2012, OWCP reviewed the case on its merits and denied modification of the wage-loss compensation determination. On October 26, 2012 appellant appealed the April 4, 2012 decision to the Board. On December 20, 2012 the Board issued an order dismissing his appeal as it was untimely filed and the Board lacked jurisdiction to review the appeal.⁵

On March 29, 2013 appellant requested reconsideration with OWCP of the April 4, 2012 decision. The request was received by OWCP on April 5, 2013. By decision dated May 8, 2013, OWCP denied appellant's request as it was untimely filed and failed to demonstrate clear evidence of error. Appellant disagreed and again requested reconsideration. On August 14,

² Docket No. 08-278 (issued May 13, 2008), Docket No. 09-519 (issued October 22, 2009), Docket No. 13-169 (issued December 20, 2012), Docket No. 14-132 (issued June 11, 2014), and Docket No. 15-0865 (issued October 6, 2015).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

2013 OWCP denied his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board. By decision dated June 11, 2014, the Board affirmed the May 8 and August 14, 2013 OWCP decisions.⁶

Appellant again requested reconsideration on June 26, 2014. Evidence received in support of this reconsideration request included a May 22, 2013 letter from the U.S. Postal Service apologizing for delayed delivery of his reconsideration request mailed on March 29, 2013, and confirming delivery of that letter to an OWCP mailroom in London, Kentucky, on April 4, 2013. Also submitted was a printout showing that appellant's certified mail item was delivered on April 4, 2013 in London, Kentucky, and a copy of correspondence between appellant and the office of Senator Elizabeth Warren.

By decision dated September 29, 2014, OWCP denied appellant's request for reconsideration. It found that, while he had established that the March 29, 2013 request for reconsideration was delivered to OWCP's mailroom on April 4, 2013, it was not received by OWCP's district office until April 5, 2013, and was, therefore, untimely filed. OWCP further found that appellant did not submit any relevant and pertinent new evidence with his most recent reconsideration request that showed it erroneously applied or interpreted a specific point of law, or advanced a relevant legal argument not previously considered. Appellant appealed to the Board.

By decision dated October 6, 2015, the Board set aside OWCP's September 29, 2014 decision and remanded the case for further review under the clear evidence of error standard. The Board found that OWCP received appellant's latest request for reconsideration on June 26, 2014, which was more than a year after the latest merit decision dated April 4, 2012. The Board further found that OWCP applied the wrong standard of review to the untimely request for reconsideration.⁷

By decision dated January 19, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that he had not submitted any new evidence pertaining to the issue of his claim for compensation since the last merit decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁹ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is

⁶ *Id.*

⁷ *Id.*

⁸ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application.” 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607.

sought.¹⁰ OWCP will consider an untimely request for reconsideration only if the request demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit decision.”¹¹ The request must establish on its face that such decision was erroneous.¹² To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993). Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS

The last merit decision of record is dated April 4, 2012. When the case was last on appeal, the Board determined that appellant’s latest request for reconsideration, which OWCP received on June 26, 2014 was untimely pursuant to 20 C.F.R. § 10.607(a), and therefore, subject to the clear evidence of error standard.¹⁴ Since the Board’s prior decision, appellant has failed to present any additional evidence or argument that would warrant revisiting the issue of whether the current June 26, 2014 request for reconsideration was timely filed. Accordingly, the Board shall focus on whether appellant demonstrated clear evidence of error with respect to OWCP’s latest merit decision denying appellant’s claim for wage-loss compensation commencing August 9, 1992.

In his June 26, 2014 request for reconsideration, appellant focused exclusively on the timeliness issue and did not articulate any particular basis for awarding wage-loss compensation retroactive to August 9, 1992. OWCP subsequently received August 12, 2014 correspondence between appellant and his U.S. Senator. This information, however, is not relevant to the issue of whether OWCP erred in denying appellant’s claim for wage-loss compensation commencing

¹⁰ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). 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). *Id.* at Chapter 2.1602.4b.

¹¹ *Id.* at § 10.607(b).

¹² *Id.*

¹³ *Id.* at § 10.608(b).

¹⁴ *See supra* note 9.

August 9, 1992. Thus, the evidence of record is insufficient to demonstrate clear evidence of error with respect to OWCP's April 4, 2012 decision.

On appeal, appellant argues that OWCP completely overlooked the legislation and regulations for disability annuitants, which he alleges establishes that he had not recovered or been restored to earning capacity by OPM. His argument does not demonstrate clear evidence of error as the legal criteria for OPM disability benefits does not similarly control one's eligibility for FECA wage-loss compensation.¹⁵ Accordingly, 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.

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 January 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ An employee's rights and remedies under other statutory authority do not establish entitlement to benefits under FECA. *See J.F.*, 59 ECAB 331, 339 (2008).