

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.

On appeal counsel argues that a new medical report is sufficient to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts as presented in the prior Board decision are incorporated herein by reference. The relevant facts are set forth below.

On February 18, 2014 appellant, then a 38-year-old assistant unit operator, filed a traumatic injury claim (Form CA-1) alleging that on January 30, 2014 he injured the left side of his lower back, the sacrum, and his left leg when his feet slipped out from under him while at work.

By decision dated April 14, 2014, OWCP denied appellant's claim as the medical evidence of record did not establish an injury causally related to the accepted January 30, 2014 employment incident. On April 29, 2014 counsel for appellant requested a telephonic hearing before an OWCP hearing representative, and submitted medical reports regarding appellant's diagnosed conditions of left-sided back pain; severe left buttock, thigh, and leg radiculopathy; degenerative disc disease at L3-4, L5-S1, worse at L3-4; mild facet arthropathy at L3-4 and L5-S1; and mild foraminal stenosis, worst on the left at L5-S1. By decision dated January 29, 2015, the hearing representative affirmed OWCP's April 14, 2014 decision.

On May 5, 2015 appellant, through counsel, appealed the January 29, 2015 decision to the Board. By decision dated October 8, 2015, the Board found that appellant had not submitted sufficient medical evidence to establish causal relationship between his diagnosed medical conditions and the January 30, 2014 employment incident.⁴

By letter dated and received on December 2, 2016, counsel filed a motion requesting that OWCP rescind the October 8, 2015 Board decision.⁵ He argued that since the last decision by OWCP, new medical evidence had been received, including a detailed medical report with a rationalized statement of causal relationship. Counsel argued that Board precedent required OWCP to consider all evidence on file, and that, therefore, this new medical evidence, which was not previously available for consideration by OWCP, should suffice to rescind the decision of October 8, 2015.

³ Docket No. 15-1210 (issued October 8, 2015).

⁴ *Id.*

⁵ OWCP is not authorized to review Board decisions. Although the October 8, 2015 decision was the last merit decision, the hearing representative's January 29, 2015 merit decision is the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d).

In a report dated September 1, 2016, signed by the physician on November 9, 2016, Dr. Neil Allen, Board-certified in internal medicine and neurology, opined: “[appellant’s] age-related changes within the spine combined with the accident on January 30, 2014 contributed to the manifestation of symptomatic lumbar spondylosis.” He related, “[t]he forceful and acute lumbar extension and torsion sustained by [appellant] on January 30, 2015 was the aggravating event directly resulting in a symptomatic lumbar disc herniation and lumbar spondylosis. This is supported by accepted medical fact in the literature, as described above.”

OWCP treated counsel’s December 2, 2016 motion to rescind as a request for reconsideration. By decision dated December 12, 2016, it denied the request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.⁶ For decisions after August 29, 2011, the date the request is received into iFECs is considered the date of receipt under OWCP procedures.⁷ 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.⁸

OWCP 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.⁹ 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 demonstrates clear evidence of error on the part of OWCP.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011).

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

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *Id.*; 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.”

¹¹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

demonstrate clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵

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.¹⁶ In order to demonstrate 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 the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁷

ANALYSIS

The Board finds that, in its December 12, 2016 decision, OWCP properly determined that appellant's request for reconsideration was untimely filed. Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.¹⁸ Appellant's request for reconsideration was received on December 2, 2016, which was more than one year following the Board's October 8, 2016 merit decision. Therefore, he must demonstrate clear evidence of error on the part of OWCP in issuing its January 29, 2015 decision.

The Board further finds that appellant failed to demonstrate clear evidence of error on the part of OWCP in issuing its January 29, 2015 decision. He did not submit the type of positive, precise, and explicit evidence manifesting on its face that OWCP committed an error.

Appellant's request for reconsideration contained a new report from Dr. Allen, dated September 1, 2016, signed on November 9, 2016, which was not previously considered by OWCP in its January 29, 2015 decision. On appeal counsel contends that this report was sufficient for OWCP to exercise its discretion to reopen the case for merit review, or that the motion to rescind should be granted. However, OWCP's procedure manual provides that the submission of such a report, even if well rationalized, does not demonstrate clear evidence of error.¹⁹

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁷ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016); see *D.G.*, 59 ECAB 455 (2008). See also *S.R.*, Docket No. 17-0271 (issued April 24, 2017).

For these reasons, the Board finds that OWCP properly determined that appellant 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 December 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 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