

FACTUAL HISTORY

This case has previously been before the Board. The facts and the circumstances from the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that on June 17, 2013 appellant, then a 55-year-old nursing assistant, sustained a closed fracture of the distal phalanx of the left great toe. He filed a claim for a recurrence of disability (Form CA-2a) commencing December 2, 2013. Appellant stopped work on February 3, 2014 and subsequently resigned from federal employment.

In a decision dated December 18, 2014, OWCP closed appellant's case effective that date, finding that the accepted fracture had resolved as of June 6, 2014, based on the opinion of Dr. Eve N. Hanna, an attending physician Board-certified in emergency medicine. Appellant appealed to the Board, contending that he remained totally disabled from work due to the accepted left great toe fracture.³

By decision and order issued June 15, 2015,⁴ the Board affirmed OWCP's December 18, 2014 decision, finding that there was no medical evidence of record establishing that the accepted fracture disabled appellant from work on and after December 18, 2014 or that it required additional medical treatment.

Appellant continued to submit letters asserting that his condition had not resolved and that his claim had been improperly developed. He also resubmitted medical reports previously of record and evidence that predated his June 17, 2013 work injury. The evidence also included August 30 and October 28, 2013 radiology reports for the great toes, right knee, and right ankle. In the August 30, 2013 right ankle x-ray report, Dr. Aaron Andrews, a diagnostic radiologist, noted that appellant had a history of an injury two months earlier and that he had a "loud pop after stretching yesterday."

In letters received by OWCP on June 24 and August 26, 2016, appellant requested reconsideration. He contended that the accepted fracture led to a worsening of diabetic conditions. Appellant also alleged that the employing establishment deliberately obstructed his claim.

By decision dated September 15, 2016, OWCP denied appellant's request for reconsideration, as it was untimely filed and failed to demonstrate clear evidence of error. It found that appellant's first letter requesting reconsideration was received on June 24, 2016, more than one year after the Board's June 15, 2015 merit decision, the final merit decision in the claim.

³ During the pendency of the prior appeal, appellant submitted treatment notes from the employing establishment addressing back conditions, knee conditions, and the June 17, 2013 fracture, dated from 2006 through November 20, 2013.

⁴ Docket No. 15-0711 (issued June 15, 2015), *Order Denying Petition for Reconsideration*, Docket No. 15-0711 (issued November 13, 2015).

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁶ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁷ OWCP, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that it will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of the last merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request (the received date) in the Integrated Federal Employee's Compensation System (iFECS).⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁹

In those cases where requests for reconsideration are untimely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.¹⁰ OWCP regulations and procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulation, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by OWCP of how the

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁷ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁹ 5 U.S.C. § 10.607(b); *supra* note 7.

¹⁰ *Supra* note 6.

¹¹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016)

¹² *Supra* note 6.

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *Jesus D. Sanchez*, *supra* note 7.

¹⁵ *Supra* note 13.

evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error by OWCP.¹⁶ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁷

ANALYSIS

On June 24, 2016 appellant requested reconsideration regarding his claim for recurrence of disability. The Board finds that as more than one year elapsed from the most recent merit decision on this issue, the June 15, 2015 merit decision, and appellant's request for reconsideration received by OWCP on June 24, 2016, his request for reconsideration was untimely filed.¹⁸

The Board also finds that appellant failed to demonstrate clear evidence of error. On reconsideration appellant contended that the accepted fracture worsened his diabetic conditions, and that the employing establishment obstructed his claim.

In its June 15, 2015 merit decision, the Board affirmed a December 18, 2014 merit decision of OWCP finding that appellant's accepted condition had resolved and that he had not established disability from work on and after December 18, 2014 due to the accepted condition. Absent further merit review of his issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.¹⁹

On reconsideration, appellant asserted that his condition had worsened and that OWCP had improperly handled his claim. He provided similar letters following OWCP's December 18, 2014 decision. The term clear evidence of error is intended to represent a difficult standard, and the argument appellant provided on reconsideration is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.²⁰ Appellant's argument is of insufficient probative value to shift the weight in his favor and raise a substantial question as to the correctness of OWCP's December 18, 2014 merit decision. Likewise medical evidence submitted by appellant after OWCP's December 18, 2014 merit decision is insufficient to demonstrate clear evidence of error. With regard to evidence previously of record, appellant did not explain how such evidence raised a substantial question as to the correctness of OWCP's decision.²¹ Although appellant submitted radiology reports not previously of record, this evidence neither addressed the cause of his condition, nor related his symptoms to a nonwork

¹⁶ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁷ *Gregory Griffin*, *supra* note 8.

¹⁸ *See supra* note 11 at Chapter 2.1602.4a (February 2016), which provides that a right to reconsideration within one year accompanies any subsequent merit decision, including any merit decision by the Board.

¹⁹ *A.B.*, Docket No. 16-0864 (issued November 16, 2016).

²⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²¹ *See S.E.*, Docket No. 16-1258 (issued December 5, 2016).

event, stretching. As noted, the term clear evidence of error is intended to represent a difficult standard. The Board finds that this evidence does not rise to the level of clear evidence of error.

On appeal, appellant contends that OWCP violated federal and international law by denying his FECA claim, as the Social Security Administration and Department of Veterans Affairs had issued him disability benefits for service-related conditions. However, the determination of an employee's rights or remedies under other statutory authorities does not establish entitlement to benefits under FECA.²² Appellant also argues that OWCP's denial of his claim violated his constitutional rights. As the Board is an administrative body, it does not have the jurisdiction to review a constitutional claim.²³

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration because 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 September 15, 2016 is affirmed.

Issued: March 23, 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

²² *H.S.*, 58 ECAB 554 (2007).

²³ *Andrew Fullman*, 57 ECAB 574 (2006).