

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 appellant asserts that he continues to have permanent restrictions due to the accepted lumbar sprain.

FACTUAL HISTORY

This case has previously been before the Board. The facts relevant to the present appeal are set forth below.

On April 20, 2010 appellant, then a 53-year-old letter carrier, injured his lower back while lifting a tub of mail. OWCP accepted that appellant sustained a lumbar sprain. Appellant received continuation of pay and wage-loss compensation based on Form CA-7 claims. The employing establishment informed OWCP that appellant returned to work on October 4, 2010, worked two days, and was sent home under the National Reassessment Process because no limited duty was available. He continued to receive wage-loss compensation through November 19, 2010.

In reports dated November 30, 2010, Dr. J. Todd Smith, an attending Board-certified orthopedic surgeon, described examination findings and advised that appellant could return to full duty and had no impairment with regard to the April 20, 2010 work injury. On December 21, 2010 Dr. David J. Aarons, an attending internist, noted that he agreed with the interpretation provided by Dr. Smith with regard to appellant's condition.

Appellant returned to regular duty on December 11, 2010 and worked one full day. He then applied for Social Security Administration (SSA) disability income benefits, and also requested wage-loss compensation with OWCP. In a February 23, 2011 decision, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Smith and terminated appellant's wage-loss compensation and medical benefits, effective February 24, 2011. After appellant requested a review of the written record by an OWCP hearing representative, appellant noted that SSA disability had been approved and asserted that he continued to have work restrictions. On June 16, 2011 an OWCP hearing representative affirmed the February 23, 2011 decision terminating appellant's wage-loss compensation and medical benefits. Appellant filed an appeal with the Board, and, in an order dated May 9, 2012, the Board remanded the case to OWCP to combine File Nos. xxxxxx616 and xxxxxx952.⁴ OWCP thereafter doubled the case files.

By decision dated September 12, 2012, OWCP again found the weight of the medical evidence rested with Dr. Smith and terminated appellant's wage-loss compensation and medical benefits, effective August 22, 2012. On October 5, 2012 appellant requested a hearing. He submitted additional medical evidence including a January 14, 2013 treatment note in which Dr. Aarons indicated that appellant's diagnoses included multilevel degenerative disc disease.

⁴ See *Order Remanding Case*, Docket No. 11-2031 (issued May 9, 2012).

By decision dated May 7, 2013, an OWCP hearing representative found that the medical evidence established that the lumbar sprain of April 20, 2010 had resolved and appellant had returned to baseline with regard to the preexisting degenerative disc disease. She affirmed the September 12, 2012 decision.

On February 4, 2014 appellant requested reconsideration and submitted additional reports from Dr. Aarons. In April 30 and July 5, 2013 reports, Dr. Aarons indicated that appellant had severe multilevel degenerative disc disease with severe foraminal stenosis at L5-S1 that would not improve. He opined that appellant's inability to work as a letter carrier was "directly due to [her] lumbar spine injury which I believe was incurred while working for the [employing establishment]." Dr. Aarons advised that appellant had permanent restrictions due to this injury of no lifting more than 10 pounds, no stooping, bending, twisting, or reaching over his head. Driving and sitting were limited to less than one hour.

In a March 17, 2014 merit decision, OWCP found that Dr. Aarons did not explain how the April 20, 2010 employment injury caused or aggravated the diagnosed multilevel degenerative disc disease and that he failed to provide medical rationale to support that appellant continued to have disability or residuals due to the April 20, 2010 employment injury. In its April 16, 2015 decision, the Board affirmed the March 17, 2014 OWCP decision.⁵

In correspondence received on April 20, 2016 appellant, through counsel, requested reconsideration.⁶ He asserted that the medical evidence, including reports from Dr. Aarons and an April 2016 magnetic resonance imaging (MRI) scan of the lumbar spine established that appellant continued to be disabled due to the employment injury.

Subsequent to the March 17, 2014 OWCP merit decision, appellant submitted reports dated March 9 through August 9, 2015 from doctors at Teamwork Ready Birmingham Clinics. In a March 9, 2015 report, Dr. Kathleen Warner, a Board-certified internist, noted appellant's report of his job duties, the work injury, and his medical care. She noted appellant's complaint of constant radiating low back pain and described examination findings of tenderness in the lumbosacral spine with decreased range of motion. Dr. Warner diagnosed lumbar disc disease and lumbosacral sprain. She opined that appellant's traumatic injury, when he had to lift 150 pounds, had been mishandled by OWCP. Dr. Warner recommended a lumbar MRI scan and physical therapy. On April 9, 2015 she noted that appellant was progressing well with physical therapy, but appeared somewhat impaired that day, likely due to overmedication with narcotics.

On May 28, 2015 appellant was evaluated by Dr. Thomas Crumbley, a chiropractor, who noted his complaint of constant low back pain. Dr. Crumbley diagnosed lumbar sprain and recommended a functional capacity evaluation.

In treatment notes dated June 30, July 27, and August 4, 2015 Dr. Rhett Krone, Board-certified in emergency medicine, noted a history of chronic back pain. Examination of the back

⁵ Docket No. 14-1407 (issued April 16, 2015).

⁶ At that time appellant was represented by Robert H. Turner, Jr., Esquire.

demonstrated that appellant was generally nontender, had some restricted motion, and an antalgic gait.

A February 22, 2016 MRI scan of the lumbar spine demonstrated normal alignment, no evidence of an acute fracture or dislocation, and mild multilevel discogenic degenerative changes with moderate discogenic degenerative disease at the L5-S1 level.

By decision dated June 9, 2016, OWCP denied appellant's reconsideration request, finding that the request was untimely filed and failed to demonstrate clear evidence of error in OWCP's last merit decision.

LEGAL PRECEDENT

Section 8128(a) of FECA⁷ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁸ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁹ OWCP, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP 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 Employees' Compensation System (iFECS).¹⁰ 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).¹¹

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹² OWCP procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP regulations, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error. Evidence which does not raise a

⁷ 5 U.S.C. § 8128(a).

⁸ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.607; *G.F.*, Docket No. 15-1053 (issued September 11, 2015).

¹¹ *Supra* note 7.

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to 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.¹⁴ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁵ 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.¹⁶

ANALYSIS

In a request received by OWCP on April 20, 2016 appellant, through counsel, requested reconsideration regarding his low back condition. The Board finds that as more than one year has elapsed between the most recent merit decision on this issue, dated April 16, 2015 decision, and appellant's request for reconsideration received by OWCP on April 20, 2016, his request for reconsideration was untimely filed.¹⁷

The Board also finds that appellant failed to demonstrate clear evidence of error.

In its April 16, 2015 decision, the Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 22, 2012 because he had no residuals of the accepted lumbar sprain. The Board further found that he did not establish that he had any continuing employment-related disability or condition after that date causally related to the April 20, 2010 employment injury. It affirmed a March 17, 2014 merit decision of OWCP.¹⁸ Absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.¹⁹

The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise, and explicit evidence which

¹⁴ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁶ *Nancy Marciano*, 50 ECAB 110 (1998).

¹⁷ See *supra* note 13 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. The Board notes that one year from the April 16, 2015 Board decision would be Saturday, April 16, 2016; therefore, the reconsideration request would have been timely if it had been received on Monday, April 18, 2016. It was not received until Wednesday, April 20, 2016.

¹⁸ *Supra* note 4.

¹⁹ See *T.B.*, Docket No. 15-0001 (issued July 1, 2015). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

manifested on its face that OWCP committed an error.²⁰ With the April 20, 2016 reconsideration request, counsel maintained that the medical evidence, including reports from Dr. Aarons and an April 2016 MRI scan of the lumbar spine, established continued disability from the employment injury. All reports of record submitted by Dr. Aarons had been reviewed by the Board in its April 16, 2015 decision. Appellant did not explain how resubmission of this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for further benefits.²¹

As to the medical evidence submitted subsequent to the March 17, 2014 OWCP decision, while Dr. Warner opined that appellant's case had been mishandled, she merely related appellant's description of his job duties and medical treatment. Dr. Krone merely noted examination findings and diagnosed chronic back pain. He did not relate his findings to appellant's employment or the April 20, 2010 work injury.²²

As a chiropractor, Dr. Crumbley's report is of no probative value because he did not diagnose a subluxation from x-ray, and, therefore, is not considered a "physician" under FECA.²³

The February 22, 2016 MRI scan report is of limited probative value as it contains no opinion on causal relationship²⁴

As noted, evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.²⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁶ The Board finds that the evidence and argument submitted by appellant does not demonstrate clear evidence of error on the part of OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

²⁰ *Supra* note 14.

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

²² *Willie M. Miller*, 53 ECAB 697 (2002) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

²³ *A.O.*, Docket No. 08-580 (issued January 28, 2009). Under section 8101(2) of FECA, the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. 5 U.S.C. § 8101(2); *see D.S.*, Docket No. 09-860 (issued November 2, 2009).

²⁴ *See id.*

²⁵ *See supra* note 13; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

²⁶ *See supra* note 13; *Leona N. Travis*, 43 ECAB 227 (1991).

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2016 decision of the Office of Workers' Compensation is affirmed.

Issued: March 21, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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