

FACTUAL HISTORY

On October 16, 2013 appellant, then a 49-year-old administrator, filed a traumatic injury claim (Form CA-1) alleging that on September 16, 2013 he sustained trauma to his back, shoulder, and neck area and that he suffered from emotional and mental trauma as a result of racing down three flights of stairs and assisting others in an effort to escape an active shooter at work. He stopped work and returned on September 23, 2013.

By letter dated November 13, 2013, OWCP advised appellant that no evidence had been received to support his traumatic injury claim. It requested that he respond to the attached questionnaire in order to substantiate the factual element of his claim and submit medical evidence to establish a diagnosed condition causally related to the alleged September 16, 2013 employment incident. Appellant was afforded 30 days to submit the additional information.

Appellant submitted an October 27, 2013 progress note by Dr. Lewis Eberly, Board-certified in neurology and neurophysiology, who related that appellant had experienced sleep problems for 13 years. Dr. Eberly reviewed appellant's medical history and provided physical and neurological examination findings. He diagnosed daytime hypersomnia, sleep onset, and sleep apnea.

Appellant also provided emergency room records dated November 6, 2013. In an arthrogram diagnostic scan report of the left shoulder, Dr. Tammy Lamb, a Board-certified diagnostic radiologist, noted diagnoses of shoulder joint pain, brachial neuritis or radiculitis, cervical spondylosis without myelopathy, and cervicocranial syndrome. In a November 6, 2013 magnetic resonance imaging (MRI) scan of appellant's left shoulder, Dr. Mitali Bapna, a Board-certified diagnostic radiologist, diagnosed supraspinatus tendinosis with partial bursal surface tear, mild tendinosis, tendinosis of the long head of the biceps tendon, and narrowing of the subacromial space with hypertrophic changes of the coracoacromial arch.

In a November 25, 2013 MRI scan report of the lumbar spine, Dr. Mark Cameron Lopiano, a Board-certified diagnostic radiologist, diagnosed mild degenerative disease with no findings of central, foraminal, or lateral nerve root impingement.

Appellant submitted reports dated December 2 and 16, 2013 cosigned by Shoshana Katz, a physician assistant, and Dr. Assaf T. Gordon, a physician Board-certified in physical medicine and rehabilitation. Dr. Gordon indicated that he examined appellant for complaints of pain in the neck and left lower extremity. He reviewed appellant's history and provided physical examination findings. Dr. Gordon diagnosed cervical disc disruption, lumbar radiculopathy, low back pain, cervical radiculopathy, and cervical postlaminectomy syndrome.

OWCP denied appellant's claim by decision dated January 14, 2014. It found that he failed to establish fact of injury because he did not submit supporting evidence regarding the details or circumstances of the September 16, 2013 employment incident. OWCP also determined that appellant had not submitted sufficient medical evidence to establish that his diagnosed conditions were causally related to the alleged employment incident.

In a statement dated January 28, 2014, appellant explained that on September 16, 2013 he raced down three flights of stairs to escape an active shooter situation at work. He indicated that

he exited on the south side of the building with a large crowd of people, and they realized that they were trapped by a 10-foot wall, which separated the employing establishment from the river walk. Appellant related that he and two other male coworkers began to assist several dozen adult women over the wall. He asserted that, in his efforts to help women over the wall, he sustained bruises to his shoulder and chest, migraines headaches, and some sleepless nights filled with night terrors. Appellant noted that he underwent several MRI scans of his neck, shoulder, and lower back, which showed two herniated discs in his neck, a municipal tear to his left shoulder, and a herniated disc in his lower back.

On March 11, 2014 OWCP received appellant's request for a review of the written record by an OWCP hearing representative. In a letter dated March 6, 2014, appellant noted that he was providing a copy of his previous January 28, 2014 letter and copies of his physician's records. He asserted that he believed that his injuries resulted from the September 16, 2013 shooting at the employing establishment when he helped several dozen frightened adult women over a wall. Appellant explained that he experienced sharp, shooting pains through his neck, shoulders, chest, arms, hands, and lower back area.

Appellant also submitted a November 7, 2013 MRI scan report of his cervical spine by Dr. Nitin Kumar, a Board-certified diagnostic radiologist. Dr. Kumar observed discogenic disease at C4-5 and C6-7 resulting in central canal and bilateral neural foraminal narrowing at each level without cord compression or cord signal abnormality. Appellant also resubmitted Dr. Eberly's October 25, 2013 progress note, Dr. Gordon's October 28, 2013 progress note, Dr. Lamb's November 6, 2013 arthrogram report, Dr. Bapna's November 7, 2013 MRI scan report, and Dr. Cameron's November 25, 2013 MRI scan report of the lumbar spine.

In office notes dated October 28, 2013 to February 17, 2014, Dr. Gordon related appellant's complaints of pain in the neck and left shoulder since a September 16, 2013 incident at work. He reviewed appellant's history and provided examination findings of his cervical spine and shoulder. Dr. Gordon diagnosed spondylosis without cervical myelopathy, shoulder pain, cervical radiculopathy, cervical postlaminectomy syndrome, cervicocranial syndrome, lumbar radiculopathy, low back pain, and cervicalgia. He noted that he administered epidural steroid injections.

By decision dated April 14, 2014, an OWCP hearing representative denied appellant's request for review of the written record because it was not filed within 30 days of the January 14, 2014 decision. She also explained that OWCP, in its discretion, carefully considered his request and determined that the issue in his claim could equally well be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

In a June 13, 2014 letter, appellant's representative at the time advised OWCP that he would be representing appellant regarding his workers' compensation claim and requested a copy of appellant's entire compensation file. OWCP received a June 4, 2014 authorization of representation signed by appellant.

On December 16 and 29, 2014 appellant, through his representative, requested reconsideration of the January 14, 2014 decision. The representative asserted that appellant provided a statement which itemized the actions he performed during the escape from an active shooter on his work premises. He noted that, even though the statement was not extremely

detailed, it sufficiently outlined the events as they occurred. The representative alleged that appellant had submitted sufficient evidence to establish the elements of fact of injury and performance of duty. He related that appellant's treating physicians would forward medical reports to support causal relationship.

By decision dated March 31, 2015, OWCP affirmed the denial of appellant's claim with modification. It found that the evidence of record was sufficient to support that the September 16, 2013 incident occurred as alleged, but denied his claim because the medical evidence submitted failed to establish that his diagnosed condition was causally related to the accepted incident. OWCP mailed the March 31, 2015 decision to appellant and his representative to their last known addresses of record.

In a letter dated August 25, 2015, appellant's representative related that appellant had requested reconsideration of the January 14, 2014 decision, which OWCP acknowledged receipt of on January 9, 2015. He reported that since then it appeared that no development had taken place. On September 2, 2015 OWCP resent a copy of the March 31, 2015 OWCP decision to appellant.

On October 6, 2015 appellant's then representative resubmitted the August 25, 2015 letter and indicated that it was his second request. In a letter dated October 8, 2015, OWCP informed him that a decision was originally mailed to his office on March 31, 2015. It noted that it was attaching a copy of the decision.

On August 29, 2016 appellant again requested reconsideration. In an August 8, 2016 report, Dr. Gordon indicated that he had treated appellant for lumbar spondylosis with radiculopathy, cervical postlaminectomy syndrome, myofascial pain, shoulder pain, and occipital neuralgia since October 28, 2013. He described the September 16, 2013 employment incident and related that appellant sustained these injuries at work on September 16, 2013. Dr. Gordon noted that the activities of "lifting and assisting several adults over the wall in which [appellant] engaged would have placed severe strain [on] the bilateral shoulders, neck, and low back."

By decision dated September 7, 2016, OWCP denied appellant's August 29, 2016 reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error. It explained that because his reconsideration request of OWCP's March 31, 2015 merit decision was received on August 29, 2016 it was not filed within the one-year time limitation. OWCP further found that appellant's reconsideration request and evidence submitted failed to demonstrate clear evidence that OWCP's decision was in error.

LEGAL PRECEDENT

OWCP regulations provide that, to be entitled to a merit review of an OWCP decision, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.³ It, however, may not deny an application for review solely because the application was untimely filed. OWCP may consider an untimely application for

³ 20 C.F.R. § 10.607(a); 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. 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.⁴ In this regard, it will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁶

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 manifest on its face that OWCP committed an error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ The evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁹ The Board has held that even 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 insufficient to demonstrate clear evidence of error.¹⁰ OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹¹ If clear evidence of error has not been presented, it should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹²

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.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP received his request for reconsideration on

⁴ See *id.* at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ *Id.* at § 10.607(b); *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5a (October 2011).

¹² *Id.*

¹³ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

August 29, 2016, which was outside the one-year time limit from March 31, 2015.¹⁴ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁵

The Board has reviewed the record and finds that the evidence submitted in the untimely request for reconsideration does not raise a substantial question as to the correctness of OWCP's March 31, 2015 decision and is therefore insufficient to demonstrate clear evidence of error.

In its most recent merit decision, OWCP denied appellant's traumatic injury claim because the medical evidence of record failed to demonstrate a causal relationship between his diagnosed conditions and the accepted September 16, 2013 employment incident. It determined that Dr. Gordon did not provide any medical rationale to establish that the September 16, 2013 employment incident caused or contributed to appellant's various medical conditions. Along with his most recent reconsideration request, appellant provided an August 8, 2016 report by Dr. Gordon. Dr. Gordon related that appellant sustained his injuries at work on September 16, 2013 when he physically assisted several dozen women over a wall.

The Board finds that this evidence fails to demonstrate clear evidence of error. Although Dr. Gordon's August 8, 2016 report provided a more detailed description of the accepted incident, this report neither established causal relationship nor raised a substantial question as to the correctness of OWCP's decision. As previously noted, 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 insufficient to demonstrate clear evidence of error.¹⁶ Consequently, this report is insufficient to demonstrate clear error by OWCP with respect to the denial of his traumatic injury claim.

The Board has found that the term "clear evidence of error" is intended to represent a difficult standard.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ The evidence submitted 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.¹⁹ For the reasons provided above appellant has failed to do so.

On appeal, appellant alleges that he did not receive notification of the March 31, 2015 decision. He indicated that he had to request a copy of the case record from OWCP and it took over one month to receive it. Appellant asserted that he should not be held accountable for the

¹⁴ See *supra* note 11 at Chapter 2.1602(4) (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

¹⁵ *Supra* note 10; *Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *Supra* note 10.

¹⁷ *James R. Mirra*, 56 ECAB 738 (2005); *supra* note 11.

¹⁸ *Supra* note 14.

¹⁹ *Supra* note 15.

government's lack of response. The Board finds, however, that the March 31, 2015 decision was sent to appellant and his representative at their respective last known addresses of record. In the absence of evidence to the contrary, a letter properly addressed and mailed in the regular course of business is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.²⁰ The Board finds that the record contains no indication that the March 31, 2015 decision was returned as nondeliverable. Consequently, under the mailbox rule, it is presumed that appellant and his representative both received their respective copies of the decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 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

²⁰ See e.g., *Kenneth E. Harris*, 54 ECAB 502 (2003).