

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.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On February 23, 2012 appellant, then a 38-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on February 22, 2012 he injured his low back when lifting a wheelchair-bound patient up steps. He did not stop work.

Appellant was initially treated by Dr. Eromonelel O. Idahosa, a Board-certified internist, on February 22, 2012 for low back pain. He reported assisting a wheelchair-bound patient up steps and he felt a pull in his low back. Dr. Idahosa diagnosed low back pain and muscle strain.

On October 5, 2012 Dr. Warren J. Hoyt, a Board-certified internist, treated appellant for ongoing neck and lower back pain. Appellant reported his low back pain began after lifting a 380-pound patient and he felt a pull in his back. An October 11, 2012 magnetic resonance imaging (MRI) scan of the lumbar spine revealed central disc protrusion at L2-3 with disc contact with the traversing L3 nerve roots, and mild grade 2 spondylolisthesis at L5-S1 due to bilateral L5 pars interarticularis defects.

Appellant was also treated by Dr. Amy Leland, a Board-certified physiatrist, for a back injury. In reports dated November 1 to January 2, 2013, Dr. Leland treated him for chronic neck pain since a 2001 motor vehicle accident and for a recent work-related low back injury occurring on February 22, 2012 while pulling a wheelchair-bound patient upstairs. He reported that on October 4, 2012 his back symptoms flared up without a specific event and she diagnosed right side sacroiliac joint dysfunction and low back pain. Dr. Leland found appellant disabled for six weeks. A December 6, 2012 electromyogram revealed no abnormalities of the lower extremities with no evidence of radiculopathy or peripheral neuropathy.

In a February 8, 2013 decision, OWCP denied the claim as the medical evidence did not demonstrate that the claimed medical condition was related to the accepted work incident. Therefore, appellant failed to establish an employment injury.

On March 11, 2013 appellant requested reconsideration. He submitted a February 15, 2013 report from Dr. Hoyt, who opined that appellant's lumbar disc injury with recurring low back pain and sciatica of the legs was due to a work injury. Dr. Hoyt reported that on

⁴ Docket No. 15-0108 (issued April 7, 2015).

February 22, 2012 appellant was injured while lifting a 380-pound patient. He noted that within a reasonable degree of certainty “such an axial overload could have and did injure appellant’s lumbar spine, and specifically his discs.” Dr. Hoyt advised that the October 11, 2012 MRI scan showed bulging discs contacting three nerve roots. He noted that appellant’s walking was impaired due to sciatica and he had sacroiliitis joint dysfunction “likely” related to the original lifting injury. Dr. Hoyt noted that appellant could return to work with restrictions.

In a decision dated May 23, 2014, OWCP denied modification of the decision dated February 8, 2013.

On May 19, 2014 appellant requested reconsideration and submitted evidence from Dr. Hoyt. On June 12, 2013 Dr. Hoyt indicated that appellant could work with restrictions. In a February 7, 2014 report, he noted appellant’s complaints of low back and leg pain since February 22, 2012. Dr. Hoyt noted first treating appellant on April 2, 2012 and appellant reported that he felt a pull and pain in his back upon lifting a 380-pound patient in a wheelchair. An MRI scan revealed a central disc protrusion that was consistent with the injury described. Dr. Hoyt indicated that the overly heavy axial spinal loading would have injured appellant’s lumbar discs. He asserted that appellant had an injury, his symptoms and MRI scan were consistent with this, and it had an ongoing impact on his ability to work. Dr. Hoyt did not suspect malingering. He opined with a reasonable degree of medical certainty that appellant was injured on the job and continued to have residuals of this injury. Appellant also submitted physical therapy reports.

In a decision dated May 29, 2014, OWCP denied modification of the decision dated May 23, 2014. Appellant appealed to the Board. In an April 7, 2015 decision, the Board affirmed the May 29, 2014 OWCP decision.⁵

Appellant subsequently submitted a December 24, 2015 report from Dr. Hoyt who noted that he sustained a 2012 back injury at work and experienced ongoing chronic low back pain. He requested a rear-loaded van as a reasonable accommodation, this request was denied and he filed an Equal Employment Opportunity (EEO) complaint. Appellant indicated that since filing the EEO complaint he has not been getting breaks and lunches and his back is getting worse. Dr. Hoyt diagnosed obstructive sleep apnea, chronic low back pain, chronic cervical pain, asthma, and obesity. In a February 23, 2016 report, he noted that appellant reported his low back pain and bilateral neck pain was better after treatment with a myofascial massage therapist. Appellant reported that in 2012 he sustained a back injury while lifting a 380-pound wheelchair-bound double amputee up a tall step and he felt a severe pull in his lower right back. He noted that prior to this incident he had some back soreness from working but not in the same location and not persisting more than a few days.

In a March 9, 2016 letter, received by OWCP on November 15, 2016, counsel requested reconsideration. Counsel asserted that the causal connection between appellant’s diagnoses and the accepted work-related injury were firmly established by Dr. Hoyt. She indicated that

⁵ Docket No. 15-0108 (issued April 7, 2015).

appellant sustained an injury to his back during a work incident while lifting a wheelchair-bound patient on February 22, 2012. Counsel referenced Dr. Hoyt's February 7, 2014 medical report which noted "I would say and will testify that with a reasonable degree of medical certainty, my opinion as a physician is that [appellant] was injured on the job and suffers to this day as a result." Dr. Hoyt further noted "[Appellant] felt a pull and then the pain ensued thereafter. The MRI scan of October 11, 2012 revealed a central disc protrusion, contacting bilateral traversing L3 nerve roots. What is seen would be consistent with an injury as he has described. The overly heavy axial spinal loading would have injured his lumbar disc." Counsel asserted that Dr. Hoyt's report provided all the information necessary to find causal relation for the lifting incident on February 22, 2012 to the diagnosed conditions. She further indicated that in a February 15, 2013 report Dr. Hoyt noted "[appellant's] lumbar disc injury with recurring low back pain and sciatica of legs is due to a work-related injury in my medical opinion." Dr. Hoyt further explained that "On February 22, 2012 [appellant] suffered this injury while lifting a 380-pound patient he was transporting. Within a reasonable degree of certainty such an axial overload could have and did injury his lumbar spine and specifically his discs." Counsel asserted that appellant's case was similar to *Glenn C. Chasteen*,⁶ where the Board found that causal relationship did not denote a single and exclusive causative factor, nor did it preclude aggravation of an underlying condition by employment factors. The Board noted that when a person has a preexisting condition which is not disabling but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable. Counsel asserted that Dr. Hoyt's report was well rationalized and expressed in terms of a reasonable degree of medical certainty. She requested that appellant's case accepted for lumbago, spondylolisthesis at L5-S 1, and central disc protrusion L2-3 contacting bilateral traversing L3 nerve roots.

By decision dated November 28, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁷ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁸ The Board has found that imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake

⁶ 42 ECAB 493, 499 (1991).

⁷ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁸ 20 C.F.R. § 10.607(a).

⁹ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP must reopen the case for merit review.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹¹ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹² The evidence must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question 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. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁴ As appellant's request for reconsideration was not received by OWCP until November 15, 2016, more than one year after issuance of the Board's April 7, 2015 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP denying his claim for compensation.

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

Appellant submitted a December 24, 2015 report from Dr. Hoyt who noted that appellant had a 2012 back injury at work and ongoing chronic low back pain. Dr. Hoyt diagnosed obstructive sleep apnea, chronic low back pain, chronic cervical pain, asthma, and obesity. In a February 23, 2016 report, he noted that appellant reported his low back pain and bilateral neck pain was better after myofascial massage. Dr. Hoyt noted that in 2012 appellant sustained a back injury while lifting a wheelchair-bound patient and felt a severe pull in his lower right back. He diagnosed obstructive sleep apnea, chronic low back pain, chronic cervical pain, asthma, and obesity. While Dr. Hoyt provided support for causal relationship, the Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-

¹⁰ *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (February 2016) (the term "clear evidence of error" is intended to represent a difficult standard).

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁴ 20 C.F.R. § 10.607(a).

rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁵ The Board finds that this evidence does not rise to the level of clear evidence of error.

In her reconsideration request, counsel asserted that the causal connection between appellant's diagnoses and the accepted work-related injury was firmly established by Dr. Hoyt's reports. She reiterated the opinion of Dr. Hoyt in support of causal relationship and asserted that he provided all the information necessary to find causal relation between the February 22, 2012 lifting incident and the diagnosed conditions. Counsel cited Board precedent and asserted that the claim should be accepted. The Board notes that, while appellant addressed his disagreement with OWCP's decision denying his claim for a traumatic injury, his disagreement does not demonstrate clear evidence of error as it does not raise a substantial question as to the correctness of OWCP's most recent merit decision. Regarding the cited precedent, *Glenn C. Chasteen*,¹⁶ counsel asserted that if a person has a preexisting condition which is not disabling but which becomes disabling because of aggravation causally related to the employment, regardless of the degree of such aggravation, the resulting disability is compensable. However, *Chasteen* and the present matter are not procedurally similar. In *Chasteen*, the Board had jurisdiction over the merits of the claim. In the present case, as explained, the Board does not have merit jurisdiction over appellant's claim. It only has jurisdiction to consider whether appellant has demonstrated clear evidence of error. Furthermore, as noted, clear evidence of error is intended to represent a difficult standard and even a well-rationalized report is not clear evidence of error.¹⁷ These assertions by counsel do not demonstrate clear evidence of error.

The Board finds that OWCP properly found that appellant's March 9, 2016 request for reconsideration received on November 15, 2016 was untimely filed and failed to demonstrate clear evidence of error.

On appeal counsel asserts that appellant timely submitted the request for reconsideration of the April 7, 2015 decision. She notes that the reconsideration request was mailed on March 9, 2016 prior to the one year deadline and was sent certified mail. Counsel noted a confirmation number for the mailing. She further asserted that the mail was received on March 31, 2016 but OWCP scanned only the exhibits into the file on April 1, 2016 and the reconsideration request was not scanned into the file until November 10, 2016. As noted above, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought. The received date is determined by when the document is recorded in the Integrated Federal Employees' Compensation System (iFECS).¹⁸ In this case, the reconsideration request was received by OWCP on November 15, 2016 and there is no evidence in the record at the time of the November 28, 2016 decision that it was received before that time. As noted, the Board does not have jurisdiction over the merits of the claim.

¹⁵ *D.G.*, 59 ECAB 455 (2008).

¹⁶ *Supra* note 4.

¹⁷ *See supra* note 13.

¹⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

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 November 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2017
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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