

FACTUAL HISTORY

On June 26, 2015 appellant, then a 42-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries to his left foot, lower back, and right leg when, during an arrest, a patient assaulted him by running over him with a motorized wheelchair on June 15, 2015. A supervisor noted that appellant stopped work on the date of injury.

Appellant submitted hospital discharge instructions dated June 26, 2015.

In a diagnostic report dated June 24, 2015, Dr. Hank Freeman, Board-certified in diagnostic radiology, examined the results of radiographs of appellant's lumbosacral spine and found them to be unremarkable.

In a diagnostic report of the same date, Dr. Parinda Shah, Board certified in diagnostic radiology, reviewed the results of a magnetic resonance imaging (MRI) scan of appellant's lumbar spine and found normal alignment with no evidence of acute fracture. Dr. Shah further noted mild spondylosis at L5-S1.

In a report dated June 25, 2015, Dr. Angela Arbach, a Board-certified internist, examined appellant and diagnosed acute traumatic radiculopathy with no evidence of cord compression.

By letter dated July 6, 2015, OWCP informed appellant of the factual and medical deficiencies in his claim. It requested that he submit additional evidence and afforded 30 days for submission of such evidence.

In a report dated June 24, 2015, Dr. Alyson Quigley, a Board-certified internist, diagnosed acute traumatic radiculopathy with no evidence of cord compression. She noted that appellant was involved in an altercation with a suspect, fell to the ground, and twisted to the right as he fell. This report was also signed by Dr. Alexandra Lloyd-Smith, a Board-certified neurologist.

Appellant submitted progress notes dating from June 26 through July 13, 2015, with some reports signed by nurses and other reports signed by physicians. In a portion of the notes authored by Dr. Deborah G. Feiner, a Board-certified internist, she related that appellant had suffered an injury at work when he was assaulted by a patient. She noted that during an arrest, appellant fell to the ground and twisted to the right as he fell. Appellant reported that he did not feel pain at that time, but woke up the next morning with lumbar pain.

By letter dated July 10, 2015, Dr. Marjet Cordon, a specialist in internal medicine, explained that appellant was injured at work on June 15, 2015 during an arrest, in which he twisted/wrenched his back during a struggle. She diagnosed disc herniation and traumatic musculoskeletal strain/pain.

By decision dated August 12, 2015, OWCP denied appellant's claim, finding that he had not submitted sufficient evidence to establish causal relationship between the incident of June 15, 2015 and his diagnosed conditions.

In a letter dated January 9, 2017, received by OWCP on January 17, 2017, appellant's congressman requested that appellant's case be reconsidered. He stated that appellant twice filed a request for reconsideration subsequent to the denial of his claim, but that OWCP claimed it had not been received. As a military service member, appellant was deployed to Guantanamo Bay from January 2 through November 28, 2016, and stated that this deployment prevented him from sending paperwork within the deadlines. In an attached medical report dated June 26, 2015, Dr. Arbach stated that appellant was involved with an altercation with a suspect, and that appellant fell to the ground during the arrest, twisting to the right as he fell. She diagnosed a small herniated disc. An attached incident report dated June 15, 2015 described the incident involving a belligerent patient, which coincided with the description of the incident given by appellant and his physicians.

Also attached was a letter dated August 18, 2015, wherein Dr. Quigley explained that four days prior, appellant was involved in an altercation with an assailant who resisted arrest resulting in his being thrown to the ground and twisting his back. Appellant underwent an MRI scan which revealed desiccation of the disc at L5-S1. His injury and pain were unanimously attributed to the injury he sustained in the altercation because: (1) the strain and nerve inflammation were consistent with a sudden twisting injury to the back; (2) the time course for development of inflammation in the area was consistent with the time since the incident; and (3) he had no preexisting conditions to otherwise explain this injury.

By decision dated April 7, 2017, OWCP denied appellant's request for reconsideration. It found that his request 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, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ 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.⁴

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁵ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for

³ 20 C.F.R. § 10.607(a).

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

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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 shows clear evidence of error on the part of OWCP.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² In order to establish 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.¹³

ANALYSIS

In its April 7, 2017 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision and timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in iFECS.¹⁴ In this instance, the iFECS record reflects that appellant's request for reconsideration, sent by appellant's congressman on his behalf, was received on January 17,

⁶ 20 C.F.R. § 10.607(b); 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."

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *J.M.*, Docket No. 15-1586 (issued March 23, 2016) (the Board explained that according to OWCP procedures, the received date is determined by the document received date in iFECS).

2017, which was more than one year after the August 12, 2015 decision. While the congressman also noted that appellant was deployed to Guantanamo Bay from January 2 through November 28, 2016, OWCP's regulation at section 10.607(a) sets forth the time limitation period of one year. Late filing may not be excused by extenuating circumstances, except if appellant establishes through probative medical evidence that he was unable to communicate in any way, and his testimony is necessary to obtain modification.¹⁵ The evidence of record does not establish that appellant was unable to communicate while deployed to Guantanamo Bay. Therefore, appellant must demonstrate clear evidence of error with regard to the decision of August 12, 2015.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its August 12, 2015 decision. He did not submit the type of positive, precise, and explicit evidence manifesting on its face that an error was committed.

Appellant's request for reconsideration included medical reports from Dr. Arbach and Dr. Quigley. Dr. Arbach's report dated June 26, 2015 recounted the circumstances of appellant's claimed injury, but did not offer an explicit opinion on causation. Dr. Quigley's report did contain an opinion on causation and some rationale for that conclusion, but the report was not fully rationalized, containing an explanation of how the incident of August 12, 2015 caused his diagnosed condition. As noted above, in order to establish 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.¹⁶ While Dr. Quigley's report was of some probative value regarding the issue of causal relationship, it was not 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. Even a well-rationalized report which, if timely filed, would have created a conflict in medical evidence, is not sufficient to establish prior error in the prior decision.¹⁷ Furthermore, clear evidence of error is intended to represent a difficult standard.¹⁸ As such, appellant has not submitted sufficient evidence to establish clear evidence of error on the part of OWCP in its decision dated August 12, 2015.

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.

¹⁵ 20 C.F.R. § 10.607(c). See also *M.H.*, Docket No. 16-0983 (issued August 24, 2016).

¹⁶ *Supra* note 13.

¹⁷ See Federal (FECA) Procedure Manual, *supra* note 20 at 2.1602.5(a) December 2011); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁸ *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2017 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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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