

appeal, pursuant to the Federal Employees' Compensation Act⁴ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.⁵

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows. On December 10, 1986 appellant, then a 33-year-old former letter sorting machine operator, filed an occupational disease claim (Form CA-2) for right arm tendinitis. He indicated that he first became aware of his condition in December 1978, and that it was not until August 1986 that he first realized the disease was caused or aggravated by his employment. OWCP determined that appellant's December 10, 1986 claim was untimely filed pursuant to 5 U.S.C. § 8122. The record revealed that as of May 21, 1980 appellant knew or should have known of the relationship between his claimed arm condition and his employment. There was also insufficient evidence to establish that the employing establishment received timely notification of appellant's claimed arm condition/injury, that might otherwise excuse appellant's failure to file his claim within the three-year timeframe imposed by 5 U.S.C. § 8122. In its July 19, 1990 merit decision, the Board affirmed OWCP's determination that appellant's claim was untimely pursuant to 5 U.S.C. § 8122.⁶ Since then the case has been before the Board on two additional occasions.

By decision dated January 22, 2007, the Board affirmed OWCP's January 13 and March 20, 2006 nonmerit decisions denying reconsideration, finding that appellant's requests were untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.⁷ In an April 17, 2014 decision, the Board affirmed OWCP's November 15, 2012 nonmerit decision which denied appellant's October 12, 2012 request for reconsideration as untimely and because he failed to demonstrate clear evidence of error with respect to the denial of his claim as untimely (OWCP File No. xxxxxx367).⁸

Appellant again requested reconsideration on January 6, 2015. He submitted various medical reports from 1980 and 1996 regarding his emotional state, as well as his right upper

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ Appellant also appealed from OWCP's April 16, 2015 decision. However as the appeal was not filed within 180 days of the issuance of the April 16, 2015 decision, the Board has no jurisdiction to review it. *See* 20 C.F.R. § 501.3(e).

⁶ Docket No. 89-1581 (issued July 19, 1990).

⁷ Docket No. 06-1915 (issued January 22, 2007).

⁸ Docket No. 13-0719 (issued April 17, 2014). The Board also separately addressed a December 18, 2012 nonmerit decision OWCP issued under File No. xxxxxx170.

extremity. In a January 23, 2015 decision, OWCP again denied further merit review with respect to appellant's December 10, 1986 untimely occupational disease claim.

On March 7, 2015 appellant again requested reconsideration. He reiterated an earlier argument that the employing establishment had notice of his right arm condition/tendinitis as early as December 13, 1979. Appellant argued that this information had been provided in connection with his June 5, 1979 traumatic injury claim in OWCP File No. xxxxxx170.⁹ He also referenced OWCP's December 17, 1987 merit decision which found that his claim was untimely filed pursuant to 5 U.S.C. § 8122.¹⁰

Appellant submitted a November 30, 2006 electrodiagnostic study report which indicated the findings were consistent with very mild right carpal tunnel syndrome, and no evidence of left carpal tunnel syndrome. He also submitted a copy of an undated letter from D.C., the employing establishment's safety manager, who summarized appellant's case history, indicated that he was treated for a right arm condition in 1979, and essentially rebutted appellant's contention that his right arm condition was work related. Appellant argued that D.C.'s letter established error in OWCP's December 17, 1987 merit decision. He also resubmitted three medical reports from 1980 and 1996 regarding his emotional state, as well as his right upper extremity condition.

By decision dated April 16, 2015, OWCP denied further merit review.

By letters dated April 23 and 29, 2015, appellant requested reconsideration under File No. xxxxxx367. In his April 29, 2015 letter, he argued that an April 3, 1980 form letter (2801-A) from C.L., his superior officer, indicated that C.L. had knowledge of appellant's arm condition prior to his June 5, 1979 slip and fall injury. Appellant submitted a copy of C.L.'s form letter.

Appellant also resubmitted a June 12, 1979 letter from Dr. Thomas M. Stanley, a neurologist, who advised the employing establishment that he had been treating appellant for right forearm pain.

In a May 12, 2015 letter, appellant reiterated his argument that the employing establishment and OWCP were aware of his arm injury as early as May 1979.

By decision dated June 11, 2015, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely filed and failed to demonstrate clear evidence of error.

By letter dated July 21, 2015, appellant requested reconsideration under File No. xxxxxx367. He did not submit any additional evidence with his request.

⁹ The Board found this same argument unpersuasive in its April 17, 2014 decision. Docket No. 13-0719.

¹⁰ OWCP's December 17, 1987 decision was part of the Board's July 19, 1990 merit review under Docket No. 89-1581.

By decision dated August 11, 2015, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely filed and failed to demonstrate clear evidence of error.

By letter dated August 28, 2015, appellant again requested reconsideration under File No. xxxxxx367. He did not submit any additional evidence with his request.

By decision dated September 14, 2015, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹¹ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹² One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹³ OWCP will consider an untimely request for reconsideration only if the request demonstrates "clear evidence of error" on the part of OWCP in its "most recent merit decision."¹⁴ The request must establish on its face that such decision was erroneous.¹⁵ Where a request is untimely and fails to demonstrate any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁶

¹¹ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.607.

¹³ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. *Id.* Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹⁴ *Id.* at § 10.607(b).

¹⁵ *Id.* To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁶ 20 C.F.R. § 10.608(b).

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration were untimely filed. The most recent merit decision in OWCP File No. xxxxxx367 was issued by the Board on July 19, 1990. OWCP received appellant's requests for reconsideration on April 23, July 21, and August 31, 2015. As all three requests postdate the latest merit decision by more than a year, they are all untimely pursuant to 20 C.F.R. § 10.607. Therefore, appellant must demonstrate clear evidence of error on the part of OWCP in denying his December 10, 1986 occupational disease claim as untimely filed pursuant to 5 U.S.C. § 8122.

The Board further finds that appellant's April 23, July 21, and August 31, 2015 requests for reconsideration failed to demonstrate clear evidence of error. In order to demonstrate clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. On appeal appellant reiterates his contention that OWCP erred by failing to properly develop the case record and arrive at an appropriate decision with regard to his claim for a work-related arm condition. The underlying issue in this case was whether appellant timely filed his occupational disease claim for a right arm condition (tendinitis). Appellant's allegations regarding OWCP's failure to develop the claim do not address the issue of timely filing. He has failed to present any evidence sufficient to shift the weight of the evidence in favor of him and raise a substantial question as to the correctness of OWCP's decision. Appellant has repeatedly argued that his timely filing of the 1979 traumatic injury claim in OWCP File No. xxxxxx170 should establish timely filing of his 1986 occupational disease claim. As the Board previously explained in its April 17, 2014 decision,¹⁷ these are two separate claims and timely filing of the traumatic injury claim in 1979 does not establish that the December 1986 occupational disease claim was timely filed. Moreover, appellant previously testified that he had not filed a claim for the arm injury in 1979. Therefore, he has failed to demonstrate clear evidence of error on the part of OWCP in denying his December 10, 1986 occupational disease claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

¹⁷ Docket No. 13-0719 (issued April 17, 2014).

ORDER

IT IS HEREBY ORDERED THAT the September 14, August 11, and June 11, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 6, 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