

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. The facts as presented in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 7, 1989 appellant, then a 43-year-old mail processor clerk, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on that date while breaking down mail. OWCP accepted the claim for a low back strain. On February 23, 1990 appellant filed an occupational disease claim (Form CA-2), which OWCP converted to a notice of recurrence of disability regarding the September 7, 1989 employment injury. The Office of Personnel Management (OPM) approved appellant's application for disability retirement on October 2, 1990. Appellant retired from the employing establishment effective October 1, 1990. On July 22, 1991 OWCP accepted appellant's recurrence claim and expanded acceptance of his claim to include the condition of herniated nucleus pulposus. On October 2, 1991 appellant filed an election form opting to receive benefits under FECA effective September 11, 1990. By letter dated September 27, 1991, he was placed on the periodic rolls for temporary total disability.

The Board issued a decision on April 1, 1998 in which it reversed decisions of OWCP dated June 11 and September 11, 1997 which terminated appellant's compensation.³ In a decision dated July 15, 2003, the Board reversed a February 3, 2003 hearing representative's decision affirming a September 6, 2002 decision terminating appellant's compensation benefits.⁴ The Board, on April 17, 2006, affirmed an August 31, 2005 decision in which OWCP terminated appellant's compensation effective September 4, 2005 as he had refused an offer of suitable work.⁵ On May 23, 2008 the Board affirmed a May 3, 2007 OWCP hearing representative's decision, finding an overpayment of compensation and denying waiver of the overpayment.⁶ The Board issued an order dismissing appellant's appeal on March 24, 2010 as no person adversely affected by OWCP's final decision or authorized representative had filed an appeal with the Board.⁷ The Board issued a decision on January 5, 2012 affirming a May 11, 2011 decision denying appellant's request for reconsideration of the August 31, 2005 termination of compensation benefits.⁸ The Board found that OWCP had properly found appellant's request was untimely filed and that he had failed to demonstrate clear evidence of error. By decision

³ Docket No. 98-0075 (issued April 1, 1998).

⁴ Docket No. 03-1009 (issued July 15, 2003).

⁵ Docket No. 06-0073 (issued April 17, 2006).

⁶ Docket No. 07-2010 (issued May 23, 2008).

⁷ Docket No. 09-1939 (issued March 24, 2010).

⁸ Docket No. 11-1388 (issued January 5, 2012).

dated December 13, 2012, the Board affirmed OWCP's March 30, 2012 nonmerit decision.⁹ The Board found that OWCP properly found appellant's request for reconsideration was untimely filed and that he had failed to demonstrate clear evidence of error in the August 31, 2005 termination of his compensation benefits.

Subsequent to the Board's decision, appellant resubmitted medical and factual evidence and submitted new factual evidence. The new factual evidence consisted of questions from appellant regarding his disability retirement, the employing establishment's job offer, and the suitability of the offered position. Appellant also submitted his sworn statement describing his condition and his inability to perform any type of employment due to his medical conditions.

On May 20, 2013 OWCP received an undated letter from appellant requesting reconsideration. Appellant also requested reconsideration in a letter dated September 18, 2013. He argued that he was not a viable candidate for vocational rehabilitation and, thus, OWCP erred in finding that he refused an offer of suitable work. Appellant further argued that his psychiatrist concluded that he was unable to return to work and OWCP erred in failing to consider his mental restrictions.

In support of his claim, appellant submitted a September 17, 2013 report from Dr. Robert T. Albanese, Jr., a treating Board-certified psychiatrist. Dr. Albanese opined that appellant was totally disabled due to his combat-related post-traumatic stress disorder. Appellant related that OWCP concluded that he was capable of working based on an opinion from an orthopedic surgeon despite medical evidence from a psychiatric physician that he was totally disabled.

By decision dated November 12, 2013, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found Dr. Albanese's report insufficient to establish clear evidence of error as he found appellant totally disabled due to a nonaccepted post-traumatic stress disorder and summarized appellant's description of his claim. OWCP noted that appellant had failed to submit any medical evidence regarding his mental status in 2004 or 2005.

On September 16, 2015 OWCP received an April 3, 2014 report from Dr. John W. Ellis, a treating Board-certified family medical practitioner, who noted that appellant was seen for a medical evaluation and opinion regarding his September 7, 1989 employment injury. Dr. Ellis noted appellant's medical history and that he had refused a job offer in 2005. Physical examination findings were provided. Dr. Ellis diagnosed muscle back unit tendon sprain, back deranged discs, and bilateral L-5 and S-1 spinal nerve root impingement, which he attributed to the accepted September 7, 1989 employment injury. He opined that appellant's back injury and post-traumatic stress disorder rendered him totally disabled and unable to perform any type of gainful employment. Dr. Ellis opined that appellant was entitled to compensation benefits due to his accepted employment conditions.

In an August 21, 2015 report, Dr. John W. Ellis noted first examining appellant on April 3, 2014 and he reviewed an August 22, 2014 magnetic resonance imaging (MRI) scan and

⁹ Docket No. 12-1579 (issued December 13, 2012).

September 28, 2014 electromyograph/nerve conduction study (EMG). He explained that appellant's diagnoses included lumbar sprain, back deranged discs, left L-4 and L-5 radiculopathy, and bilateral L-5 and S-1 spinal nerve root radiculopathy, which he attributed to the September 7, 1989 employment injury. Dr. Ellis opined that appellant's accepted September 7, 1989 employment injury and repetitive work duties aggravated his prior back injury.

In a letter dated September 16, 2015 and received by OWCP that same day, counsel provided a statement of accepted facts in support of appellant's claim for compensation. He argued that Dr. Ellis' reports were substantial evidence warranting reopening of appellant's claim for a merit review. On September 23, 2016 OWCP received a September 19, 2016 letter from counsel in which he related that he was following up on his request of September 16, 2015 that appellant's claim be reopened.

By decision dated November 2, 2016, OWCP denied appellant's request for reconsideration finding that the September 23, 2016 request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.¹⁰ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.¹¹ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.¹² Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,¹³ if the claimant's application for review shows clear evidence of error on the part of OWCP.¹⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁶ The evidence must be positive, precise, and explicit and must

¹⁰ See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹¹ 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

¹² *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹³ 20 C.F.R. § 10.607.

¹⁴ See *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ *F.R.*, Docket No. 09-0575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely 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. To show clear evidence of error, the evidence submitted 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.¹⁷

OWCP's procedures note that 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 an error (for example, proof that a schedule award was miscalculated). Evidence, such as a detailed, well-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.¹⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁹

ANALYSIS

A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁰ Appellant, through counsel, requested reconsideration on September 16, 2015 and requested follow up in a September 19, 2016 letter, which OWCP received on September 23, 2016. The Board notes that OWCP did not acknowledge appellant's September 16, 2015 reconsideration request. However, as both requests were received more than one year after the last merit decision, dated April 17, 2006, they were both untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the August 31, 2005 OWCP decision which terminated his entitlement to wage-loss and schedule award compensation benefits for failure to accept an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).²¹

The Board finds that the arguments and evidence submitted by appellant in support of his requests for reconsideration fail to raise a substantial question as to the correctness of OWCP's decision denying modification of its termination decision. The issue is whether appellant has demonstrated clear evidence of error in OWCP's termination of his wage-loss and schedule award compensation for refusing an offer of suitable employment.

¹⁷ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 14.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (February 2016); *James Mirra*, 56 ECAB 738 (2005).

¹⁹ See *M.L.*, *supra* note 14; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

²⁰ *Robert F. Stone*, 57 ECAB 393 (2005).

²¹ 20 C.F.R. § 10.607(a); see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

In his request for reconsideration and on appeal, appellant, through counsel, contends that OWCP erred in its August 31, 2005 decision. He asserts that Dr. Ellis' report is sufficient to establish that appellant's claim was wrongly decided and creates a new conflict with the report of Dr. Howard L. Schuele, a previous impartial medical examiner and Board-certified orthopedic surgeon, regarding appellant's ability to perform the offered job. The record also contains a September 17, 2013 report from Dr. Albanese, Jr. opining that appellant was unable to work due to his post-traumatic stress disorder. While the reports of Dr. Albanese, Jr. and Dr. Ellis support appellant's disability for work, they do not demonstrate clear evidence of error as the opinions of these physicians finding that he could not work did not specifically address whether he could perform the duties of the offered position as of August 31, 2005.²² As noted, clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.²⁴

To demonstrate clear evidence of error, it is not sufficient merely to establish that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in terminating appellant's compensation for refusal of suitable work. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's August 31, 2005 decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

On appeal counsel argues that the reports of Dr. Ellis constitute substantial evidence warranting reviewing the claim on its merits. He also asserts there is now a conflict in the medical opinion evidence between Dr. Ellis and Dr. Schuele regarding appellant's work ability. As discussed above, the Board finds the report from Dr. Ellis insufficient to demonstrate clear evidence of error.

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.

²² See *F.R.*, Docket No. 09-0575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

²³ *Supra* note 18.

²⁴ *Supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 2, 2016 is affirmed.

Issued: October 24, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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