

**United States Department of Labor
Employees' Compensation Appeals Board**

E.P., Appellant)	
)	
and)	Docket No. 17-1086
)	Issued: October 13, 2017
DEPARTMENT OF THE AIR FORCE, ROBINS)	
AIR FORCE BASE, Warner Robins, GA,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 24, 2017 appellant filed a timely appeal from an April 10, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated, March 15, 1991, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly denied appellant's January 30, 2017 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted new evidence with his appeal to the Board. However, the Board may only review evidence that was of record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. See 20 C.F.R. § 501.2(c)(1); *M.W.*, Docket No. 15-0949 (issued October 8, 2015).

FACTUAL HISTORY

Appellant's claim has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 25, 1988 appellant, then a 38-year-old computer operator, filed a traumatic injury claim (Form CA-1) alleging that on July 14, 1988 he injured his back when he tripped and fell over a box. OWCP accepted the claim for a low back strain. Appellant stopped work on July 15, 1988 and returned to work on January 10, 1989.

Appellant subsequently filed a Form CA-2a claim for a recurrence of disability commencing July 3, 1989 as a result of his July 14, 1988 employment injury. OWCP denied this claim on January 16, 1990, finding that he failed to submit sufficient evidence to establish that his current back condition was causally related to his July 14, 1988 employment injury.

On November 19, 1990 appellant timely requested reconsideration. On March 15, 1991 OWCP denied modification of its prior decision. It found that the medical evidence of record failed to establish that the claimed condition or disability from work was causally related to appellant's accepted employment injury.

The March 15, 1991 decision was the last OWCP decision on the merits of appellant's recurrence claim. The appeal rights accompanying OWCP's March 15, 1991 merit decision notified appellant that any further request for reconsideration must be made within one year of the date of the decision, *i.e.*, within one year of March 15, 1991.

In a letter dated January 12, 2017, appellant contended that he should have been receiving workers' compensation benefits and not retirement benefits due to his accepted work injury. He stated that he had never healed from the accepted employment injury, that he was forced to prematurely return to work following back surgery, and that all of his current conditions were causally related to the original injury, including his emotional stress. Appellant also argued that OWCP should have paid his medical bills. He noted that neither the union nor the employing establishment considered what was best for him.

In support of his claim for merit review, appellant resubmitted evidence previously considered by the Board and OWCP including a March 14, 2012 report by Dr. Benjamin M. Johnston, a treating Board-certified internist, an October 24, 1988 attending physician's supplemental report, June 30, 2014 report prepared by Dr. Harvey A. Jones, an attending general surgeon, and July 14, 1988 hospital report. OWCP also received additional new medical evidence.

A March 17, 2015 unsigned note diagnosed malignant prostate neoplasm and listed medications and allergies. A record of injury/illness and treatment form, with an illegible signature, noted that appellant sustained a lumbar contusion and sprain at work on July 31, 1983

when he tripped and fell backward. A June 16, 2016 form report from Central Georgia Internal Medicine.³

OWCP also received an October 19, 2016 prescription from Dr. Oyekunle Murairra, a treating physician Board-certified in critical care, pulmonary, and internal medicines and a summary of a November 21, 2016 visit with Dr. Chukweumeka Nwabuebo, a treating physician Board-certified in internal medicine and cardiovascular disease, which included a list of medications, a list of tests prescribed, and information regarding appellant's next medical appointment.

In a letter received on January 30, 2017 appellant requested reconsideration. He noted that he was intermittently hospitalized from 1990 until 1992 and therefore could not timely request reconsideration of the 1991 merit decision. Appellant also noted that he had been represented by counsel at the time and should not be held responsible for counsel's failure to timely request reconsideration.

In support of his request appellant submitted his February 4, 2017 statement, a December 10, 2015 progress note from Dr. Anthony Quan Hong, a treating Board-certified neurologist, a May 15, 2016 progress report from Melissa Bozarth, a certified nurse practitioner, a February 15, 2017 summary of a medical visit with Dr. Murairra, and an undated notice of occupational disease and claim for compensation (Form CA-2) noting that he first became aware of the claimed condition on July 14, 1988 and that he first realized the condition was employment related on July 31, 1983.

In a December 10, 2015 progress note, Dr. Hong provided examination findings and diagnosed skin paresthesia, lumbosacral radiculopathy, and chronic pain syndrome. In a May 15, 2016 report, Ms. Bozarth provided examination findings, noted appellant's medical history and medications, and diagnosed lumbar radiculopathy, lumbar spinal stenosis, hypertension, hyperlipidemia, and muscle weakness; and a February 15, 2017 summary of an office visit with Dr. Nwabuebo listed medications, tests prescribed, and next appointment information.

By decision dated April 10, 2017, OWCP determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. It found the record was devoid of any evidence establishing that he was mentally incompetent or incapable of filing a timely request for reconsideration of the March 15, 1991 merit decision.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁴ It will not review a decision denying or terminating a

³ The signature of the physician is illegible.

⁴ 5 U.S.C. § 8101 *et seq.* 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. *See J.S.*, Docket No. 10-0385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

benefit unless the application for review is filed within one year of the date of that decision.⁵ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.⁶ OWCP procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To demonstrate 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.¹⁴ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁵

⁵ 20 C.F.R. § 10.607; *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000).

⁶ *B.W.*, Docket No. 10-323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007) *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁸ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *See Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *See Leon J. Modrowski*, *supra* note 6; *Jesus D. Sanchez* *supra* note 6.

¹² *See Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, *supra* note 8.

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ *See George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

On January 30, 2017 appellant sought reconsideration of a March 15, 1991 merit decision denying modification of its prior decision denying appellant's claim for a recurrence of disability on July 3, 1989 as a result of his accepted July 14, 1988 employment injury. While appellant alleged that he was mentally incompetent to timely request reconsideration following the March 15, 1991 merit decision, he has not provided any medical evidence to support a finding of incompetency during the relevant time period. Therefore appellant has not proven incompetence as alleged.¹⁶

Because his January 30, 2017 request was received by OWCP more than one year after OWCP's March 15, 1991 merit decision, the Board finds that OWCP properly determined that appellant's request was untimely filed. Thus, appellant must demonstrate clear evidence of error on the part of OWCP in denying his claim.¹⁷

In support of his request appellant submitted an October 19, 2016 prescription and February 15, 2017 summary of a medical visit from Dr. Murairra, a November 21, 2016 summary of an office visit by Dr. Nwabuebo, and a June 14, 2016 progress note by Dr. Hong. Dr. Hong diagnosed skin paresthesia, lumbosacral radiculopathy, and chronic pain syndrome. OWCP also received unsigned medical notes listing various diagnoses. None of these reports point to any error in OWCP's decision to deny a recurrence of total disability on July 3, 1989.

The Board further notes that the May 14, 2016 report from Ms. Bozarth, a certified nurse practitioner, does not constitute medical evidence under section 8101(2) of FECA.¹⁸

To demonstrate 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.¹⁹ A detailed, well-rationalized medical report which would have required further development if submitted prior to issuance of the denial decision, does not demonstrate clear evidence of error.²⁰ To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to

¹⁶ *E.P.*, Docket No. 16-1402 (issued December 15, 2016).

¹⁷ 20 C.F.R. § 10.607(b). *See S.D.*, 58 ECAB 713 (2007); *Jack D. Johnson*, 57 ECAB 593 (2006).

¹⁸ *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *Sean O Connell*, 56 ECAB 195 (2004) (reports by nurse practitioners and physician assistants are not considered medical evidence as these persons are not considered physicians under FECA). 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

¹⁹ *See Robert G. Burns*, 57 ECAB 657 (2006); *Leon D. Faidley, Jr.*, *supra* note 14.

²⁰ *See G.B.*, Docket No. 16-319 (issued April 16, 2016); *Joseph R. Santos*, 57 ECAB 554 (2006).

produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.²¹

None of the evidence appellant submitted manifests on its face that OWCP committed an error in denying appellant's recurrence claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's merit decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

On appeal appellant contends that the medical evidence of record is sufficient to establish his recurrence claim. He also noted that he sustained three employment injuries involving his back. As discussed above and in the prior Board decisions, appellant has failed to demonstrate any error on the part of OWCP in denying his recurrence claim and therefore has failed to demonstrate clear evidence of error.

CONCLUSION

OWCP properly denied appellant's January 30, 2017 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 10, 2017 is affirmed.

Issued: October 13, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016); see *Dean D. Beets*, 43 ECAB 1153 (1992).