

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

C.B., Appellant)	
)	
and)	Docket No. 17-0234
)	Issued: August 1, 2018
DEPARTMENT OF THE NAVY, MARE)	
ISLAND NAVAL SHIPYARD, Vallejo, CA,)	
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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 10, 2016 appellant filed a timely appeal from an October 5, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from the last merit decision, dated January 12, 2001, to the filing of this appeal,¹ pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ For adverse final decisions issued by OWCP prior to November 19, 2008, the Board's review authority is limited to appeals which are filed within one year from the date of issuance of OWCP's decision. See 20 C.F.R. § 501.3(d)(2) (2008).

² 5 U.S.C. § 8101 *et seq.*

³ Appellant submitted additional evidence with his appeal. The Board's jurisdiction, however, is limited to the evidence that was before OWCP at the time of its final decision. Thus, the Board is precluded from considering this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly denied appellant's July 11, 2016 request for reconsideration, finding that 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 set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows. On March 5, 1985 appellant, then a 39-year-old shipfitter, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries to his right knee and lower back in the performance of duty on January 16, 1985. He indicated that his injury occurred while bending and squatting to get plans from below. Under OWCP File No. xxxxxx783, OWCP accepted appellant's January 16, 1985 traumatic injury for "[reaction to right sacroiliac area and medial right knee]."⁵ Appellant received wage-loss compensation for temporary total disability, and OWCP placed him on the periodic compensation rolls effective June 9, 1985.

By decision dated June 16, 1993, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 27, 1993 because he no longer suffered residuals of the January 16, 1985 employment injury and had no remaining injury-related disability. It based its decision on the June 11 and August 20, 1992 reports from Dr. Harle B. Grover, a Board-certified orthopedic surgeon and OWCP referral physician, who examined appellant on May 28, 1992. A representative of OWCP's Branch of Hearings and Review affirmed the termination of compensation benefits, by decision dated March 28, 1994, and OWCP subsequently denied modification in a November 29, 1994 decision. When the case was first on appeal, the Board found that OWCP properly terminated compensation benefits effective June 27, 1993. The Board further found that appellant failed to establish any continuing injury-related residuals or disability after June 27, 1993. Accordingly, the Board affirmed both the March 28 and November 29, 1994 merit decisions.⁶

Between July 1997 and April 1998, appellant requested reconsideration on four separate occasions. In response to appellant's various requests, OWCP issued decisions dated July 30 and October 15, 1997, and March 10 and May 14, 1998, which either denied modification or denied merit review. By decision dated May 18, 2000, the Board found that appellant had not established entitlement to compensation after June 27, 1993.⁷ The Board affirmed OWCP's July 30, 1997

⁴ Docket No. 95-0755 (issued June 2, 1997); Docket No. 98-1824 (issued May 18, 2000); Docket No. 03-0168 (issued March 13, 2003); and Docket No. 03-1866 (issued February 3, 2005).

⁵ Appellant previously injured his lower back in the performance of duty on January 15, 1980 (OWCP File No. xxxxxx656), May 2, 1983 (OWCP File No. xxxxxx285), and November 23, 1983 (OWCP File No. xxxxxx219). In each instance, OWCP accepted his claim for either lumbar or lumbosacral strain/sprain. It administratively combined the four case records for appellant's lumbar-related injuries, and designated OWCP File No. xxxxxx783 as the master file.

⁶ Docket No. 95-0755, *supra* note 4.

⁷ Docket No. 98-1824, *supra* note 4.

merit decision, but set aside a subsequent nonmerit decision finding instead that appellant submitted sufficient evidence to warrant further merit review. Therefore, the Board remanded the case to OWCP for further merit review.

In three merit decisions dated August 9, and 22, 2000, and January 12, 2001, OWCP denied modification of its prior decision(s). By decision dated April 16, 2002, it denied further merit review of its January 12, 2001 decision. On August 1, 2002 appellant again requested reconsideration of OWCP's January 12, 2001 merit decision. By decision dated October 3, 2002, OWCP denied appellant's August 1, 2002 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. In a March 13, 2003 decision, the Board affirmed both the April 16 and October 3, 2002 nonmerit decisions.⁸

Appellant again requested reconsideration on June 6, 2003, which OWCP denied by decision dated July 2, 2003. In a decision dated February 3, 2005, the Board affirmed OWCP's July 2, 2003 nonmerit decision.⁹

Appellant requested reconsideration in a letter dated July 5, 2016 and received by OWCP on July 11, 2016 as recorded in the Integrated Federal Employees' Compensation System (iFECS). With his request, he submitted medical evidence.

A January 26, 2016 right lower extremity electromyography (EMG) and nerve conduction velocity (NCV) study revealed abnormalities "possibly suggestive for mild sensory neuropathic process on right lower extremity." There was no evidence of lumbosacral radiculopathy. The EMG/NCV report also noted a history of diabetes and that the right thigh paresthesia over the anterolateral aspect might indicate for meralgia paresthetica.

A January 28, 2016 lumbar spine magnetic resonance imaging (MRI) scan demonstrated endplate spurs anteriorly at L1-2, a one millimeter posterior protrusion at L2-3, mild bilateral neural foraminal stenosis at L3-4, mild left neural foraminal stenosis at L4-5, a one millimeter broad-based posterior protrusion at L5-S1, mild dextrosciosis of the lumbar spine, and colonic diverticulosis.

In an April 6, 2016 report, Dr. Linda Choe, a Board-certified physiatrist and pain medicine specialist, indicated that appellant had been under her care since June 2012 for lumbar spine issues. She opined that appellant had "changes in his spine consistent with age." Dr. Choe asserted that the EMG testing performed in 2016 showed no electrophysiological abnormalities, however, there was a comment made about clinical presentation of meralgia paresthetica. She reported that she last saw appellant in February 2016 and an updated MRI scan showed a triangulated canal at L2-3. Dr. Choe indicated that on March 1, 2016 she performed a caudal epidural steroid injection procedure on appellant.

⁸ Docket No. 03-0168 (issued March 13, 2003).

⁹ Docket No. 03-1866 (issued February 3, 2005).

By decision dated October 5, 2016, OWCP denied appellant's July 11, 2016 request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP regulations provide that to be entitled to a merit review of an OWCP decision, an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought.¹⁰ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the iFECS.¹¹

OWCP, however, may not deny an application for review solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.¹² In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to 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

The Board makes an independent determination of whether a claimant has demonstrated 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.¹⁸

¹⁰ 20 C.F.R. § 10.607; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹¹ *Id.* at Chapter 2.1602.4b.

¹² *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁵ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹⁶ *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

ANALYSIS

The last merit decision of record is dated January 12, 2001, and OWCP received appellant's latest request for reconsideration on July 11, 2016. A request for reconsideration is considered timely if received within one year of the date of OWCP's decision for which review is sought.¹⁹ As more than 15 years elapsed between OWCP's January 12, 2001 merit decision and appellant's July 11, 2016 request for reconsideration, the Board finds that OWCP properly determined that the request for reconsideration was untimely filed.²⁰ Because appellant's request for reconsideration was untimely filed, he must demonstrate clear evidence of error on the part of OWCP in its most recent merit decision.²¹

OWCP's January 12, 2001 merit decision denied modification of the termination of appellant's FECA benefits effective June 27, 1993. At that time, it found appellant's then newly submitted medical evidence was insufficient to overcome the weight previously afforded Dr. Grover's May 28, 1992 second opinion evaluation. In support of his latest, July 11, 2016, request for reconsideration, appellant submitted January 2016 diagnostic studies, as well as an April 6, 2016 report from Dr. Choe who opined that appellant had "changes in his spine consistent with age." She asserted that EMG testing performed in 2016 showed no electrophysiological abnormalities, but also commented about a clinical presentation of meralgia paresthetica. Dr. Choe further noted that an updated MRI scan showed a triangulated canal at L2-3. She failed to provide a well-rationalized explanation as to how and whether these conditions, which have not been accepted by OWCP, are causally related to the January 16, 1985 employment injury.²² Thus, the Board finds that this evidence does not demonstrate clear evidence of error because it does not show that OWCP committed an error in terminating appellant's compensation benefits, nor raise a substantial question as to the correctness of OWCP's decision.

The EMG/NCV study dated January 26, 2016 and the MRI scan of the lumbar spine dated January 28, 2016 do not constitute competent medical evidence because they do not contain rationale by a physician relating appellant's conditions to his employment.²³ Therefore, the Board finds that this report does not demonstrate clear evidence of error because it does not show that OWCP committed an error in terminating appellant's compensation benefits, nor raise a substantial question as to the correctness of OWCP's decision.

To demonstrate clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is

¹⁹ 20 C.F.R. § 10.607(a).

²⁰ *Id.*; see *Alberta Dukes*, 56 ECAB 247 (2005).

²¹ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

²² See *T.M.*, Docket No. 08-975 (issued February 6, 2009) (for conditions not accepted or approved by OWCP as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

²³ See *Paul Foster*, 56 ECAB 208, 212 n.12 (2004).

intended to represent a difficult standard.²⁴ None of the evidence submitted manifests on its face that OWCP committed an error in terminating appellant's compensation benefits. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's July 11, 2016 request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2018
Washington, DC

Christopher J. Godfrey, 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

²⁴ Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.5.a (February 2016); *see Dean D. Beets*, 43 ECAB 1153 (1992).