

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

E.K., Appellant)	
)	
and)	Docket No. 18-0422
)	Issued: August 22, 2018
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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 22, 2017 appellant filed a timely appeal from a December 7, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated November 29, 2016, 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 the claim.

ISSUE

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

FACTUAL HISTORY

On October 18, 2016 appellant, then a 51-year-old group tool program manager, filed a notice of traumatic injury (Form CA-1) alleging that on October 14, 2016, while exiting a C-130

¹ 5 U.S.C. § 8101 *et seq.*

aircraft he was inspecting, an improperly secured safety rail gave way, causing him to fall onto the metal deck of the wing stand, resulting in multiple lacerations of the left forearm and right shin, bilateral shoulder strains, and a left-sided neck strain. He stopped work on October 14, 2016 and returned to work on October 17, 2016.

In support of his claim, appellant submitted his official position description, and a March 6, 2016 Notice of Personnel Action (SF-50) which confirmed his employment in the employing establishment's Aircraft Maintenance Group.

By development letter dated October 25, 2016, OWCP notified appellant of the additional evidence needed to establish his claim, including a detailed description of the claimed October 14, 2016 employment incident, factual evidence corroborating its occurrence, and a report from his attending physician explaining how and why the incident would cause the claimed injuries. It noted that he had not yet submitted any medical evidence. OWCP afforded appellant 30 days to submit such evidence.

In response, appellant submitted an employing establishment accident report corroborating that on October 14, 2016 a safety rail collapsed as appellant descended an aircraft wing platform. He fell onto the main wing stand, sustaining lacerations of the left forearm and right shin, as well as neck, low back, and right lower extremity injuries. Employing establishment personnel rendered first aid.

By decision dated November 29, 2016, OWCP denied appellant's claim as fact of injury was not established. It accepted that the October 14, 2016 employment incident occurred at the time, place, and in the manner alleged. However, as appellant failed to submit any medical evidence, he failed to establish that the accepted employment incident caused any injury.

On January 31, 2017 appellant requested reconsideration. On the appeal request form, he noted "back, neck, shoulder." Appellant did not submit additional evidence or argument.

By decision dated February 8, 2017, OWCP denied reconsideration as he failed to submit new and relevant evidence or argument.

On December 1, 2017 OWCP received appellant's request for reconsideration. In a letter dated November 27, 2017, appellant noted that immediately after the October 14, 2016 employment incident, he was treated by Dr. William H. McCann, the occupational medical services (OMS) physician on duty. Approximately four days after the incident, he related that he experienced increased back and right elbow pain. Appellant alleged that he requested to be treated by OMS but was declined as he was a civilian and his situation was no longer emergent. He submitted additional evidence.

In a report dated October 14, 2016, Dr. McCann provided a history of the accepted employment incident. On examination, he found a left elbow contusion and a laceration of the right shin. Dr. McCann administered a tetanus vaccine and returned appellant to full duty.

By decision dated December 7, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found that it had received his request for reconsideration on December 1, 2017, more than one year following the most recent merit decision dated November 29, 2016. Therefore, it was

untimely filed. OWCP further found that the additional evidence and argument submitted on reconsideration did not demonstrate that the November 29, 2016 decision was in 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.² Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System (iFECS).³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted OWCP under section 8128 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 untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁵ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for 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 demonstrates clear evidence of error on the part of OWCP.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit, and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate 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 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.⁷

OWCP 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

² 20 C.F.R. § 10.607(a). For merit decisions issued on or after August 29, 2011, an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

³ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

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).

⁶ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.1602.5(a) (February 2016).

⁷ *A.K.*, Docket No. 17-1254 (issued May 23, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

created a conflict in medical opinion requiring further development, is not clear evidence of error.⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.⁹

ANALYSIS

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.

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.¹⁰ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹¹ As appellant's request for reconsideration was received on December 1, 2017, more than one year after the November 29, 2016 decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹²

The underlying issue in this case is whether appellant established that he sustained injuries to his neck, back, and extremities relative to an accepted October 14, 2016 employment-related fall. OWCP denied the claim by decision dated November 29, 2016 as he failed to submit any medical evidence to substantiate an employment injury.

Appellant did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its November 29, 2016 decision.¹³ In a report dated October 14, 2016, Dr. McCann provided a history of injury and diagnosed left elbow contusion and laceration of the right shin. While his opinion provided some medical discussion of appellant's alleged October 14, 2016 employment injury, it did not establish causal relationship. This report was therefore insufficient to raise a substantial question as to the correctness of OWCP's decision.¹⁴ Clear evidence of error is intended to represent a difficult standard and even such as a the submission of 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, does not constitute clear evidence of error.¹⁵ It is not enough to show that evidence

⁸ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

⁹ *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Robert F. Stone*, 57 ECAB 292 (2005).

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

¹³ *See D.F.*, Docket No. 17-0745 (issued March 14, 2018).

¹⁴ *See A.M.*, Docket No. 17-1900 (issued February 22, 2018).

¹⁵ *D.G.*, 59 ECAB 455 (2008).

could be construed so as to produce a contrary conclusion.¹⁶ Instead, the evidence must shift the weight in appellant's favor.¹⁷ The Board finds that the evidence submitted does not rise to the level of clear evidence of error.

On appeal appellant contends that his request for reconsideration should be considered as timely filed because it was postmarked on November 27, 2017, within one year of the November 29, 2016 merit decision. As set forth above, a request for reconsideration is considered filed on the date OWCP receives it. The timeliness of a reconsideration request is not based on the date of its postmark.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that 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 December 7, 2017 is affirmed.

Issued: August 22, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

¹⁶ R.S., Docket No. 18-0505 (issued July 24, 2018).

¹⁷ *Id.*