

than 180 days elapsed from the last merit decision, dated March 5, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act⁴ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review 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 December 28, 1983 appellant, then a 29-year-old warehouse worker, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 1983 he was assisting another employee lift a piece of steel weighing approximately 150 to 200 pounds and injured his back. OWCP accepted his claim for lumbosacral sprain and displacement of the lumbar intervertebral spine at L5-S1. Appellant stopped work on December 20, 1983 and returned to full-time duty on May 6, 1985.

Appellant was treated by Dr. Julian D. Kelly, Jr., a Board-certified orthopedist, from February 20 to May 2, 1984, for his low back injury sustained on December 19, 1983. Dr. Kelly diagnosed low back pain due to low back strain superimposed on bilateral L5 spondylolysis with very mild spondylolisthesis. On July 18, 1984 appellant underwent a lumbar myelogram which was negative. A computerized tomography (CT) scan of the lumbar spine dated July 19, 1984 was a limited scan due to marked obesity of the patient. However, central bulging discs were noted at L4-5 and L5-S1 with no definite disc herniation.

Appellant came under the treatment of Dr. Edward F. Downing, a Board-certified neurologist, from July 16, 1984 to May 1, 1985, for a herniated lumbar disc. Dr. Downing noted that appellant underwent an L5-S1 laminectomy in July 1984 and was progressing satisfactorily. On December 26, 1984 he noted that appellant's leg pain resolved and he anticipated that appellant would return to work in a month or two. On May 1, 1985 Dr. Downing returned appellant to light-duty work and discharged him from his care.

In a telephone log dated May 17, 1985, OWCP indicated that appellant returned to full-duty work on May 6, 1985. Appellant used two days of sick leave and resigned on May 9, 1985.

On June 26, 1985 Dr. Downing indicated that appellant returned to work and was assigned to operate a forklift, but he was unable to perform the job. He opined that appellant was totally disabled from work. Appellant continued to be treated by Dr. Downing, and on January 14, 1987 he determined that appellant was totally disabled from work due to his lumbar disc problems and his marked obesity. OWCP paid wage-loss compensation.

Appellant had a functional capacity evaluation (FCE) on July 21, 1994 which revealed that he was totally disabled from performing any type of work. He continued to be treated by Dr. Downing. On March 15, 1999 Dr. Downing treated appellant for L4-5 and L5-S1

⁴ 5 U.S.C. § 8101 *et seq.*

radiculopathy. He recommended diagnostic testing and another FCE. In a May 5, 1999 FCE, appellant was found able to function at a sedentary level. Thereafter, the record was dormant with regard to medical development until OWCP referred appellant for a second opinion in 2005. Thereafter, OWCP referred appellant to several second opinion physicians.

In a September 23, 2013 report, Dr. Douglas Hein, a Board-certified orthopedist and an OWCP referral physician, indicated that he reviewed the medical record and examined appellant. He noted that appellant was morbidly obese, had severe lumbar motion deficits, and reported hypoesthesias in the L5-S1 distribution bilaterally. X-rays of the lumbar spine revealed grade 1 spondylolisthesis, spondylolysis at L5-S1, and decreased disc space. Dr. Hein advised that appellant had a traumatic injury to his back with preexisting spondylolysis, spondylolisthesis, and subsequent disc herniation at L5-S1. He opined that appellant's morbid obesity was a major component in his ongoing disability with spinal instability and was documented in literature as being associated with sciatica. Dr. Hein noted that there were no current findings that supported disability medically connected to his work injury. He opined that appellant was properly treated and his conditions would have resolved had it not been for his preexisting conditions and morbid obesity. Dr. Hein advised that spondylolysis and spondylolisthesis were progressive lesions which were exacerbated by morbid obesity. He noted that appellant had no ongoing impairment from his injury and no work-related disability. Dr. Hein opined that appellant was not capable of sustained physical activities secondary to his preexisting conditions and exacerbation from his obesity. He noted that appellant had no residuals secondary to his accepted injury.

In a work capacity evaluation (OWCP-5c), Dr. Hein advised that appellant sustained a herniated disc at L5-S1 which was surgically treated. He noted that preexisting conditions and obesity precluded significant activity. Dr. Hein noted several permanent restrictions and indicated that they were based on obesity and spondylolisthesis.

On February 25, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, finding that the second opinion physician, Dr. Hein's September 23, 2013 report, established that there were no continuing residuals of his work-related conditions.

By decision dated April 4, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 6, 2014. It based its decision on the September 23, 2013 report of Dr. Hein.

The employing establishment's Office of Operational Protection conducted a preliminary FECA fraud investigation on October 6, 2014, noting appellant was suspected of making false and fraudulent representations on CA-1032 forms to obtain disability benefits from OWCP. The investigation determined that appellant falsified his annually completed CA-1032 forms by failing to report his involvement in a business enterprise, Believers Walk of Faith Christian Assembly.

By decision dated January 27, 2015, OWCP determined that appellant forfeited his compensation for the periods January 1, 1994 to March 30, 1995 and March 13, 1999 to January 23, 2014 under 5 U.S.C. § 8106(b) of FECA. It found that he knowingly failed to report income he received as a minister/president of various religious organizations on the Form CA-1032.

On January 28, 2015 OWCP made a preliminary determination that a \$283,001.73 overpayment of compensation occurred because appellant forfeited his compensation for the periods January 1, 1994 to March 30, 1995 and March 13, 1999 to January 23, 2014. It noted that appellant was at fault in the creation of the overpayment because he made an incorrect statement as to material facts which he knew or should have known to be incorrect and he failed to provide information he knew or should have known to be material.

By decision dated March 4, 2015, OWCP finalized its preliminary determination with regard to the of \$283,001.73 overpayment of compensation.

On December 16, 2016 appellant, through counsel, requested reconsideration of OWCP's April 4, 2014 decision. Counsel asserted that appellant's claim was accepted for lumbosacral ligament sprain and displacement of a lumbar intervertebral disc. He indicated that in terminating all benefits, OWCP relied upon the second opinion report of Dr. Hein dated September 25, 2013. On the OWCP-5c form, completed as part of the second opinion examination, Dr. Hein listed permanent restrictions and found that appellant was not capable of performing his past work because preexisting conditions and obesity precluded significant activity. Counsel asserted that Dr. Hein provided no rational basis with objective findings to explain why the restrictions for the accepted herniated disc resolved. He further asserted that Dr. Hein attributed most of appellant's problems to his obesity, but he related no objective findings to support his conclusion. Counsel contended that Dr. Hein conceded that appellant's accepted conditions had not completely resolved, but his obesity was the major contributing factor to ongoing disability. He argued that OWCP did not meet its burden of proof to terminate compensation benefits by relying upon the second opinion of Dr. Hein as his report was speculative and he conceded that the accepted injury still contributed to ongoing disability. Counsel asserted that the previous decision was in error.

By decision dated December 28, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁵ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁶ The Board has found that imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake

⁵ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

⁷ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP must reopen the case for merit review.⁸

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁹ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹⁰ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹² As appellant's request for reconsideration was not received by OWCP until December 19, 2016, more than one year after issuance of the April 4, 2014 decision, the last merit decision by OWCP on the termination issue, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP denying his claim for compensation.

The Board finds that appellant failed to demonstrate clear evidence of error on the part of OWCP. In a statement dated December 16, 2016 and received on December 19, 2016, counsel disagreed with OWCP's decision terminating wage-loss compensation and medical benefits. Counsel asserted that OWCP improperly relied upon Dr. Hein's opinion to terminate appellant's benefits. He asserted that Dr. Hein provided no rational basis with objective findings for why the restrictions for the accepted herniated disc resolved. Counsel argued that Dr. Hein conceded that the accepted conditions have not completely resolved. Based on this, counsel contended that OWCP did not meet its burden of proof to terminate benefits by relying upon Dr. Hein's report. The Board notes that, while appellant addressed his disagreement with OWCP's decision to terminate all his benefits, his disagreement does not demonstrate clear evidence of error as it does not raise a substantial question as to the correctness of OWCP's most recent merit decision

⁸ *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹² 20 C.F.R. § 10.607(a).

which terminated all of appellant's benefits for the accepted conditions. To demonstrate clear evidence of error, it is insufficient to merely show that the evidence could be construed so as to produce a contrary conclusion.

The Board notes that the underlying issue is medical in nature and that on reconsideration appellant did not submit additional medical evidence. The Board notes that 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 denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³

On appeal, counsel reiterates that OWCP improperly relied on Dr. Hein's report in terminating benefits. As explained, these assertions do not rise to the level of clear evidence of error. Furthermore, as noted, the Board does not have jurisdiction over the merits of the claim.

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.

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 5, 2018
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

¹³ *D.G.*, 59 ECAB 455 (2008).