

ISSUES

The issue is whether OWCP properly denied appellant's request for reconsideration as 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 Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 20, 2000 appellant, then a 47-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that, on August 9, 2000, he sustained shoulder injury, clavicle strain, and right rotator cuff injury when a coworker tapped him on his injured shoulder at work, which caused him to go to his knees. OWCP assigned the claim File No. xxxxxx381.⁵ By merit decisions dated November 22, 2000, May 29, 2001, and April 22, 2002, it denied the claim, finding the medical evidence of record was insufficient to establish that the diagnosed conditions were causally related to the August 9, 2000 employment incident.⁶

⁴ Docket No. 04-2283 (issued December 21, 2005); Docket No. 07-0978 (issued August 17, 2007); Docket No. 08-0271 (issued June 20, 2008); Docket No. 09-1027 (issued December 17, 2009); Docket No. 10-2378 (issued August 16, 2011); Docket No. 12-1749 (issued February 5, 2013); Docket No. 14-1589 (issued November 24, 2014); Docket No. 16-0871 (issued June 10, 2016).

⁵ The record indicates that under OWCP File No. xxxxxx590 appellant had a May 3, 2000 claim accepted for right shoulder strain. Under OWCP File No. xxxxxx559, he had a September 18, 1991 claim accepted for left elbow lateral epicondylitis, left shoulder adhesive capsulitis, left brachial plexus lesions, left tenosynovitis of the hand/wrist and sprain/strains of the right shoulder, upper arm and acromioclavicular (AC) joint. The September 18, 1991 claim has been established as a master file with both the May 3, 2000 and the current August 9, 2000 claim on appeal as subsidiary files.

⁶ In a decision dated December 21 2005, the Board affirmed an August 27, 2004 OWCP decision, finding that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 04-2283 (issued December 21, 2005). In a decision dated August 17, 2007, the Board dismissed the appeal as there was no final decision issued by OWCP within one year of the filing of the appeal. Docket No. 07-0978 (issued August 17, 2007). By decision dated June 20, 2008, the Board affirmed an October 12, 2007 OWCP decision, holding that appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 08-0271 (issued June 20, 2008). In a decision dated December 17, 2009, the Board affirmed OWCP's February 13, 2009 decision finding appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 09-1027 (issued December 17, 2009). In a decision dated August 16, 2011, the Board affirmed an August 3, 2010 OWCP decision, finding appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 10-2378 (issued August 16, 2011). By decision dated February 5, 2013, the Board affirmed a June 21, 2012 OWCP decision, again finding appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error. Docket No. 12-1749 (issued February 5, 2013). The Board in a November 24, 2014 decision, affirmed a June 4, 2014 OWCP decision finding that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error. Docket No. 14-1589 (issued November 24, 2014).

In the most recent appeal, by decision dated June 10, 2016, the Board affirmed a February 16, 2016 nonmerit OWCP decision, finding that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.⁷

On January 19, 2017 OWCP received appellant's January 11, 2017 request for reconsideration of OWCP's April 22, 2002 decision. In support of the reconsideration request, appellant's representative submitted a letter dated January 11, 2017. She provided a history of the case. Appellant's representative argued that appellant did not suffer a new injury on August 9, 2000. Rather, appellant's employment injury of May 3, 2000 was made worse by the events of August 9, 2000. Appellant's representative contended that fact of injury evidence and medical evidence which diagnosed appellant with an acute AC strain and ligament damage as a result of the August 9, 2000 injury was not considered. References to appellant's October 14, 2000 statement as well as the employing establishment's statement on the Form CA-1 were noted. Copies of the referenced material were submitted along with a copy of OWCP's April 22, 2002 decision.

By decision dated September 28, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant's representative reiterated her arguments on reconsideration.

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.⁸ When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.⁹ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System).¹⁰ 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.¹¹

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.¹² OWCP regulations and procedures provide that OWCP will reopen a claimant's case for

⁷ Docket No. 16-0871 (issued June 10, 2016).

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹⁰ *Id.* at Chapter 2.1602.4(b) (February 2016).

¹¹ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

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.¹³

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.¹⁴

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 created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁵ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

OWCP's procedures provide that the one-year time limitation for requesting reconsideration begins on the date of the original decision.¹⁷ A right to reconsideration within one year also accompanies any subsequent merit decision.¹⁸ The last decision on the merits of this case was OWCP's April 22, 2002 decision, finding that the medical evidence of record was insufficient to establish that the diagnosed conditions were causally related to the August 9, 2000 employment incident. Appellant's January 11, 2017 request for reconsideration was received by OWCP almost 15 years after the April 22, 2002 decision, well in excess of the one-year time limitation, and thus is untimely. Therefore, he must demonstrate clear evidence of error by OWCP.¹⁹

¹³ *Id.* at § 10.607(b); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹⁴ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹⁶ *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁷ 20 C.F.R. § 10.607(a).

¹⁸ *See Robert F. Stone*, 57 ECAB 292 (2005).

¹⁹ 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

On reconsideration, appellant, through his representative, argued that he did not suffer a new injury on August 9, 2000. Rather, his employment injury of May 3, 2000 was made worse by the events of August 9, 2000. Appellant's representative contended that fact of injury evidence and medical evidence which diagnosed appellant with an acute AC strain and ligament damage as a result of the August 9, 2000 injury was not considered. References to appellant's October 14, 2000 statement as well as the employing establishment's statement on the Form CA-1 were noted. Copies of the referenced material were submitted along with a copy of OWCP's April 22, 2002 decision.

Appellant's arguments on reconsideration, however, fail to establish that OWCP erred when issuing its April 22, 2002 decision. OWCP denied the claim as the medical evidence of record did not relate an accurate history of the August 9, 2000 employment incident and did not provide detailed medical rationale explaining how the diagnosed conditions were causally related to August 9, 2000 employment incident. Specifically, it found that the evidence reflected that, on August 9, 2000, appellant had incurred a "tap" on the shoulder by a coworker, not a hit. The medical evidence appellant referenced was previously of record and considered by OWCP.²⁰

Thus, appellant has not raised an argument or submitted any evidence that shows on its face that OWCP committed an error in denying his claim, nor has he provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, OWCP properly determined that appellant's untimely request for reconsideration fails to demonstrate clear evidence of error.²¹

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.

²⁰ See *A.M.*, Docket No. 17-1434 (issued January 2, 2018); see also *A.M.*, Docket No. 10-0526 (issued November 8, 2010) (appellant did not sufficiently explain how largely duplicative evidence raised a substantial question as to the correctness of OWCP's decision).

²¹ See *S.M.*, Docket No. 18-0075 (issued April 11, 2018); see also *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 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