

a large hamper and lifting mail trays while in the performance of duty. OWCP accepted the claim for lumbar sprain.

In an August 19, 2014 duty status report (Form CA-17) Dr. Michael W. Cohen, a Board-certified occupational medicine specialist, diagnosed lumbar strain and released appellant to modified duty with the following restrictions: lifting and carrying up to 10 pounds for four hours per day; sitting, standing, walking, climbing, and kneeling for eight hours per day; no bending or stooping; twisting for one hour per day; and pulling and pushing up to eight hours per day.

On September 2, 2014 the employing establishment offered appellant a position as a modified rural carrier with the following restrictions: lifting and carrying up to 10 pounds for four hours per day; no bending or stooping; and pushing and pulling for one hour per day. Appellant refused the modified job offer claiming that it violated his medical restrictions.

In a September 9, 2014 duty status report (Form CA-17) Dr. Cohen reiterated his diagnosis and released appellant to modified duty with the following restrictions: lifting and carrying up to 10 pounds for four hours per day; sitting for 30 minutes per hour for four hours per day; standing for 15 minutes per hour for two hours per day; walking for 15 minutes per hour for two hours per day; no climbing; kneeling for one hour per day; no bending or stooping; twisting for one hour per day; and pulling and pushing for eight hours per day.

On October 1, 2014 appellant filed a claim for total disability for the period commencing August 9, 2014 and continuing.

In an October 9, 2014 letter, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

Subsequently, appellant submitted duty status reports (Form CA-17s) dated September 30 through November 25, 2014 from Dr. Cohen which reiterated appellant's diagnosis and work restrictions in his September 9, 2014 duty status report.

In a duty status report (Form CA-17) dated December 9, 2014, Dr. Cohen advised that appellant was capable of returning to work that day with the following restrictions: lifting and carrying up to 15 pounds; sitting for 45 minutes per hour for six hours per day; standing and walking for four hour per day; no climbing; kneeling, bending, stooping, and twisting for one hour per day; pulling and pushing for eight hours per day; and simple grasping for eight hours per day.

By decision dated January 16, 2015, OWCP denied appellant's claim for disability for the period August 9, 2014 and continuing finding that the medical evidence of record was insufficient to support total disability due to the employment injury. It noted that the evidence of record indicated that he stopped work on August 9, 2014 and had not returned.

In response, appellant submitted reports dated January 6 through July 27, 2015 from Dr. Cohen diagnosing lumbar strain with worsening symptoms, lumbar disc degeneration, and lumbar radiculopathy, resolved. He also submitted reports dated October 22, 2015 through January 11, 2016 from Dr. Dennis Michael Hembd, a Board-certified physiatrist, who diagnosed sprain of ligaments of lumbar spine and released appellant to work with light-duty restrictions. On December 18, 2015 Dr. Hembd's physician assistant advised that appellant had not yet reached

maximum medical improvement and provided the following work restrictions: occasional squatting with a 20-pound lifting maximum; occasional bending and stooping; and pushing and pulling 10 to 25 pounds.

On May 5, 2016 appellant requested reconsideration of OWCP's January 16, 2015 decision and submitted a three-page narrative statement indicating that he was under extreme emotional distress due to a hostile work environment, which prohibited him from requesting reconsideration in a timely manner. He further submitted four grievance statements alleging harassment, retaliation, and discrimination in the workplace.

By decision dated November 7, 2016, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error. It found that he had failed to provide any explanation as to why its decision was improperly decided and offered no further evidence for consideration.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ One such limitation provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁵

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁷ The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so

² See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁴ 20 C.F.R. § 10.607(a).

⁵ See *Jesus D. Sanchez*, *supra* note 2; *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

⁶ 20 C.F.R. § 10.607(b).

⁷ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

⁸ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-0956 (issued April 15, 2010).

⁹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² 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.¹³

ANALYSIS

The Board finds that appellant's May 5, 2016 request for reconsideration was untimely. It noted that the last merit decision was issued on January 16, 2015 and it received his request for reconsideration on May 5, 2016. As appellant's request for reconsideration was not received by OWCP within the one-year time limitation, pursuant to 20 C.F.R. § 10.607(a), his request for reconsideration was untimely. OWCP proceeded to deny his request for reconsideration utilizing the clear evidence of error standard.¹⁴

The November 7, 2016 OWCP decision found that the documentation submitted with appellant's reconsideration request did not demonstrate clear evidence of error. The Board finds, however, that OWCP did not make any findings regarding the evidence submitted in support of the reconsideration request.¹⁵

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁶ Its regulations at section 10.126 of Title 20 of the Code of Federal Regulations provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹⁷ Moreover, Federal (FECA) Procedure Manual provides that the reasoning behind OWCP's evaluation should be clear enough for the

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁴ See *Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ See *J.J.*, Docket No. 11-1958 (issued June 27, 2012); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

¹⁶ 5 U.S.C. § 8124(a); see *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

¹⁷ 20 C.F.R. § 10.126. *M.L.*, *supra* note 8; see also *O.R.*, 59 ECAB 432 (2008).

reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁸

To determine whether appellant has demonstrated clear evidence of error, OWCP will review the evidence submitted and arguments raised in support of the request and determine whether such evidence or argument is sufficient to show error in its prior decision.¹⁹ It shall then issue a decision containing findings of fact and conclusions of law.²⁰ In the instant case, OWCP did not discuss the new medical evidence submitted by appellant from Drs. Cohen and Hembd. Its failure to provide factual findings and explain the basis for its conclusion that appellant did not demonstrate clear evidence of error precludes the Board's review of the decision.²¹

The Board, having duly considered the matter, finds that OWCP failed to properly explain the findings with respect to the issue presented. Thus, OWCP, in its November 7, 2016 decision, did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision, *i.e.*, whether he demonstrated clear evidence that OWCP's last merit decision was incorrect.

The Board will set aside OWCP's November 7, 2016 decision and remand the case for an appropriate decision on appellant's untimely reconsideration request.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁸ See *supra* note 15; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

¹⁹ See *George C. Vernon*, 54 ECAB 313 (2003).

²⁰ See *supra* note 17.

²¹ See *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with this decision of the Board.

Issued: June 22, 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