

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

A.T., Appellant)	
)	
and)	Docket No. 17-0654
)	Issued: May 8, 2018
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, EL PASO)	
INTERNATIONAL AIRPORT, El Paso, TX,)	
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 January 31, 2017 appellant filed a timely appeal from a November 22, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last OWCP merit decision dated August 25, 2015, 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 to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The record provided to the Board includes evidence received after OWCP issued its November 22, 2016 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional 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 request for reconsideration pursuant to 5 U.S.C. § 8128(a) as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 17, 2013 appellant, then a 39-year-old lead transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his right foot, left leg and lower left back when he ran after a passenger who had breached the checkpoint. He stopped work the next day, September 18, 2013. The employing establishment noted that appellant had undergone foot surgery four weeks prior and that his doctor had released him to full duty without restrictions on September 17, 2013.

An authorization for examination and/or treatment (Form CA-16) was issued by the employing establishment on September 17, 2013. On the form, appellant indicated that he had pain, tingling/numbness of right foot, left leg, and lower back. Dr. Francisco Guerra, a family practitioner, noted that appellant had right heel spur surgery in August 2013 and had a history of lumbar disc degenerative joint disease. He diagnosed sciatica, right limb pain and lumbago and checked a box marked "yes" indicating that the conditions were caused or aggravated by the employment activity of running after a passenger.

In a September 23, 2013 report, Dr. Vivianne Nguyen, a podiatrist, noted the claimed September 17, 2013 incident. Appellant's diagnoses were listed as status post endoscopic plantar fasciotomy, right foot contusion and neuritis of medial dorsal cutaneous nerve and deep peroneal nerve. Dr. Nguyen indicated that appellant's right foot contusion was not surgery related, but was from the strain of running after a suspect at work.

By development letter dated October 4, 2013, OWCP advised appellant of the deficiencies in his claim and requested additional factual and medical evidence. Appellant was advised that he should provide a narrative medical report from his physician which contained a medical explanation as to how the reported work incident caused or aggravated a medical condition. He was afforded 30 days to provide such evidence.

In a September 23 and 30, 2013 attending physician's report, an unknown provider with a specialty in family practice, noted that appellant had previously undergone right foot surgery by Dr. Nguyen for heel spur. On the day appellant was released back to work, he had to run, which caused pain in foot and back. A diagnosis of right foot injury and lumbago with radiculopathy was provided. The provider checked "yes" to indicate that the condition was believed to have been caused or aggravated by the employment activity described.

In September 30 and October 7, 2013 reports, Dr. Nguyen diagnosed contusion and right foot strain, with neuritis of the medial dorsal cutaneous nerve and deep peroneal nerve.

Several reports from Dr. Barry L. Cromer, an orthopedic surgeon, were submitted. He noted that appellant's injury occurred on September 17, 2013 when appellant was chasing an

unscreened passenger. Diagnoses of lumbar radiculopathy, sciatica, lumbago, lumbar sprain and low back pain were noted. In an October 4, 2013 report, Dr. Cromer indicated that appellant did not have any preexisting problems with the injured areas. In November 5 and 11, 2013 reports, he advised that appellant's symptoms had worsened. Dr. Cromer indicated that his lumbar spine and right lower leg problems began on September 17, 2013. In a December 3, 2013 report, he indicated that appellant's symptoms had improved. Dr. Cromer noted that his diffuse pain was related to a workers' compensation injury of September 17, 2013. He released appellant to modified work with restrictions. Work capacity evaluations (Form OWCP-5c) dated October 4, November 11, and December 6, 2013 were also provided.

In a December 3, 2013 report, Dr. David M. Sack, a preventive medicine/occupational environmental specialist and physician for the employing establishment, noted appellant's history of the claimed employment incident and that appellant had been off work since the incident. He related that, on the date of the alleged injury, appellant had just returned from a five-week work absence related to treatment and surgery for a heel spur. Dr. Sack opined that, while it might be feasible that the reported mechanism caused a foot injury, he was not sure how it would precipitate such a prolonged and debilitating back condition. He further opined that appellant's restrictions disabling him from work were not supported and were likely prolonging recovery. Dr. Sack concluded that the involvement of multiple physicians complicated the development and execution of a focused return to work plan.

By decision dated December 18, 2013, OWCP accepted that the September 17, 2013 employment incident occurred as alleged and that appellant had diagnosed medical conditions. However, it denied the claim finding that the medical evidence of record was insufficient to establish that his diagnosed foot and back conditions were causally related to the accepted work incident.

On February 21, 2014 appellant requested reconsideration. Evidence submitted in support thereof consisted of appellant's narrative statement received February 21, 2014 reports pertaining to the foot and back from physical therapists and nurse practitioners, authorization requests, and diagnostic testing. The employing establishment controverted the claim by letter of April 1, 2014.

In a January 10, 2014 letter, Dr. Cromer opined that the history of injury was consistent with a workers' compensation injury. He explained that it was plausible that appellant injured the previous surgical site due to strenuous sprinting. It was also medically feasible that appellant's back strain/sprain was causally related to the September 17, 2013 work incident.

Progress reports and work capacity evaluations from Dr. Cromer were provided. Dr. Cromer indicated that the conditions of lumbago, lumbar sprain, and plantar fasciitis were actively being treated. In a December 6, 2013 report, he indicated that the symptoms of appellant's limb pain and lumbar radiculopathy were localized to peroneal nerve distribution. Dr. Cromer stated that this condition was related to the September 17, 2013 "workers' compensation injury." In a January 10, 2014 report, he indicated that appellant's symptoms had worsened. Dr. Cromer stated that the initial injury occurred to the lumbar spine and right foot on September 17, 2013 and opined that appellant's problems were related to that injury. Follow-up reports of January 17 and March 20, 2014 were provided. In a March 20, 2014 report, Dr. Cromer indicated that appellant's lumbar spine and right foot problems started on September 12, 2013 and were related to that injury.

In a January 24, 2014 report, Dr. Nguyen stated that she performed endoscopic plantar surgery on appellant on August 13, 2013. Appellant's postoperation treatment ended on September 16, 2013 and he was released to go back to work the following day. Dr. Nguyen stated that appellant presented to the office on September 23, 2013 after he abruptly chased someone during work hours and started to have pain on the right foot at the heel area as well as numbness and pain on the first intermetatarsal base. She opined that he had a right foot contusion due to the injury he sustained at work. Dr. Nguyen indicated that appellant received a strain and neuritis of the medial dorsal cutaneous nerve and deep peroneal nerve from running after a suspect at work. She also stated that the mechanism of his injuries from his history was consistent with the work event. Thus, Dr. Nguyen opined that appellant's persistent pain since September 17, 2013 resulted from the September 17, 2013 work incident.

By decision dated June 2, 2014, OWCP denied modification of its December 13, 2013 decision. It found that the medical reports of record contained inconsistencies and speculative wording. Additionally, the medical reports lacked a rationalized medical opinion based on a complete factual and medical background explaining causal relationship between the diagnosed condition and the accepted employment incident.

On December 16, 2014 appellant requested reconsideration. In support thereof, he submitted a May 27, 2014 statement and an undated statement received on December 16, 2014. An October 24, 2014 supervisor's statement, in connection with disability retirement, indicated that appellant had been unable to perform his job since January 22, 2014 as his medical limitations did not meet the minimum physical requirements of the employing establishment.

Diagnostic testing reports and reports pertaining to lumbar epidural steroid injections at L5-S1 were received.

In an October 8, 2014 report, Dr. Gregory R. Misenhimer, an orthopedic surgeon, provided an assessment of lumbosacral neuritis and degeneration of lumbosacral intervertebral disc. He indicated that appellant's August 27, 2014 electromyogram and nerve conduction velocity EMG/NCV study showed strong evidence of an acute radiculopathy affecting the right L5 nerve root. The most recent magnetic resonance imaging (MRI) scan revealed degeneration of the L4 and L5 discs without herniation.

In September 26 and November 3, 2014 reports, Dr. Caesar A. Zuniga, a podiatrist, diagnosed plantar fasciitis, equinus deformity, and foot pain. No history of injury was provided.

In an August 27, 2014 report, Dr. Michael K. Boone, a physiatrist, indicated that appellant's symptoms had been present since September 12, 2013. He noted the history of injury and provided a chart of appellant's medical history, noting the date of onset for each condition. Dr. Boone provided an assessment of lumbosacral root lesions.

Dr. Cromer continued to treat appellant for the conditions of foot pain, foot sprain, lumbago, lumbar radiculopathy, lumbar strain, plantar fasciitis, and sciatica. In his September 11, 2014 report, Dr. Cromer reported that appellant had surgery on his right foot two months ago.

By decision dated August 25, 2015, OWCP denied modification of its prior decision.

On August 30, 2016 appellant requested reconsideration. In an undated statement, received by OWCP on August 30, 2016, he stated that he worked successfully for the first six hours on his first day back to work after plantar fasciitis surgery without swelling or pain to either his foot or back until he had to abruptly chase a runner, someone who had breached and passed the TSA checkpoint. Appellant argued that Dr. Cromer provided medical documentation to support the mechanism of injury causal relationship in his September 30, 2013 and January 10, 2014 reports.

Documents including work restrictions and referrals were submitted. The reports documented appellant's medical course and progress, which included treatment with a dorsal column stimulator (DCS), which had malfunctioned and was eventually removed, and the development of restless leg syndrome. None of the reports provided an opinion regarding the cause of appellant's diagnosed conditions.

By decision dated November 22, 2016, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.³ In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request [the received date in the Integrated Federal Employees' Compensation System (iFECS)].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

Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁶ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

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

³ 20 C.F.R. § 10.607(a) (2011).

⁴ *Id.* at § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016). *R.R.*, Docket No. 17-1210 (issued April 12, 2018).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993); *see also Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ 20 C.F.R. § 10.607(b) (2011); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁷ *See Alberta Dukes*, 56 ECAB 247 (2005).

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 establish 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 show 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.⁸

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.⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

The last decision on the merits of the claim was OWCP's August 25, 2015 decision, which denied modification of a June 2, 2014 determination that appellant had not established causal relationship between his diagnosed medical conditions and the September 17, 2013 employment incident. Appellant had one year from the date of that decision to make a timely request for reconsideration. His request for reconsideration was received by OWCP on August 30, 2016.¹¹ As his request for reconsideration was received more than one year after the August 25, 2015 merit decision, it was untimely filed and, therefore, appellant must demonstrate clear evidence of error.¹²

The Board also finds that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error on the part of OWCP.

On December 18, 2013 OWCP made its initial determination that the medical evidence of record failed to establish that the claimed medical conditions to appellant's foot and back were causally related to the accepted work incident of September 17, 2013. Subsequently, OWCP

⁸ *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹⁰ *Nancy Marciano*, 50 ECAB 110 (1998).

¹¹ See 20 C.F.R. § 10.607(a) (the reconsideration request must be received within one year of OWCP's decision for which review is sought).

¹² *L.S.*, Docket No. 16-0603 (issued May 20, 2016).

denied multiple requests for reconsideration of this decision, finding that the evidence was not sufficient to modify the prior decision as there was no well-rationalized medical report from a physician which explained whether and how appellant's diagnosed medical conditions were causally related to the accepted work incident of September 17, 2013. Appellant has failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in denying his claim.¹³

On reconsideration appellant referred to reports dated September 30, 2013 and January 10, 2014, which he argued supported the mechanism of injury and causal relationship. While the reports cited by him are generally supportive of causal relationship, they do not demonstrate clear evidence of error on the part of OWCP. OWCP specifically found that the reports cited by appellant, as well as other multiple reports of record, lacked a well-reasoned explanation from a physician as to how his medical condition occurred as a result of his employment incident. The Board notes that while appellant addressed his disagreement with OWCP's decision denying his claim for traumatic injury, 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 which denied appellant's claim for traumatic injury because of insufficient medical evidence addressing causal relationship.¹⁴

To demonstrate clear evidence of error, it is not sufficient merely to establish that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹⁵ None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim for compensation.¹⁶ Appellant also has not submitted new medical evidence which addresses the causal relationship of appellant's medical conditions. Accordingly, the Board finds that the arguments and evidence submitted by appellant are insufficient to demonstrate clear evidence of error.¹⁷

For these reasons, the Board finds that appellant has not demonstrated clear evidence of error by OWCP in the denial of his claim for traumatic injury.

¹³ See *D.H.*, Docket No. 18-0042 (issued March 16, 2018).

¹⁴ See *S.R.*, Docket No. 16-1107 (issued February 23, 2017); *R.R.*, Docket No. 14-1272 (issued October 15, 2014).

¹⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁶ See *James R. Mirra*, 56 ECAB 738 (2005).

¹⁷ The Board notes that a Form CA-16, authorization for examination and/or treatment, was issued by the employing establishment on September 17, 2013. When the employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. See 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608, 610 (2003).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 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