

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

M.R., Appellant)	
)	
and)	Docket No. 18-0142
)	Issued: May 15, 2018
DEPARTMENT OF THE AIR FORCE, TINKER)	
AIR FORCE BASE, OK, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 25, 2017 appellant, through counsel, filed a timely appeal from a September 11, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from December 18, 2014, the date of the most recent merit decision, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

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 August 26, 2014 appellant, then a 51-year-old aircraft sheet metal mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on August 20, 2014, he was preparing food for a break when he felt something hit his left calf. He listed his injury as a broken left tibia. Appellant submitted medical reports in support of his claim.

By development letter dated November 14, 2014, OWCP informed appellant that further information was needed to support his claim, including evidence to support that he experienced the incident or employment factor alleged to have caused injury. Appellant was afforded 30 days to submit the additional evidence.

In a statement received by OWCP on December 13, 2014, appellant indicated that the day prior to the injury, he kicked a small, heavy steel, two-step stand. He noted that on August 20, 2014 he woke up with a sore ankle. Appellant noted that he went on break, and that he went to sit down and felt his bone give way. He remembered that his calf had been hit by a roll of industrial paper towels that somebody had thrown. Appellant indicated that everything happened at same time, so he was not sure as to the sequence of events. He also noted that he kicked a stand in the same manner back in the spring and it hurt for a few days. Appellant submitted medical evidence in support of his claim.

By decision dated December 18, 2014, OWCP denied appellant's claim. It determined that appellant's statements as to how the injury occurred were inconsistent so as to cast serious doubt as to whether the specified event occurred at the time, place, and in the manner alleged. Accordingly, OWCP denied appellant's claim as the evidence of record did not establish that an incident occurred as alleged. It further noted that, even if appellant had established the factual portion of his claim, he did not submit medical evidence that contained a medical diagnosis in connection with the employment event.

By letter received by OWCP on December 28, 2015, appellant, through counsel, requested reconsideration, and submitted additional medical evidence. By decision dated January 3, 2017, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On May 17, 2017 appellant, through counsel, again requested reconsideration. Counsel argued that the factual basis for the claim had not been contested and that it was agreed that the incident occurred. Therefore, he contended, that OWCP erred in that it failed to consider the medical evidence. With his request, counsel resubmitted medical reports. These medical reports consisted of reports by Dr. Christopher Jordan, Board-certified orthopedic surgeon, dated October 16 and 29, 2014; reports by Dr. Daniel J. Jones, an orthopedic surgeon, dated August 22 through October 2, 2014, and an August 26, 2014 report by Dr. Oliver Cyitanic, a Board-certified radiologist.

By decision dated September 11, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of 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 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.³ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System.⁴ 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.⁵

OWCP may not deny an application for review solely because the application for review is untimely filed. It must undertake a limited review to determine whether the application demonstrates clear evidence of error.⁶ OWCP regulations and procedure 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.⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of how the evidence

² 20 C.F.R. § 10.607(a).

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

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁵ *Supra* note 3.

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 104, 111 (1989).

⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016). OWCP's procedure further 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 erred in its decision.

⁸ *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ *See Leona N. Travis*, *supra* note 9.

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.¹²

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹³ In order 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 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

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP's regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision. The last merit decision in this case was December 18, 2014. As appellant's request for reconsideration was received on May 17, 2017, more than one year after the December 18, 2014 decision, it was untimely filed. Therefore, he must demonstrate clear evidence of error with regard to the December 18, 2014 decision.

The Board finds that appellant has failed to demonstrate clear evidence of error with regard to the December 18, 2014 decision. Appellant did not submit the type of positive, precise, and explicit evidence manifesting on its face that OWCP committed error in the denial of the claim.¹⁵

OWCP denied appellant's claim because he failed to establish that the employment incident occurred as alleged. It determined that appellant's statements of injury were inconsistent and could not be accepted as factual. Appellant did not submit any evidence that addressed fact of injury. In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁶ The Board finds that appellant's argument and evidence submitted with his untimely request for reconsideration fails to demonstrate clear evidence of error.¹⁷

OWCP's procedures provide 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 of miscalculation in a schedule award). The evidence submitted herein

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ See *S.P.*, Docket No. 17-1708 (issued February 23, 2018).

¹⁶ *B.C.*, Docket No. 16-1404 (issued April 14, 2017).

¹⁷ See *D.B.*, Docket No. 17-1197 (issued November 1, 2017).

does not rise to that level. The Board finds that the additional evidence submitted by appellant, which consisted of medical reports, does not shift the weight of the evidence in favor of the claimant nor does it raise a substantial question as to the correctness of OWCP's decision.¹⁸ Therefore, appellant has failed to demonstrate clear evidence of error in his untimely request for reconsideration.

For these reasons, OWCP properly determined that appellant failed to demonstrate clear evidence of error in that decision.

On appeal counsel argues that: (1) there is a conflict as to the medical evidence which was not resolved in accordance with the recognized principles of law; (2) OWCP failed to adjudicate the claim in accordance with the standard of causation; (3) OWCP failed to give deference to the findings of the attending physician; (4) OWCP failed to follow the procedure manual; (5) OWCP did not meet burden of proof to terminate benefits; (6) the employing establishment did not refute credibility of claimant; and (7) the Board must enter *de novo* review and makes its own independent judgment of the claim. Counsel further requests that the Board take specific corrective action rather than simply remand the claim, and that the Board specifically identify any deficiency in any medical report that it finds contains "insufficient rationale." The Board finds that counsel's arguments are general arguments that do not address the facts or the issues in this specific claim, and do not demonstrate clear evidence of error in the denial of appellant's 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.

¹⁸ See *M.M.*, Docket No. 16-1627 (issued January 4, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 11, 2017 is affirmed.

Issued: May 15, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board