

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

P.W., Appellant)	
)	
and)	Docket No. 18-0638
)	Issued: October 9, 2018
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, METROPOLITAN)	
CORRECTIONAL CENTER, Chicago, IL,)	
Employer)	
)	

Appearances:
Stephanie N. Leet, 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 February 2, 2018 appellant, through counsel, filed a timely appeal from an August 7, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated June 25, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the 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.

² 5 U.S.C. § 8101 *et seq.*

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 May 4, 2014 appellant, then a 48-year-old correctional systems officer, filed a traumatic injury claim (Form CA-1) alleging that, on May 3, 2014, he sustained a bump on the right side of his head when an inmate attempted to strike another inmate with a push broom, but instead the inmate struck him in the forehead. He stopped work on May 6, 2014 and returned to work on May 28, 2014. Appellant did not submit additional evidence.

OWCP, in a May 24, 2014 development letter, advised appellant of the deficiencies in his claim and afforded him 30 days to submit medical evidence. Appellant did not respond.

By decision dated June 25, 2014, OWCP denied appellant's traumatic injury claim. It found that he had failed to respond to its May 24, 2014 development letter and thus failed to establish a medical diagnosis in connection with the accepted May 3, 2014 injury and/or work event.

In a May 22, 2014 prescription note, Dr. Tony Hampton, a Board-certified family practitioner, placed appellant off work through May 27, 2014 due to medical illness. He advised that appellant could return to work on May 28, 2014. Dr. Hampton, in a June 6, 2014 attending physician's report (Form CA-20), indicated a date of injury as May 3, 2014. He provided examination findings and diagnosed headache, hypertension, and head injury. Dr. Hampton checked a box marked "yes" indicating that the diagnosed conditions were caused or aggravated by an employment activity, noting that appellant was hit in the forehead with a broom. He advised that appellant was totally disabled as of May 6, 2014. Dr. Hampton noted that the date on which he could resume his regular work was undetermined.

A May 5, 2014 handwritten employee health record contained an unknown signature and related a history of injury that on May 3, 2014 an inmate hit appellant on the forehead with a broom. The record reflected examination findings and an assessment of blunt forehead injury.

Hospital records dated May 5, 2014 documented appellant's evaluation by Dr. Dale V. Davenport, Board-certified in emergency medicine, for a head injury sustained on May 3, 2014 after being struck in the head by a broom handle at work. Dr. Davenport diagnosed headache and unspecified essential hypertension. In a separate note dated May 5, 2014, he reiterated appellant's history of injury and diagnosis of hypertension. Dr. Davenport also diagnosed head trauma.

On May 12, 2017, appellant, through counsel, requested reconsideration of OWCP's June 25, 2014 decision. Counsel acknowledged that the reconsideration request was untimely, but cited Board precedent and contended that the medical evidence of record clearly established that appellant sustained headache and hypertension due to his May 3, 2014 employment incident.

By decision dated August 7, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System.⁶ OWCP will consider an untimely request for reconsideration only if the request demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.”⁷ The request must establish on its face that such decision was erroneous.⁸ Where a request is untimely filed and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁹

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant’s application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁰ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹¹ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹² 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

³ This section provides in pertinent part: the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁶ *Id.* at Chapter 2.1602.4b.

⁷ 20 C.F.R. § 10.607(b).

⁸ *Id.*

⁹ *Supra* note 7 at § 10.608(b).

¹⁰ *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 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

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.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations¹⁴ and procedures¹⁵ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was OWCP's June 25, 2014 decision. Appellant had one year from the date of that decision to make a timely request for reconsideration. Since OWCP did not receive his request until May 12, 2017, it was filed outside the one-year time period. As appellant's May 12, 2017 request for reconsideration was submitted more than one year after the June 25, 2014 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his May 4, 2014 traumatic injury claim.¹⁶

The Board has reviewed the record and finds that the evidence submitted does not raise a substantial question as to the correctness of OWCP's last merit decision and is therefore insufficient to demonstrate clear evidence of error. The underlying issue in appellant's claim was medical in nature with respect to causal relationship. The Board notes that the term clear evidence of error is intended to represent a difficult standard.¹⁷ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.¹⁸ It is not enough to show that evidence could be construed so as to produce a contrary conclusion.¹⁹

The evidence submitted to the record following the June 25, 2014 merit OWCP decision consisted of several medical reports. To demonstrate clear evidence of error in the denial of the claim, the new evidence had to establish the underlying issue of causal relationship. The May 5, 2014 hospital record and Dr. Davenport's May 5, 2015 report did not address causal relationship. The only medical reports discussing causal relationship, the underlying merit issue in this case, were the June 6, 2014 Form CA-20 report and May 22, 2014 prescription note from Dr. Hampton.

¹³ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁴ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁶ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.5 (February 2016); *see Dean D. Beets*, *supra* note 11.

¹⁸ *See id.*, Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *D.G.*, 59 ECAB 455 (2008).

¹⁹ *See M.N.*, Docket No. 15-0758 (issued July 6, 2015).

While Dr. Hampton, in his June 6, 2014 Form CA-20 report, checked a box marked “yes” that appellant’s headache, hypertension, and head injury resulted from the May 3, 2014 employment incident, the Board has long held that when a physician’s opinion on causal relationship consists only of checking “yes” to a form question, without sufficient rationale, as here, that opinion is of diminished probative value.²⁰ While his opinion is generally supportive of causal relationship, it does not demonstrate clear error on the part of OWCP in rendering its June 25, 2014 decision.²¹

In his May 22, 2014 prescription note, Dr. Hampton placed appellant off work through May 27, 2014 due to medical illness. This evidence does not raise a substantial question as to the correctness of OWCP’s decision as it does not address the relevant issue of causal relationship between the claimed injuries and the accepted May 3, 2014 employment incident.²² Dr. Hampton did not specifically attribute a diagnosed condition and resultant disability to the May 3, 2014 work incident.²³

Appellant did not submit medical evidence sufficient to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of OWCP’s decision. Consequently, the Board finds that he has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

On appeal counsel acknowledges that appellant’s request for reconsideration was untimely, but cites Board precedent and contends that the medical evidence of record clearly establishes that appellant sustained injury due to the May 3, 2014 employment incident. The Board finds that the legal precedent cited by counsel are cases in which the Board had jurisdiction over the merits of the claim. Here, however, the Board does not have jurisdiction over the merits and thus these cases are inapplicable to the present claim. For the reasons set forth above, the Board finds that the evidence submitted in support of appellant’s untimely request for reconsideration was insufficient to *prima facie* shift the weight of the evidence in appellant’s favor and raise a substantial question as to the correctness of OWCP’s June 25, 2014 decision denying his traumatic injury 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.

²⁰ *Sedi L. Graham*, 57 ECAB 494 (2006).

²¹ *See C.D.*, Docket No. 17-1915 (issued February 21, 2018).

²² *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

²³ *See E.P.*, Docket No. 17-1544 (issued April 10, 2018); *T.D.*, Docket No. 16-1600 (issued March 23, 2017).

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 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