

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case, as set forth in the prior decision, are incorporated herein by reference. The relevant facts are as follows.

On July 9, 2014 appellant, then a 46-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a lower back injury on June 28, 2014 when bending and lifting while in the performance of duty. OWCP accepted the claim for lumbar sprain.

Appellant subsequently filed claims for wage-loss compensation (Form CA-7) for the period August 9, 2014 and continuing.

On September 2, 2014 the employing establishment offered appellant a position as a modified APC Host/Express Mail Deliverer effective that day. The physical requirements included lifting and carrying up to 10 pounds, pushing and pulling for one hour per day, and no bending/stooping. Appellant refused the job offer because he felt that he must be provided tasks that were exclusive to a rural carrier craft position and he refused the offered modified-duty job. The position remained available to him.

By decision dated January 16, 2015, OWCP denied appellant's claim for disability compensation for the period August 9, 2014 and continuing, finding that the medical evidence did not establish that he was disabled due to the accepted employment-related conditions.

Appellant submitted intermittent progress notes by Dr. Michael W. Cohen, a Board-certified occupational medicine specialist, dated January 6 through July 27, 2015. In these progress notes Dr. Cohen diagnosed lumbar strain with worsening symptoms, lumbar disc degeneration, and lumbar radiculopathy, resolved.

Appellant also submitted reports from Dr. D. Michael Hembd, a Board-certified physiatrist, covering intermittent medical treatment from October 22, 2015 through January 11, 2016. Dr. Hembd diagnosed sprain of the ligaments of the lumbar spine and back pain. He noted that appellant "will continue with light[-]duty restrictions" and added that he would release appellant to full-duty work once he completed physical therapy. Following appellant's physical therapy sessions, on January 11, 2016, Dr. Hembd's physician assistant, Sarah L. Zichella, determined that appellant had reached maximum medical improvement and released him to full-duty work.

On May 5, 2016 appellant requested reconsideration.

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 the evidence and arguments submitted on reconsideration did not raise a substantial question as to the correctness of OWCP's January 16, 2015 decision.

² Docket No. 17-0476 (issued June 22, 2018).

Appellant appealed to the Board. By decision dated June 22, 2018, the Board set aside OWCP's November 7, 2016 nonmerit decision and remanded the case as it did not provide findings of fact and a statement of reasons regarding the reasons that the reports of Drs. Cohen and Hembd were insufficient to demonstrate clear evidence of error that OWCP's last merit decision was incorrect. On remand, the Board directed OWCP to issue an appropriate decision containing findings of fact and a clear statement of reasons addressing appellant's untimely request for reconsideration.³

Upon return of the case record to OWCP, appellant submitted reports dated November 29 and December 7, 2016 from Dr. Randall Armstrong, a Board-certified family practitioner, who diagnosed other intervertebral disc degeneration, lumbar region. Dr. Armstrong also opined that appellant's belief that he was not capable of lifting more than 15 pounds appeared to be self-generated as there were no findings on physical examination, x-ray, or magnetic resonance imaging (MRI) scans, to support that restriction. He advised that appellant was capable of returning to regular duty.

By decision dated October 11, 2018, OWCP denied appellant's request for reconsideration because 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.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ 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.⁶ 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).⁷

Section 10.607(b) provides 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.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and

³ *Id.*

⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁶ 20 C.F.R. § 10.607(a).

⁷ See *Jesus D. Sanchez*, *supra* note 4; *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

⁸ 20 C.F.R. § 10.607(b).

⁹ See *Nancy Marciano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

must be manifest on its face that OWCP committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³

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.¹⁴ The Board makes an independent determination of whether a claimant has submitted 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.¹⁵

ANALYSIS

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.

OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision.¹⁶ The Board has held that, for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the integrated Employees' Compensation System (iFECS).¹⁷ The most recent merit decision was OWCP's January 16, 2015 decision denying appellant's claims for disability compensation. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since his request was not received by OWCP until May 5, 2016, it was filed outside the one-year time period.¹⁸ As appellant's May 5,

¹⁰ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-0956 (issued April 15, 2010).

¹¹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

¹⁵ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

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

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); see *supra* note 14.

¹⁸ OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provides that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP. See 20 C.F.R. § 10.607 (2011); see also *C.B.*, Docket No. 13-1732 (issued January 28, 2014) (where the Board held that for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in iFECS).

2016 request for reconsideration was received more than one year after the January 16, 2015 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.¹⁹

In its January 16, 2015 merit decision, OWCP denied appellant's disability compensation claims because the medical evidence failed to establish that he was totally disabled for work and/or unable to perform the duties of the modified APC Host/Express Mail Deliverer position due to his accepted employment-related condition.

In support of his untimely request for reconsideration, appellant submitted progress notes from Dr. Cohen covering his intermittent treatment of appellant for lumbar strain with worsening symptoms, lumbar disc degeneration, and lumbar radiculopathy, resolved, during the period January 6 through July 27, 2015. Appellant also submitted reports from Dr. Hembd who treated appellant intermittently from October 22, 2015 through January 11, 2016 for sprain of the ligaments of the lumbar spine and back pain, noting work restrictions. Neither physician addressed whether his treatment and/or the work restrictions were causally related to the June 28, 2014 employment injury. The Board finds that the reports of Drs. Cohen and Hembd do not demonstrate clear evidence of error on the part of OWCP in denying appellant's disability claims on January 16, 2015. Additionally, Drs. Cohen and Hembd do not raise a substantial question as to the correctness of OWCP's January 16, 2015 merit decision. As such, they are insufficient to warrant further merit review.

Upon return of the case record to OWCP, appellant submitted reports dated November 29 and December 7, 2016 from Dr. Armstrong who diagnosed other intervertebral disc degeneration, lumbar region and opined that appellant's belief that he was not capable of lifting more than 15 pounds appeared to be self-generated as there were no findings on physical examination, x-ray, or MRI scans, to support that restriction and released him to regular duty. The Board finds that this evidence also does not demonstrate clear evidence of error because it does not show that OWCP committed an error in denying appellant's disability compensation claims, nor raise a substantial question as to the correctness of OWCP's decision.

The report of Ms. Zichella does not demonstrate clear error in the January 16, 2015 merit decision because the reports of nonphysicians, including physician assistants do not constitute probative medical evidence under FECA.²⁰

To demonstrate clear evidence of error, it is insufficient merely to show 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.²¹ The evidence submitted does not manifest on its face that OWCP committed an error in denying appellant's claims for disability compensation. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial

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

²⁰ *D.F.*, Docket No. 17-0745 (issued March 14, 2018); *R.S.*, Docket No. 16-1303 (issued December 2, 2016); *L.L.*, Docket No. 13-0829 (issued August 20, 2013).

²¹ *Supra* note 17 at Chapter 2.1602.5.a (February 2016); see *Dean D. Beets*, *supra* note 9.

question as to the correctness of OWCP's last merit decision. Thus, the Board finds that the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board