

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 January 12, 2017 appellant, then a 56-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on January 11, 2017, he sustained a "strange sensation and bump in upper right groin" while "transferring tray of mail from rear to front" while in the performance of duty. On the reverse side of the claim form, the employing establishment related that it could not determine whether he was injured in the performance of duty.

In an undated statement received by OWCP on January 19, 2017, appellant's supervisor, M.G., indicated that, on January 11, 2017, appellant informed her that he may have a hernia. She indicated that appellant had related that he picked up a large parcel and felt a pop.

In a development letter dated January 23, 2017, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It provided a factual questionnaire for his completion and requested medical evidence in support of his claim. OWCP afforded appellant 30 days to submit the necessary evidence. No response was received within the time allotted.

By decision dated March 9, 2017, OWCP denied appellant's claim, finding that the evidence submitted was insufficient to establish that the January 11, 2017 incident occurred in the performance of duty as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In a report dated January 17, 2017, received by OWCP on March 10, 2017, Dr. Allan M. Spiegel, a neurology specialist, indicated that he examined appellant for right groin pain. He noted that appellant was carrying a 30-pound tray of mail from the rear to the front of his truck, and, when appellant leaned into the rear of his truck, he felt a twinge of pain in the right inguinal area which subsequently became swollen. Dr. Spiegel diagnosed inguinal hernia based on a physical examination and related that the diagnosis was a direct result of appellant's employment-related duties on January 11, 2017. He requested authorization for an ultrasound of appellant's groin.

In an ultrasound scan report dated July 28, 2017, Dr. R. Marvin Freedy, a Board-certified diagnostic radiologist, indicated impressions of suspected right inguinal hernia, identified on upright scanning.

In a report dated August 4, 2017, Dr. Spiegel reviewed the ultrasound and noted an impression of suspected right inguinal hernia. He referred appellant to a general surgeon for further assessment.

On March 12, 2018 appellant requested reconsideration of OWCP's March 9, 2017 decision. He submitted additional evidence along with his request.

In reports dated October 31, 2017 and February 6, 2018, Dr. David S. Mason, a Board-certified colon and rectal surgeon, indicated in the "history of present illness" section that appellant suffered from an inguinal hernia on both sides. He noted an impression of bilateral inguinal hernia

and related that appellant wished to proceed with laparoscopic bilateral inguinal hernia repair with mesh.

By decision dated April 2, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant did not submit factual evidence along with his request for reconsideration.

In a report dated March 5, 2018, received by OWCP on April 10, 2018, Dr. Mason indicated that he performed a laparoscopic bilateral hernia repair with mesh, and related pre- and postoperative diagnoses of bilateral inguinal hernias.

On April 10, 2018 appellant resubmitted three previously submitted medical reports dated January 17, July 28, and August 4, 2017.

On April 10, 2018 appellant requested reconsideration of OWCP's April 2, 2018 decision. He submitted additional evidence and argument along with his reconsideration request. Appellant indicated that he was "injured on the job" on January 11, 2017, that he submitted medical evidence in support of his claim, and did not receive any further correspondence. He further related that after being notified of OWCP's initial denial dated March 9, 2017, he mailed in his reconsideration request by Express Mail, and was signed for by an OWCP employee on March 9, 2018. Appellant argued that he submitted his request for reconsideration within the one-year time frame.

Appellant resubmitted March 5, 2018 hospital records signed by Dr. Mason, which diagnosed bilateral inguinal hernia and noted that a laparoscopic transabdominal preperitoneal inguinal hernia repair had been performed.

By decision dated August 16, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to establish clear evidence of error in the denial of his claim.

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 has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that for merit decisions issued on or after August 29, 2011, the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ 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 (iFECS).⁷ The Board has found that the imposition of

⁴ 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).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁷ *Id.* at Chapter 2.1602.4b.

the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁸

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.”⁹ To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.¹² 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.¹³

The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁶ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁷ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸ Where a request is untimely 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.¹⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant’s request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

⁸ See *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Thankamma Mathews*, 44 ECAB 765 (1993).

⁹ 20 C.F.R. § 10.607(b).

¹⁰ *Id.*

¹¹ *Supra* note 9; *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹² *R.C.*, Docket No. 17-0198 (issued January 28, 2019); see *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ *R.C.*, *id.*; *Thankamma Mathews*, *supra* note 8.

¹⁴ *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹⁵ *R.L.*, Docket No. 18-0496 (issued January 9, 2019); *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *R.L.*, *supra* note 15; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, *supra* note 8.

¹⁹ 20 C.F.R. § 10.608(b).

Appellant had one year from the date of OWCP's March 9, 2017 merit decision to timely request reconsideration. As OWCP did not receive appellant's reconsideration request until April 10, 2018, more than one year after the March 9, 2017 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his claim.²⁰

The Board has reviewed the record and finds that appellant has not demonstrated clear evidence of error.

In its most recent merit decision of March 9, 2017, OWCP found that the evidence submitted was insufficient to establish that the event occurred as appellant described. Therefore the underlying merit issue on reconsideration is factual in nature. With his reconsideration request, appellant resubmitted medical reports dated January 17, July 28, August 4, 2017, and March 5, 2018. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.²¹ Appellant has not sufficiently explained how the submission of this evidence raises a substantial question concerning the correctness of OWCP's decision.²²

As previously noted, clear evidence of error is intended to represent a difficult standard.²³ It is not enough to show that evidence could be construed so as to produce a contrary conclusion.²⁴ Instead, the evidence must shift the weight in appellant's favor.²⁵

Appellant also submitted argument along with his reconsideration request. He argued that he was "injured on the job" on January 11, 2017, that he submitted medical evidence in support of his claim, and did not receive any further correspondence. The Board finds that this argument is duplicative. Therefore it does not raise a substantial question as to the correctness of OWCP's decision or shift the weight of the evidence in his favor.²⁶

Thus, the Board finds that appellant has failed to demonstrate clear evidence of error.

CONCLUSION

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

²⁰ *Supra* note 9; see *Debra McDavid*, 57 ECAB 149 (2005).

²¹ See *D.L.*, Docket No. 18-1007 (issued November 28, 2018); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

²² *Id.*

²³ *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

²⁴ *Id.*

²⁵ *R.S.*, Docket No. 18-0505 (issued July 24, 2018).

²⁶ See *G.B.*, Docket No. 18-1629 (issued April 15, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 14, 2019
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