

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 this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 30, 1984 appellant, then a 29-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that, on August 1, 1984, he felt a sharp pain from the left side of his lower back which radiated down the back side of his leg to his calf when carrying both a mailbag and a second bundle of letters on his shoulder while in the performance of duty. He explained that the sharp pain caused him to fall from his jeep to the sidewalk/curb. Appellant stopped work on the date of injury.

OWCP accepted the claim for displacement of lumbar intervertebral disc without myelopathy and sprain of lumbosacral joint ligament. It paid appellant wage-loss compensation on the periodic rolls.

On March 25, 2015 OWCP referred appellant for a second opinion examination with Dr. Aubrey M. Swartz, a Board-certified orthopedic surgeon, to determine the status of his accepted conditions and resultant disability.

In a May 7, 2015 report, Dr. Swartz noted his review of a statement of accepted facts and discussed appellant's history of injury and treatment. He performed a physical examination which concluded that appellant had no residuals or disability causally related to the August 1, 1984 employment injury. Dr. Swartz explained that the lumbar strain had improved and resolved by December 31, 1992. He opined that appellant was capable of returning to his date-of-injury job with modifications due solely to his age. Dr. Swartz advised that no further treatment was needed.

On June 11, 2015 OWCP issued a notice of proposed termination of compensation. It advised appellant that his wage-loss compensation and medical benefits would be terminated because he had no ongoing residuals of disability related to his accepted employment injury. OWCP indicated that the weight of the medical evidence, as demonstrated by the opinion of Dr. Swartz, established that appellant's work injury had resolved. It afforded appellant 30 days to submit additional evidence or argument. No response was received.

By decision dated July 16, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective that same date.

On October 20, 2015 appellant, through counsel, requested reconsideration and submitted additional evidence.

² 5 U.S.C. § 8101 *et. seq.*

In a July 20, 2015 report, Dr. David Broderick, specializing in orthopedic surgery, noted appellant's history of injury and treatment. He diagnosed chronic lumbosacral strain with left lower extremity radiculitis and opined that the August 1, 1984 employment injury had aggravated appellant's symptomatology to the point that he could not continue with his work activities. Dr. Broderick further opined that appellant had chronic back symptomatology due to undergoing two previous back surgeries and a work injury 31 years prior. He explained that it was unlikely that he would be able to resume his former work activities without significant risk for flare up of symptomatology or reinjury and, thus, remained disabled from work.

In an August 26, 2015 supplemental report, Dr. Broderick explained that Dr. Swartz's opinion varied wildly from those of other physicians who had examined appellant throughout the years. He noted that appellant had been unable to work for many years due to back pain. Dr. Broderick opined that appellant "certainly would not be able to perform the activities suggested by Dr. Swartz." He opined that it would be difficult "for an individual in the prime of his health without a history of two back surgeries and chronic sciatica."

By decision dated January 8, 2016, OWCP denied modification of its July 16, 2015 decision.

On January 10, 2017 appellant requested reconsideration of the January 8, 2016 decision. He submitted a statement, in which he disagreed with the termination of his wage-loss compensation and medical benefits. Appellant also submitted a statement from his wife, who noted her observations of appellant's disability status and argued that Dr. Swartz was biased.

Appellant also provided copies of evidence previously of record, including a copy of a July 9, 2015 affidavit from appellant, a November 6, 1992 report from his treating physician Dr. Robert England, a general surgeon, medical reports from 2003 and 2013, an August 16, 2015 letter from appellant to the employing establishment requesting to be reinstated, an October 15, 2015 request for reconsideration, and various other letters regarding the status of appellant's claim dated 2009, 2010, 2013, and 2015.

By decision dated April 10, 2017, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.⁵ Timeliness is determined by the document receipt date of the request for

³ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁸ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁹

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 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 demonstrate 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 demonstrate 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.¹⁰

OWCP's 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.¹¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

¹⁰ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹² *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

ANALYSIS

The Board finds that this case is not in posture for decision.

The most recent merit decision of OWCP was the January 8, 2016 decision. One year from January 8, 2016 was January 8, 2017. As that date fell on a Sunday, appellant had until Monday, January 9, 2017 to timely request reconsideration.¹³ As OWCP received appellant's reconsideration request on Tuesday, January 10, 2017, more than one year after the January 8, 2016 decision, the request was untimely filed.

The proper standard of review for an untimely reconsideration request is the clear evidence of error standard. In denying appellant's reconsideration request, OWCP applied the standard of review for timely requests for reconsideration.¹⁴ As OWCP applied the incorrect standard of review to the untimely request for reconsideration, the Board will set aside OWCP's April 10, 2017 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.¹⁵

CONCLUSION

The Board finds that this case is not in posture for decision.

¹³ *Supra* note 5.

¹⁴ *See L.W.*, Docket No. 16-1202 (issued January 25, 2018); *H.L.*, Docket No. 13-2077 (issued March 20, 2014).

¹⁵ *See* 20 C.F.R. § 10.607(b).

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: May 13, 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