

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

_____)	
G.B., Appellant)	
)	
and)	Docket No. 19-1762
)	Issued: March 10, 2020
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, ROGUE RIVER)	
BASIN PROJECT, Trail, OR, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 19, 2019 appellant filed a timely appeal from a March 13, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ The most recent merit decision in this case was a June 22, 2015 Board decision, which became final 30 days after issuance, and is not subject to further review.² As there was no merit decision issued by OWCP within 180 days from the filing of this appeal, pursuant to the Federal Employees' Compensation

¹ Appellant timely requested oral argument before the Board. By order dated March 2, 2020, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Oral Argument*, Docket No. 19-1762 (issued March 2, 2020).

² 20 C.F.R. § 501.6(d).

Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts and circumstances of the case as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on January 18, 1989 appellant, then a 37-year-old maintenance worker, sustained an employment-related low back strain with subluxations. Appellant was off work until April 26, 1989 when he returned to light duty. OWCP assigned the claim File No. xxxxxx776. Appellant continued working light duty until April 5, 1990 when he slipped on a rock and slid down a slope while in the performance of duty. OWCP assigned that claim File No. xxxxxx702. It accepted this claim for herniated disc at L4-5, and appellant underwent lumbar surgery on June 20, 1990.⁶ Appellant returned to light duty on September 10, 1990 and resigned his position on September 13, 1990. On October 10, 1997 he filed a notice of recurrence (Form CA-2a) claiming that the recurrence occurred from "1989 to present." Appellant indicated that he was unable to perform light-duty work due to chronic back pain and clinical depression. By decision dated September 29, 1998, OWCP denied the recurrence of disability claim. In a July 14, 1999 decision, a hearing representative with OWCP's Branch of Hearings and Review affirmed the September 29, 1998 decision.

Appellant requested reconsideration on October 13, 1999. By decision dated November 8, 1999, OWCP denied modification of the July 14, 1999 decision. On November 8, 1999 appellant again requested reconsideration. On December 2, 1999 OWCP accepted a recurrent herniated disc at L4-5. Appellant elected to receive FECA benefits, effective May 19, 1996. OWCP paid retroactive compensation beginning that day, and placed him on the periodic compensation rolls.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ Docket No. 17-1298 (issued January 25, 2018); Docket No. 14-1241 (issued June 22, 2015); *Order Remanding Case*, Docket No. 13-1474 (issued December 18, 2013).

⁶ OWCP administratively combined the files, with File No. xxxxxx776 becoming the master file.

In November 2011 OWCP referred appellant to Dr. Mitchell A. Weinstein, Board-certified in neurosurgery, for a second opinion evaluation. By decision April 16, 2012, it found the weight of the medical evidence rested with the opinion of Dr. Weinstein who advised that appellant had no employment-related residuals. OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 17, 2012. Following multiple reconsideration requests, OWCP issued a merit decision dated July 25, 2012, denying modification of the prior decision,⁷ a nonmerit decision dated September 5, 2012, and a merit decision dated May 21, 2013, denying modification of the prior decisions.

Appellant appealed to the Board on June 10, 2013. By order dated December 18, 2013, the Board remanded that case to OWCP because the case record before the Board did not contain a surveillance DVD that was relevant to the case. The Board directed OWCP to obtain the DVD and to issue a *de novo* decision.⁸ Two DVDs were thereafter obtained by OWCP. In a merit decision dated January 9, 2014, OWCP again reviewed the evidence of record and denied modification of the prior decisions. Appellant again filed an appeal with the Board on May 5, 2014.

By decision dated June 22, 2015, the Board found that OWCP properly determined that the weight of the medical evidence rested with the opinion of Dr. Weinstein and, therefore, OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on April 16, 2012. The Board further found that the medical evidence submitted was insufficient to meet appellant's burden of proof to establish that he had continuing residuals of the accepted lumbar conditions on or after April 17, 2012.⁹

Appellant requested reconsideration on June 27, 2016. He asserted that the medical evidence established that his current condition was employment related and that the surveillance DVD did not fully characterize his condition. Appellant submitted additional evidence previously of record. Newly submitted evidence consisted of a February 23, 2016 treatment note with an accompanying state workers' compensation form, both signed by Mark K. Spencer, a physician assistant, and a lumbar bone scan dated March 11, 2016.

By decision dated September 14, 2016, OWCP denied appellant's reconsideration request, finding that the evidence submitted was irrelevant or immaterial, and thus insufficient to warrant merit review.

On October 14, 2017 appellant filed an appeal with the Board. By decision dated January 25, 2018, the Board found that OWCP erroneously applied the standard of review for a timely request for reconsideration as set forth at sections 10.605 through 10.607 of its regulations. It noted that the last merit decision of record was the Board's June 22, 2015 decision. Thus, as more than one year had elapsed since the last merit decision to the filing of appellant's request for reconsideration on June 27, 2016, OWCP should have applied the clear evidence of error legal standard which is the appropriate standard for cases in which a reconsideration request is untimely

⁷ OWCP initially issued a decision on July 23, 2012, that was superseded by the July 25, 2012 decision.

⁸ Docket No. 13-1474, *supra* note 5.

⁹ Docket No. 14-1241, *supra* note 5.

filed. The Board set aside the September 14, 2016 decision and remanded the case to OWCP. The Board directed OWCP to apply the appropriate standard for reviewing an untimely request for reconsideration as set forth at section 10.607(b) of its regulations.¹⁰

OWCP received no further evidence.

Upon return of the case record, by decision dated March 13, 2019, OWCP again denied appellant's June 27, 2016 reconsideration request, 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.¹¹ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (IFECS).¹² The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹³

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.¹⁴ OWCP's regulations and procedures 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 request for reconsideration establishes clear evidence of error on the part of OWCP.¹⁵

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 shift the weight of the

¹⁰ Docket No. 17-1298, *supra* note 5.

¹¹ 20 C.F.R. § 10.607(a).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹³ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

¹⁴ 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

¹⁵ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.1602.5(a) (February 2016).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁶

OWCP's procedures note and the Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence that 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 that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸

ANALYSIS

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.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the timeliness of appellant's June 27, 2016 reconsideration request as the Board considered the evidence relative to this issue in its January 25, 2018 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP, under section 8128 of FECA.¹⁹

Because appellant's request was untimely, he must demonstrate clear evidence of error on the part of OWCP in terminating his wage-loss compensation and medical benefits on April 16, 2012.

The Board finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision.

In support of the untimely request for reconsideration, OWCP received February 23, 2016 reports from Mr. Spencer, a physician assistant and a March 11, 2016 report of a lumbar bone scan. Reports from a physician assistant are of no probative value as a physician assistant is not a physician as defined under FECA.²⁰ The March 11, 2016 diagnostic lumbar bone scan did not demonstrate that OWCP clearly erred in terminating appellant's compensation benefits on April 16, 2012. The Board has held that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence that on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report, which if submitted prior to

¹⁶ *M.P.*, Docket No. 19-0674 (issued December 16, 2019).

¹⁷ Federal (FECA) Procedure Manual, *supra* note 15; *G.L.*, *supra* note 13.

¹⁸ *M.P.*, *supra* note 16.

¹⁹ *J.T.*, Docket No. 18-1757 (issued April 19, 2019).

²⁰ *B.R.*, Docket No. 19-0088 (issued August 13, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001). Section 8101(2) of FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2).

OWCP's denial, would have created a conflict in the medical opinion evidence requiring further development, is not clear evidence of error.²¹ The Board finds this evidence insufficient to demonstrate clear evidence of error in OWCP's April 16, 2012 decision terminating his wage-loss compensation and medical benefits.²²

The arguments raised in support of appellant's untimely reconsideration request did not establish that OWCP erred in denying his claim. He merely discussed his current medical condition, maintaining that it was caused by the employment injuries and that the surveillance DVD did not characterize his condition. However, these arguments do not demonstrate clear evidence of error, as they did not raise a substantial question as to the correctness of OWCP's April 16, 2012 decision that terminated appellant's wage-loss compensation and medical benefits effective April 17, 2012.²³

The Board finds that appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in terminating his wage-loss compensation and medical benefits on April 16, 2012. Appellant has therefore not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that the request failed to demonstrate clear evidence of error.²⁴

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.

²¹ *M.P.*, *supra* note 16.

²² *M.C.*, Docket No. 18-1659 (issued December 2, 2019).

²³ *G.L.*, *supra* note 13.

²⁴ *M.P.*, *supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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