

ISSUE

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

FACTUAL HISTORY

On October 27, 1988 the employee, then a 28-year-old boilermaker, filed a traumatic injury claim (Form CA-1) alleging that on October 25, 1988 he injured his back and left leg when he fell off a wet ladder while in the performance of duty. OWCP accepted the claim for lumbar strain. The employee underwent an authorized left lumbar laminectomy and discectomy on February 6, 1989. OWCP paid him wage-loss compensation on the periodic rolls effective May 7, 1989.

By decision dated June 27, 2005, OWCP denied the employee's request for authorization for right hip surgery. By decision dated March 28, 2006, an OWCP hearing representative affirmed the June 27, 2005 decision. He found that the employee had not established a right hip condition causally related to the accepted employment injury.

In a treatment note dated January 10, 2007, Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon, noted that the employee had experienced a cerebral vascular accident (CVA) 10 days after a right hip replacement.

On April 23, 2013 OWCP expanded its acceptance of the claim to include displacement of a lumbar intervertebral disc without myelopathy and localized unspecified osteoarthritis of the left lower leg.

On May 15, 2014 the employee underwent an OWCP-authorized lumbar laminectomy and fusion at L3 to S1. In a progress report dated June 27, 2014, Dr. Felix M. Kirven, a Board-certified orthopedic surgeon, advised that the employee was doing well after his fusion.

The employee passed away on April 5, 2019. A death certificate dated April 10, 2019 listed the cause of death as a CVA and dementia.

On April 29, 2019 appellant's congressional representative advised that appellant, the employee's widow, had requested his assistance in obtaining death benefits from OWCP.

In a development letter dated June 5, 2019, OWCP informed appellant of the evidence required to establish survivor's benefits, including a detailed report from the employee's treating physician addressing the causal relationship between his death and his accepted employment injury. It afforded her 30 days to submit the requested evidence.

On June 14, 2019 appellant filed a claim for compensation by widow, widower and/or children (Form CA-5). In the attending physician's portion of the form, Dr. Kirven identified the cause of death as a CVA. He checked a box marked "Yes" that the death of the employee was due to his accepted employment injury of a lumbar herniated disc, and opined that the employee had a

postoperative stroke after his 2014 lumbar surgery complicated by progressive strokes until his death on April 5, 2019.

In a report dated June 25, 2019, Dr. Kirven related that he had treated the employee for an October 25, 1988 employment injury. He noted that the employee had experienced a stroke following a May 22, 2014 lumbar fusion that was followed by several subsequent strokes. Dr. Kirven attributed the employee's postsurgical strokes to his May 22, 2014 surgery.

By decision dated September 25, 2019, OWCP denied appellant's survivor's claim. It found that medical records established that the employee experienced a stroke in 2006 following a right hip replacement. OWCP noted that it had previously determined that the right hip replacement was unrelated to the accepted October 25, 1988 employment injury. It further indicated that the evidence of record did not reference any further strokes.

On December 30, 2019 appellant requested reconsideration. She submitted medical evidence dated 1988 onward.

By decision dated February 12, 2020, OWCP denied modification of its September 25, 2019 decision.

On March 22, 2022 appellant's congressional representative forwarded a March 16, 2022 report from Dr. Eddie Smith, Board-certified in family medicine, to OWCP. Dr. Smith advised that he had treated the employee before his back injury and at the time of his death. He related, "I think because he did not have any preexisting problem with his hip it was caused by his work[-]related injury." Dr. Smith noted that the employee had a CVA after his hip surgery that "left him wheelchair bound. He progressed and subsequently died as a result of his stroke that occurred after his lumbar injury and following hip surgery." Dr. Smith noted that all these events had occurred after the employee's employment-related lumbar injury.

On May 4, 2022 appellant requested reconsideration.

By decision dated July 6, 2022, OWCP denied appellant's request for reconsideration as it was untimely and failed to demonstrate clear evidence of error.

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 Timeliness is determined by the document receipt date (*i.e.*,

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).

the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP’s most recent merit decision was in error.⁷ OWCP’s procedures provide that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant’s request for reconsideration demonstrates “clear evidence of error” on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which 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 merely to 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 evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.¹¹

OWCP 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 demonstrates 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

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

⁶ *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).

⁷ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁸ *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 5 at Chapter 2.1602.5 (September 2020).

⁹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

¹¹ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

error.¹² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

ANALYSIS

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

OWCP received appellant's request for reconsideration on May 4, 2022, more than one year after the last merit decision dated February 12, 2020. Appellant's request was, therefore, untimely filed. Consequently, she must demonstrate clear evidence of error.¹⁴

The Board further finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether she has met her burden of proof to establish that the employee's death was causally related to his accepted employment injury. With her request for reconsideration, appellant submitted a March 16, 2022 report from Dr. Smith. Dr. Smith noted that the employee had not experienced problems with his hip until after his employment injury. He noted that the employee had a CVA after the surgery on his hip. Dr. Smith asserted that the employee subsequently passed away due to the stroke that had occurred following his lumbar injury and hip surgery. The Board has held, however, that a medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury, but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹⁵ Further, clear evidence of error is intended to represent a difficult standard. The submission of 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.¹⁶ Dr. Smith's report fails to manifest on its face that OWCP committed an error in denying appellant's survivor's claim and, thus, is insufficient to establish clear evidence of error.

CONCLUSION

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

¹² *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (September 2020).

¹³ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁴ 20 C.F.R. § 10.607(b); *R.P.*, Docket No. 22-0686 (issued September 30, 2022); *J.F.*, Docket No. 22-0572 (issued September 20, 2022); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

¹⁵ *See B.T.*, Docket No. 22-0350 (issued May 16, 2022); *M.M.*, Docket No. 15-1376, n. 12 (issued November 10, 2015); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁶ *J.F.*, Docket No. 22-0572 (issued September 20, 2022); *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *P.B.*, Docket No. 17-1963 (issued October 23, 2018); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board