

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

On appeal, appellant, through counsel, alleged clear evidence of error on the part of OWCP in denying his claim for a consequential injury arising from a motor vehicle accident of October 4, 2006, which occurred on his way home from a physician's appointment. Contrary to OWCP's decision, appellant's surgery had been approved. Appellant's counsel also contends that OWCP found a lack of information about the automobile accident when all the requested information was in the record.

FACTUAL HISTORY

On April 4, 2002 appellant, then a 41-year-old electrical engineer, filed an occupational disease claim alleging that, as a result of moving cables on March 22, 2002 and moving a high speed video camera on two occasions on March 25, 2002, he experienced numbness in his leg and pain in his middle to lower back. On April 26, 2002 OWCP accepted his claim for back strain, thoracic and lumbosacral neuritis or radiculitis and acquired spondylolisthesis.

On July 3, 2006 Dr. Steven R. Garfin, appellant's treating Board-certified orthopedic surgeon, requested authorization for two inpatient surgeries of the lumbar spine to be performed on August 21 and 24, 2006, specifically an anterior discectomy at L4-5, L5-S1 with interbody fusions followed by posterior cement fusion. By letter dated July 14, 2006, OWCP informed appellant that it could not authorize surgery as the case required further medical development.

On August 8, 2006 OWCP referred appellant to Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon, for a second opinion with regard to whether back surgery was necessary. In an August 25, 2006 report, Dr. Sabourin opined that appellant had psychological difficulties, noting bizarre behavior through the course of examination. Based on appellant's perception of his diseases, Dr. Sabourin noted a poor prognosis absent psychological counseling. He could not find any significant neurological deficit that would require surgery at this time.

An October 4, 2006 report noted that appellant was seen that date by Dr. Raul Coimbra, a critical care and general surgeon. The nature of the appointment was for a presurgical consultation.

Appellant was in a low speed motor vehicle accident on October 4, 2006. He contends that, at the time of the accident, he was on the way home from the medical appointment regarding his scheduled back fusion. Appellant was hospitalized on the date of the accident and released on October 7, 2006.

On October 5, 2006 OWCP sent the UCSD Medical Center a letter advising that his request for authorization for medical services from October 6 through 8, 2006 had been reviewed and approved. It authorized three units in the critical care unit.

The employing establishment noted in a November 9, 2006 memorandum that appellant was to be removed from his position effective November 19, 2006 due to unacceptable performance.

In a December 19, 2006 report, Dr. Garfin noted that, at the time of appellant's motor vehicle accident, he was being considered for spinal surgery. On the date of the motor vehicle accident, appellant was on his way home from a presurgical appointment with Dr. Coimbra and was taken to the trauma center.

On May 30, 2007 appellant filed a claim for wage loss as of November 20, 2006. He noted that he was separated from employment; however, the employing establishment advised that he voluntarily resigned effective November 19, 2006.

By letter dated August 6, 2007, OWCP requested that appellant submit a medical report explaining why he was totally disabled and unable to work light duty. In a separate letter of the same date, it asked him to respond to questions with regard to the reason he stopped work. OWCP requested additional information about the motor vehicle accident of October 4, 2006. Specifically, it asked appellant to describe where the accident occurred and the purpose of the trip. OWCP asked him to identify the physician he was visiting and the purpose of the visit and to describe where in relation to the physician's office and his home the accident occurred. It also asked him that, if a police report was filed, to submit a copy of that report.

By letter dated August 21, 2007, appellant's counsel responded. She stated that on October 4, 2006 appellant was returning home from a presurgical appointment with Dr. Garfin. The accident occurred on interstate I-15.³ She noted that appellant was sitting at a dead stop behind traffic when he was rear-ended by two different cars. Appellant was taken to an intensive care unit and left after the fifth day. Appellant's counsel submitted print outs from "ACS Web Bill Processing Portal" indicating that appellant's inpatient service for October 6 through 8, 2006 had been approved.

In a typed constituent services report from appellant's congressman, appellant stated that, in October 2006, he was preparing to have two back surgeries. When driving from a presurgical meeting he was "rear-ended" in an automobile accident. This form was submitted with appellant's typed name at the bottom. Appellant did not sign the form despite the fact that the form noted that a signature was required.

By decision dated February 28, 2008, OWCP denied appellant's claim for compensation commencing November 20, 2006. It further denied his claim for a consequential injury arising from a motor vehicle accident on October 4, 2006.

By letter dated February 25, 2008 and received by OWCP on February 29, 2008, appellant's attorney forwarded a copy of the accident report. The report noted that the collision occurred on the northbound I-15 south of Ted Williams Parkway at 17:50 on October 4, 2006. The investigating officer noted that appellant complained of pain in his back, neck and numbness

³ Although counsel referred to I-215, the Board concludes, based on other evidence of record, that the correct number is I-15.

to his legs. Appellant stated that he was driving northbound on I-15 south of Ted Williams Parkway when he was stopped in heavy traffic. A Chevrolet collide into the rear end of his vehicle. The impact caused appellant's vehicle to travel forward and collide into the rear end of a Toyota. The officer noted that appellant stated that he just had back surgery a week prior and complained of pain to his neck and back with numbness to his legs.

In response to a February 6, 2008 letter, OWCP advised counsel for appellant on March 4, 2008 that the record contained no authorization for surgery. It sent a letter on July 14, 2006 advising the UCSD Medical Group that surgery could not be approved as further development was required. Additionally, OWCP noted that there was no pending request for surgery. It suggested that, since the original request for surgery was almost two years old, the treating physician should again request authorization if "medically advisable."

On March 13, 2008 appellant, through counsel, requested a review of the written record by an OWCP hearing representative.

By decision dated August 28, 2008, the hearing representative affirmed the February 28, 2008 decision. She found that appellant had not established that he was entitled to total wage-loss compensation benefits commencing November 20, 2006. The hearing representative also found that he had not established that he sustained consequential injuries related to the accepted conditions. Appellant did not provide information as to the point at which the motor vehicle accident occurred or whether it occurred on the only route or the normal route to his physician's office. The hearing representative further found that OWCP "did not formally authorize the surgery in any letter or note of record." The February 28, 2008 decision erroneously recited as factual that it had approved appellant's lumbar surgery but the March 4, 2008 letter advised that surgery had not been authorized.

On May 21, 2012 appellant through counsel, filed a request for reconsideration. Counsel contended that he established that, at the time of the motor vehicle accident, he was returning from an approved presurgical medical appointment, as documented as OWCP's website. Further, appellant clearly answered all of OWCP's questions concerning the motor vehicle accident. Appellant's counsel also submitted a map from Google with regard to the route of the accident.

By decision dated August 15, 2012, OWCP denied appellant's request as it was not timely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ OWCP regulations and procedure 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(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁸

To establish 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 must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the decision is insufficient to establish 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 The Board makes an independent determination of whether a claimant has submitted clear evidence that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

In its August 15, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. Appellant's request for reconsideration was dated May 21, 2012, well over one year after the August 28, 2008 decision of the hearing representative. Accordingly, his request for reconsideration was not timely filed. Appellant must therefore demonstrate clear evidence of error on the part of OWCP.¹⁵

⁶ *Supra* note 5; *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁵ *Id.*

The Board finds that appellant's request for reconsideration does not establish clear evidence of error. Appellant's claim was accepted for back strain, thoracic or lumbosacral neuritis or radiculitis and acquired spondylolisthesis. OWCP denied his claim for disability compensation after November 20, 2006 and for consequential injuries arising from an October 4, 2006 motor vehicle accident.

Appellant, through counsel, contended in 2007 and 2008 that the injuries following the motor vehicle accident constituted a consequential injury. By letter dated August 6, 2007, OWCP requested that he submit further information with regard to the motor vehicle accident. Specifically, it asked appellant to detail exactly where the accident occurred, the purpose of the trip, where the physician's office was located in relation to his home and where the accident occurred. OWCP also asked for a copy of the accident report. While the accident report was submitted, appellant did not adequately respond to OWCP's inquiries regarding his route to and from the medical appointment on the relation of the route to his residence.

Counsel contends that the surgery was authorized but this is not supported by the record. The October 5, 2006 letter to the UCSD Medical Center did not address the issue of surgery. While the February 28, 2008 decision erroneously noted that the surgery had been authorized, the August 28, 2008 decision of the hearing representative found that surgery had not been preauthorized. In the August 15, 2012 decision denying reconsideration, OWCP also noted that the surgery was never approved. Dr. Garfin requested authorization for two inpatient surgeries on appellant's lumbar spine. OWCP advised him in a July 14, 2006 letter that surgery could not be authorized at that time. It referred appellant to Dr. Sabourin for a second opinion as to whether back surgery was warranted. Dr. Sabourin noted that appellant had psychological difficulties and did not support surgery absent psychological counseling. Appellant's attorney submitted a copy of the ACS Web Bill Processing Portal showing approval for medical services from October 6 through 8, 2006. As noted, the October 5, 2006 letter to the medical center did not specifically authorize any request for surgery. There is evidence of record that appellant saw Dr. Coimbra on October 4, 2006 for a presurgery consultation, following which he was in a motor vehicle accident that day at approximately 5:50 p.m. However, appellant never responded to the questions asked by OWCP requesting further information with regard to the accident and its relation to the medical appointment. On August 16, 2007 OWCP asked him to describe exactly where the accident occurred and the purpose of the trip. It asked appellant to identify which physician he was visiting and the time and purpose of the visit and to describe the route he took. On August 21, 2007 counsel provided some information but did not submit any affidavit from appellant responding to OWCP inquiries. There is a typed statement with appellant's typed name at the bottom that was from his representative in Congress. Appellant did not sign this form, despite the fact that the form noted that a signature was necessary. Accordingly, as the record contained no statement from him describing the accident and its relation to his medical appointment, he has not established clear evidence of error on behalf of OWCP in denying his claim for a consequential injury.

OWCP's procedures provide that the term clear evidence of error is intended to represent a difficult standard.¹⁶ The evidence must be positive precise and explicit and must manifest on

¹⁶ *R.H.*, Docket No. 12-1909 (issued March 27, 2013).

its face that OWCP commit an error.¹⁷ As appellant has failed to raise a substantial question as to the correctness of OWCP's last merit decision, he has not established clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 15, 2012 is affirmed.

Issued: June 3, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *B.H.*, Docket No. 12-1928 (issued March 13, 2013).