United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 13-1388**
	)	**Issued: July 14, 2014**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Fresno, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 22, 2013 appellant filed a timely appeal from a February 28, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than 180 days elapsed from the last merit decision dated August 16, 2010 to the filing of this appeal on May 16, 2013, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 30, 2007 appellant, a 44-year old pharmacist, filed a Form CA-2 claim for benefits under case number xxxxxx349. He alleged cervical and bilateral shoulder conditions, epicondylitis and chronic pain syndrome causally related to employment factors. OWCP accepted the claim for neck sprain and bilateral shoulder and upper arm sprains. Appellant had previously filed a claim for traumatic injury under case number xxxxxx610 for a July 21, 2005 injury; which has been accepted for contusions of the genitals and scrotum, groin strain, lumbosacral strain, major depression and organic-erectile dysfunction.

In an April 14, 2008 report, Dr. Jacob E. Tauber, Board-certified in orthopedic surgery and appellant's treating physician, stated that appellant had undergone a magnetic resonance imaging (MRI) scan of the cervical spine which showed significant, multilevel degenerative disc disease, a broad-based disc-osteophyte complex at C5-6, with a left paracentral herniation, and disc-osteophyte complexes at C4-5 and C6-7. Appellant also underwent an MRI scan of his shoulders which revealed acromioclavicular degenerative disease bilaterally, with osteophytes that indented the supraspinatus. His right shoulder had a partial-thickness tear of the anterior portion of the right supraspinatus. Dr. Tauber noted that appellant had the following accepted conditions: neck sprain, bilateral shoulder and upper arm sprain "and other specified sites bilaterally," in addition to his previously accepted conditions, including lumbosacral strain, major depressive disorder, contusion of the genital organs and groin sprain.

Dr. Tauber advised that appellant had engaged in extensive, repetitive motion for several years and had carried out his duties by repeatedly reaching, lifting and holding his head in a fixed position for long periods of time and engaging in repetitive motion. He asserted that these duties contributed to appellant's cervical and shoulder complaints. Although the duties were not the sole cause of appellant's accepted conditions, any activity that required lifting, reaching, turning and grasping would contribute to the conditions. Dr. Tauber further opined that appellant's accepted conditions should include bilateral acromioclavicular arthritis with bilateral shoulder impingement syndrome; a partial rotator cuff tear of the right shoulder; and cervical degenerative disc disease, with disc-osteophyte complexes at C4-5, C5-6 and C6-7.

In order to determine appellant's current condition and whether he had any ongoing residuals of his accepted conditions under case number xxxxxx349, OWCP referred him to Dr. Alice Martinson, Board-certified in orthopedic surgery, for a second opinion examination. In a report dated January 19, 2009, Dr. Martinson diagnosed severe somatoform pain disorder, possible impingement syndrome in both shoulders without concrete evidence of rotator cuff tear, and mild two-level cervical disc disease without evidence of radiculopathy. She advised that appellant had the typical findings of a profound somatoform pain disorder. Appellant's total body pain and his behavior throughout the examination were consistent with somatoform pain disorder, which included a substantial component of anxiety and depression. Dr. Martinson was asked to provide all diagnoses and to describe all objective findings used to establish the diagnoses. She stated:

> "[Appellant's] somatoform pain disorder appears to be the direct consequence of his scrotal injury at work on July 21, 2005. I have been asked specifically to comment on the diagnoses listed in reports of October 30, 2007 and April 14,

> 2008 by Dr. Tauber. In these reports, Dr. Tauber appears to arrive at the diagnosis of degenerative disc disease in the lumbar spine with 'chronic sprain related to his employment that has aggravated his degenerative disc disease. On April 14, 2008 he also listed bilateral acromioclavicular arthritis with bilateral shoulder impingement syndrome and significant cervical degenerative disc disease. I concur with his diagnosis of degenerative disc disease in the lumbar spine, but do not agree with his additional conclusion of 'chronic sprain that has aggravated his degenerative disc disease.… While [appellant] complains of neck pain, there was no substantiation for the contention of cervical 'strain.' In my view, [appellant's] somatoform pain disease is directly caused by his injury episode of July 21, 2005. At the time of his examination, I was unable to identify any specific findings on physical examination, or imaging studies of his cervical spine or shoulders, which I believe were directly caused by his injury episode on July 21, 2005. I am in fact unable to separate any complaints which [appellant] has in any specific part of his body from his overall somatoform pain disorder."

When asked whether appellant had residuals of the work injury, Dr. Martinson replied: "Yes, he is severely and profoundly incapacitated by his somatoform pain disorder. In my view, all of his specific complaints in various portions of the musculoskeletal system are all attributable to his pain disorder, but not to any specific anatomic abnormality in those parts."

Dr. Martinson further opined that appellant clearly required ongoing psychological and pharmacological treatment for his somatoform pain disorder. She asserted that no additional specific diagnosis or treatment should be considered until psychological abnormalities were brought under much better control.

On August 19, 2009 OWCP issued a notice of proposed termination of compensation. It found that the weight of the medical evidence, as represented by Dr. Martinson's referral opinion, established that his accepted conditions under case number xxxxxx349 had ceased and that he had no work-related residuals stemming from the October 30, 2007 work injury.

In a September 2, 2009 report, Dr. Tauber stated his disagreement with Dr. Martinson. He noted that she had briefly described appellant's light work duties but had not described his repetitive motion duties while he was working full duty, which significantly contributed to his accepted cervical and shoulder complaints. Dr. Tauber reiterated his opinion that the accepted conditions should include bilateral acromioclavicular arthritis with bilateral shoulder impingement syndrome and degenerative disc disease in the cervical spine. He advised that appellant's work duties contributed to and aggravated his degenerative disc condition and he disagreed with Dr. Martinson's opinion that appellant's continued complaints of pain were nonindustrial in etiology. Dr. Tauber stated that it was irrelevant whether or not appellant had a somatoform pain disorder from an orthopedic standpoint; he deferred any opinion on this subject to a psychiatrist.

By decision dated September 30, 2009, OWCP terminated appellant's compensation under case number xxxxxx349. It found that Dr. Martinson's report represented the weight of medical opinion.

On October 12, 2009 appellant requested an oral hearing which was held on January 8, 2010. At the hearing appellant's attorney noted that Dr. Martinson had diagnosed somatoform disorder under the current case number xxxxxx349. He argued that orthopedists rarely diagnosed such psychological conditions and customarily deferred to psychiatrists. Counsel stated that Dr. Martinson was unable to separate appellant's physical injuries from the somatoform pain disorder and argued that her diagnosis was wrong because the treating physicians in the appropriate field of psychiatry under case number xxxxxx610 had diagnosed post-traumatic stress disorder (PTSD) and major depression. He contended that Dr. Martinson's somatoform pain disorder diagnosis had superseded the diagnoses of these accepted conditions and therefore did not provide a basis for terminating compensation under case number xxxxxx349. Counsel also noted that the physicians of record indicated that appellant still had neck, bilateral shoulder and hand pain and asserted that Dr. Martinson ignored these symptoms and attributed all of appellant's problems to the somatoform pain disorder.

By decision dated March 8, 2010, an OWCP hearing representative affirmed the September 30, 2009 termination decision. She found that Dr. Martinson did not exceed her area of expertise and that the diagnosis of somatoform pain disorder did not override the acceptance of the major depression under case number xxxxxx610. The hearing representative stated that Dr. Martinson clearly discussed the orthopedic findings and stated why she did not believe that appellant's cervical or bilateral shoulder strains, the only accepted conditions under case number xxxxxx349, were related to the employment factors as described in the statement of accepted facts.

By letter dated May 24, 2010, appellant requested reconsideration.

In a March 22, 2010 report, received by OWCP on May 28, 2010, Dr. Tauber reiterated his disagreement with Dr. Martinson's opinion that appellant's conditions were nonindustrial. He diagnosed bilateral acromioclavicular arthritis, bilateral shoulder impingement and degenerative cervical disc disease and stated that these conditions had been aggravated by extensive, repetitive motion duties at work. Dr. Tauber contended that there was a conflict in medical opinion with Dr. Martinson regarding whether these conditions were causally related to employment factors. While Dr. Martinson diagnosed a somatoform disorder, appellant had already been diagnosed with PTSD and major depression.

By decision dated August 26, 2010, OWCP denied modification of the March 8, 2010 decision.

In a report dated December 8, 2011, received by OWCP on February 12, 2013, Dr. Harwinder Singh, a physiatrist, stated that appellant was at status post multiple work-related injuries. Appellant experienced severe bilateral shoulder pain due to chronic impingement and degenerative arthritis. Dr. Singh also diagnosed chronic fatigue syndrome/fibromyalgia, chronic severe depression, PTSD and severe neuropathic pain of the bilateral lower extremity. He stated that appellant also experienced a seizure disorder and had urological problems. Given the complexity of his medical conditions and impairments, which also included chronic lower back pain due to diffuse degenerative disc disease leading to lumbar spinal stenosis, Dr. Singh did not believe that he was capable of returning to any form of gainful employment. Dr. Singh opined that appellant should be considered permanently totally disabled.

In a January 7, 2013 report, received by OWCP on January 23, 2013, Dr. Singh stated that appellant experienced chronic cervicoscapular pain with radiation to both upper extremities; tingling, numbness, and pain in his bilateral forearms and hands; bilateral shoulder pain, worse with overhead activities; chronic, moderate to severe lower back pain with radiation to his bilateral lower extremities; urinary incontinency; severe hypogonadism with erectile dysfunction; status post groin injury, with neuropathic pain in his bilateral lower extremities; and chronic depression and post-traumatic stress disorder. He stated that on examination appellant had severe bilateral shoulder impingement. The results of a January 3, 2013 cervical MRI scan showed a broad-based disc bulge and osteophyte at C4-5, leading to moderate left neuroforaminal narrowing; mild disc bulge/protrusion at C4-5 and left facet joint arthropathy; broad-based disc bulge and osteophyte at C5-6, causing mild-to-moderate spinal stenosis and flattening of his thecal sac, leading to severe left neuroforaminal narrowing and moderate on right side; broad-based disc bulge at C6-7, leading to mild central canal stenosis and bilateral neuroforaminal narrowing; and minimal grade 1 anterolisthesis of C7 with respect to TI along with facet joint arthropathy.

Dr. Singh concluded that appellant had chronic cervical pain due to diffuse degenerative disc disease and bilateral cervical radiculopathy; bilateral shoulder chronic impingement and partial tear, especially on the left side; moderate bilateral carpal tunnel syndrome; mild-to-moderate bilateral Guyon's canal syndrome; lower back pain due to diffuse degenerative disc disease, leading to bilateral L5-S1 radiculopathy; mild sensory demyelinating peripheral polyneuropathy; secondary fibromyalgia; severe hypogonadism; erectile dysfunction; chronic depression; PTSD and urinary incontinence. He recommended treatment for appellant in the form of cervical epidural steroid injection, possible neurosurgical intervention, left shoulder arthroscopic surgery and close monitoring on bilateral carpal tunnel symptoms.

By letter dated February 6, 2013, received by OWCP on February 12, 2013, appellant requested reconsideration. He stated that he was seeking reconsideration to obtain continuing treatment of his shoulder and other areas.

By decision dated February 28, 2013, under case number xxxxxx349, OWCP denied appellant's request for reconsideration. It found that the request was untimely and that he did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA[2] does not entitle an employee to a review of an OWCP decision as a matter of right.[3] This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).[6]

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] OWCP procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.[8]

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP.[9] The evidence must be positive, precise and explicit and must be manifested on its face that it committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear

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[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez,* 41 ECAB 964 (1990); *Leon D. Faidley, Jr.,* 41 ECAB 104 (1989), *petition for recon. denied,* 41 ECAB 458 (1990).

[4] *See* 20 C.F.R. § 10.606(b).

[5] *Id*. at § 10.607(b).

[6] *See* cases cited *supra* note 2.

[7] *Rex L. Weaver,* 44 ECAB 535 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3(b) (May 1991).

[9] *See Dean D. Beets,* 43 ECAB 1153 (1992).

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

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] To show clear evidence of error, 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 *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.[14] The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.[15]

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued the most recent merit decision in this case on August 26, 2010. OWCP received appellant's February 6, 2013 request for reconsideration on February 12, 2013. Thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's February 12, 2013 request for reconsideration failed to show clear evidence of error. Appellant submitted December 8, 2011 and January 7, 2013 reports from Dr. Singh, who advised that appellant was experiencing symptoms from numerous conditions. These included: severe, chronic bilateral shoulder impingement and degenerative arthritis; chronic fatigue syndrome/fibromyalgia; chronic severe depression; PTSD; severe neuropathic pain of the bilateral lower extremities; diffuse degenerative disc disease leading to lumbar spinal stenosis; seizure disorder; urinary incontinency; severe hypogonadism with erectile dysfunction; status post groin injury, with neuropathic pain in his bilateral lower extremities; and chronic depression. Appellant opined that due to the overall effects of these medical conditions appellant was not capable of returning to any form of gainful employment. Dr. Singh also indicated that a January 3, 2013 MRI scan showed evidence of diffuse degenerative cervical disc disease, bilateral cervical radiculopathy; moderate bilateral carpal tunnel syndrome and bilateral L5-S1 radiculopathy. These reports, however, while supportive of appellant's claim are insufficient 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. The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face show that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. Evidence such as a

[11] *See Jesus D. Sanchez, supra* note 3.

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

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

[14] *Leon D. Faidley, Jr., supra* note 3.

[15] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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.[16] Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP.

OWCP reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review. The Board finds that OWCP did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her reconsideration request dated February 12, 2013. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on February 28, 2013.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.[17]

Issued: July 14, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[16] *Dean D. Beets*, *supra* note 9; *Leona N. Travis*, *supra* note 10. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (March 2011).

[17] Richard J. Daschbach participated in the preparation of the decision but was no longer a member of the Board after May 16, 2014.