

FACTUAL HISTORY

This case has previously been before the Board.³ Appellant filed another traumatic injury claim on April 30, 1993 alleging pain in her neck due to twisting outside his work restrictions. In a May 23, 2007 decision, the Board affirmed an August 14, 2006 OWCP decision finding that he had not submitted sufficient medical evidence to establish that disability beginning April 30, 1993 was causally related to his accepted conditions.⁴ In a September 16, 1997 decision, the Board affirmed as modified OWCP's decisions dated November 2, 1994 and June 13, 1995 and found that, although appellant had sustained an employment injury on April 27, 1993, the injury did not result in disability beginning April 30, 1993.⁵ The facts and circumstances of the case up to that point are set forth in the Board's prior decisions and incorporated herein by reference.

Subsequent to the Board's May 23, 2007 decision, appellant submitted a July 22, 2008 report from Dr. Gerd Gruber and Dr. Eduard Schmidt, both orthopedic surgeons in Germany, who had treated appellant since January 30, 2008 for chronic cervical syndrome, chronic dorsolumbar pain, and impeded mobility of the entire vertebral column because of pain and facet joint syndrome at L4-5 bilaterally. Drs. Gruber and Schmidt noted that clinically the mobility of appellant's vertebral column was severely impeded at all three levels due to pain. They opined that this condition was consistent with lumbar ischialgia, hence the facet joint at segments L4-5 have been denervated bilaterally. Drs. Gruber and Schmidt found the diagnoses rendered appellant unable to perform his original profession and recommended retirement.

In a January 17, 2014 letter, appellant provided a summary of his compensation claims and subsequent medical treatment. He further noted errors OWCP made with his address in claim numbers xxxxxx958 and xxxxxx109.

On April 21, 2014 OWCP responded to appellant's January 17, 2014 letter and informed him that his claim for compensation under this claim number remained denied. It noted that the most recent decision issued in this matter was the Board's decision dated May 23, 2007. Appellant was advised that if he disagreed with this decision and wished to pursue the claim for

³ On August 16, 1985 appellant, a commissary worker, filed a traumatic injury claim alleging that he was injured when transporting a pallet of juice on a cart with defective wheels. OWCP has accepted an aggravation of preexisting cervical disc disease. Appellant filed a separate claim for an injury which occurred on May 2, 1992 which was accepted by OWCP for contusion of the right buttock, claim number xxxxxx968. He appealed the claim to the Board and in a decision dated July 25, 1997, the Board affirmed OWCP's decisions dated October 6, 1994 and February 24, 1995, which denied his claim for a recurrence of injury. Docket No. 95-1706 (issued July 25, 1997). This claim was consolidated with the current claim before the Board. The record also reveals that appellant began disability retirement on March 23, 1994.

⁴ Docket No. 06-2010 (issued May 23, 2007).

⁵ Docket No. 95-2726 (issued September 16, 1997). The Board determined that the medical evidence established that on April 27, 1993 appellant sustained an exacerbation of his preexisting cervical spine disease as a result of lifting and twisting while in the performance of duty. In other appeals, on January 29, 2001 decision, the Board affirmed an OWCP decision dated April 23, 1999, which found that appellant's application for review was not timely filed and failed to demonstrate clear evidence of error. Docket No. 99-2331 (issued January 29, 2001). In a November 4, 2005 order, the Board remanded the case for completion of the case file. Docket No. 05-595 (issued November 4, 2005).

compensation, the only appellate procedure available at this time was reconsideration. OWCP further noted that to support a request for reconsideration, new and relevant evidence was required. It indicated that the narrative statement summarizing appellant's claims for injury in 1992 and 1993 and related events would be included in his claim file.

On June 17, 2014 appellant requested reconsideration. He indicated that he was responding to the April 21, 2014 letter from OWCP denying his claim for benefits. Appellant requested reconsideration and referenced translated medical reports from his doctor. He submitted a November 7, 2008 report from Drs. Gruber and Schmidt, who noted that appellant had been under their medical care since January 30, 2008 for chronic cervical syndrome, chronic dorsolumbar pain, painful restriction of mobility in the entire spine, and bilateral facet joint syndrome L4-5. Drs. Gruber and Schmidt indicated that appellant's orthopedic disease was primarily due to degenerative changes in the lumbar spine, especially in the L4-5 region bilaterally. They noted that the pathologic spinal column changes were not a result of external trauma, but were degenerative and pathological changes caused by wear and tear. Drs. Gruber and Schmidt opined that appellant was no longer able to work in his profession and recommended early retirement.

By decision dated August 26, 2014, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“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 --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁶

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a).

relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁸

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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.⁹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹² The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁴ As appellant's request for reconsideration was not received by OWCP until June 23, 2014, more than one year after issuance of the last merit decision of the Board on May 23, 2007, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP denying his claim for employment-related disability beginning April 30, 1993 causally related to his April 27, 1993 traumatic injury.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In his June 17, 2014 statement, appellant indicated that he was responding to a letter he received from OWCP. He requested reconsideration and referenced translated medical reports from his doctors in Germany. Appellant's January 17, 2014 letter summarized his compensation cases and medical history. While he addressed his disagreement with OWCP's decision denying his claim for benefits, his general allegations do not raise a substantial question as to the correctness of OWCP's decision. This evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error.

⁸ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *Id.*

¹³ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ 20 C.F.R. § 10.607(a).

The Board notes that the underlying issue is medical in nature and that, on reconsideration, appellant submitted additional medical evidence. Appellant submitted a report from Drs. Gruber and Schmidt dated July 22, 2008, who treated appellant since January 30, 2008 for chronic cervical syndrome, chronic dorsolumbar pain, and facet joint syndrome at L4-5 bilaterally. Drs. Gruber and Schmidt noted that clinically the mobility of the vertebral column was severely impeded at all three levels because of pain. They opined that appellant's condition was especially consistent with lumbar ischialgia, hence the facet joint at segments L4-5 have been denervated bilaterally. Drs. Gruber and Schmidt further noted that appellant was disabled. Similarly, a November 7, 2008 report from them diagnosed chronic cervical syndrome, chronic dorsolumbar pain, painful restriction of mobility in the entire spine, and bilateral facet joint syndrome L4-5. Drs. Gruber and Schmidt noted that appellant's orthopedic disease was primarily due to degenerative changes in the lumbar spine, especially in the L4-5 region bilaterally. They opined that appellant was no longer able to work and recommended early retirement. This evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. Even though Drs. Gruber and Schmidt noted appellant's symptoms, diagnoses, and work status, the doctors did not address whether his current medical conditions and disability after April 30, 1993 were causally related to the work injuries of May 2, 1992 or April 27, 1993. Furthermore, even if these reports offered reasoned support for causal relationship, they would be insufficient to establish clear evidence of error.

The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of 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.¹⁵

For these reasons, appellant has not established clear evidence of error.

On appeal, appellant asserts that OWCP improperly denied his claim for disability after April 30, 1993 and argues that he had submitted sufficient medical evidence to support disability causally related to the work injuries of May 2, 1992 or April 27, 1993. However, as noted, the Board does not have jurisdiction over the merits of the claim. As explained, appellant has not established clear evidence of error by OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁵ *D.G.*, 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board