

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits as her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁵ In a July 15, 2011 decision, the Board affirmed June 15 and April 23, 2010 decisions of OWCP. The Board found that OWCP had properly denied appellant's request for a review of the written record by an OWCP hearing representative and had properly denied appellant's request for reconsideration as it was untimely and had failed to demonstrate clear evidence of error. The facts and history contained in the prior appeal are incorporated herein by reference.

The relevant facts include that appellant then a 35-year-old laborer, injured her back on July 26, 1985 when she fell from a ladder at work. OWCP accepted the claim for lumbar sprain and a lumber herniated nucleus pulposus without myelopathy. On January 17, 2008 it terminated appellant's wage-loss compensation and medical benefits, based on an opinion from an OWCP referral physician, because appellant no longer had any residuals or disability due to her accepted work injury.

There was no activity in the claim following the Board's July 15, 2011 decision until February 24, 2015, when appellant requested reconsideration of the January 17, 2008 termination decision. Appellant argued that she was unable to work following her termination and it was impossible to find employment after being disabled for 25 years." She indicated that the termination caused her an extreme hardship as she lost her home and her vehicle, and her credit was severely damaged. Appellant explained that she had to move in with her daughter because she was unable to pay rent and suffered from extreme lower lumbar pain and numbness in her left side and leg even to the point of falling. She noted that most of the time she walked with a cane. Appellant related that she was requesting reconsideration in the hope that her compensation would be reinstated. She also provided new medical evidence.

With her request, appellant provided a February 19, 2015 report from Dr. Arturo J. Otero, a neurologist, who noted treating appellant for many years. Dr. Otero argued that she suffered from severe chronic lumbosacral pain due to failed lumbosacral laminectomy syndrome and her recent MRI scan of the lumbar spine performed on January 26, 2015 showed mild bilateral neural foraminal stenosis at L3-L4, left hemilaminotomy at L4-L5 and moderate degenerative disc space narrowing at L3-L4 and L4-L5. He opined that it was his professional opinion that due to this, she was unable to hold meaningful gainful employment indefinitely and she was totally disabled.

In a decision dated April 8, 2015, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to demonstrate clear evidence of error.

⁵ Docket No. 10-2135 (issued July 15, 2011).

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁶ 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.⁷

OWCP, however, may not deny an application for review 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.⁸ OWCP 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 application for review shows clear evidence of error on the part of OWCP.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient

⁶ 20 C.F.R. § 10.607(a).

⁷ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(e) (December 2011). OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detail 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. *Id.* at Chapter 2.1602.3c.

¹⁰ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ *See supra* note 9.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹⁵

ANALYSIS

In its April 8, 2015 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on January 17, 2008. Appellant's February 24, 2015 letter requesting reconsideration was submitted more than one year after the January 17, 2008 merit decision and was, therefore, untimely.

OWCP properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application.¹⁶ It reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error in OWCP's January 17, 2008 decision that terminated appellant's compensation benefits.

With her February 24, 2015 request for reconsideration, appellant alleged that she continued to suffer from her injury, was unable to work and suffered extreme hardship. She indicated that as a result of the termination, she lost her home, and her car, and her credit was greatly damaged. The Board notes that the issue in the present case is medical in nature. Appellant's lay assertions about her current condition do not clearly show that OWCP erred in its termination of her benefits on January 17, 2008.¹⁷

Appellant also submitted a February 19, 2015 report from Dr. Otero, who noted that he had treated appellant for many years. Dr. Otero explained that appellant suffered from severe chronic lumbosacral pain due to failed lumbosacral laminectomy syndrome. He related that a lumbar MRI scan of the spine performed on January 26, 2015 revealed mild bilateral neural foraminal stenosis at L3-L4, left hemilaminotomy at L4-L5 and moderate degenerative disc space narrowing at L3-L4 and L4-L5. Dr. Otero opined that it was his professional opinion that due to this, she was unable to hold meaningful gainful employment indefinitely and she was totally disabled. This report is insufficient to show that OWCP's denial of the claim in 2008 was erroneous or raise a substantial question as to the correctness of OWCP's determination that appellant no longer had any disability after January 17, 2008 causally related to her employment injury.

¹⁵ *Leon D. Faidley, Jr., supra* note 7.

¹⁶ *Supra* note 4.

¹⁷ *See James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988).

The term “clear evidence of error” is intended to represent a difficult standard.¹⁸ The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹⁹

The Board finds that the evidence submitted is insufficient to shift the weight of the evidence in favor of appellant’s claim or raise a substantial question that OWCP erred in terminating appellant’s compensation benefits on the grounds that she no longer had a continuing employment-related disability. Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, appellant argues that the referral physician was referred, provided an erroneous opinion and his examination was inadequate. She argued that all he did was put her on the table, asked her to lift and bend her legs, stand and touch her toes, which she indicated that she was unable to do. Appellant noted that there were no x-rays or other tests to determine her physical condition. However, as noted, the Board does not have jurisdiction over the merits of her claim. Furthermore, appellant did not submit evidence on reconsideration that showed clear evidence of error by OWCP in its January 17, 2008 decision. She also submitted additional evidence with her appeal. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision.²⁰

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant’s claim for reconsideration of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

¹⁸ *Supra* note 7.

¹⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

²⁰ *See* 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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