

**United States Department of Labor
Employees' Compensation Appeals Board**

C.A., Appellant)

and)

DEPARTMENT OF JUSTICE, BUREAU OF)
PRISONS, Fort Dix, NJ, Employer)

Docket No. 12-1227
Issued: December 20, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 4, 2012 appellant filed a timely appeal from a March 6, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.³

¹ The last merit decision in this case was the January 6, 2011 decision, which denied his traumatic injury claim. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days elapsed from the most recent merit decision dated January 6, 2011 to the filing of this appeal on May 4, 2012 the Board lacks jurisdiction to review the merits of this case.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence following the March 6, 2012 nonmerit decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit the evidence to OWCP with a request for reconsideration.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On November 24, 2010 appellant, then a 37-year-old correctional officer, filed a traumatic injury claim alleging that on November 24, 2010 he sustained lumps on the left side of his forehead and left foot when he was assaulted by an inmate. He stopped work on November 25, 2010 and returned on November 28, 2010.

By letter dated December 3, 2010, OWCP informed appellant that no evidence was received to establish his claim and requested additional information to support his claim.

In a handwritten employee health record, a physician with an illegible signature noted that appellant sustained an injury while wrestling an inmate that day. Swelling of the right foot was noted.

Appellant also submitted hospital records and prescription notes by Dr. Ann-Jeanette Geib, Board-certified in emergency medicine, indicating that appellant was examined in the emergency room on November 24, 2010.

In a November 24, 2010 computerized tomography (CT) scan report, Dr. Yaron Lebovitz, a Board-certified diagnostic radiologist, noted that appellant sustained an unspecified injury to the head. He did not observe any fracture defects and visualized objects. Dr. Lebovitz concluded that the CT scan of the head was negative.

In a November 24, 2010 diagnostic report of appellant's foot, Dr. Jeffrey Kempf, a Board-certified diagnostic radiologist, observed a transverse fracture at the base of the fifth metatarsal and mild overlying tissue swelling.

By decision dated January 6, 2011, OWCP denied appellant's traumatic injury claim finding that the medical evidence failed to establish that he sustained any diagnosed medical condition as a result of the November 24, 2010 employment incident.

Following this decision, OWCP received a November 24, 2010 emergency room report from Dr. Geib who related that appellant was assaulted by an inmate at work and sustained head trauma and an injury to his right foot. Appellant noted that he was elbowed on the right side and struck on the left temple and right foot. Dr. Geib reviewed his history and conducted an examination. She observed mild swelling and tenderness of appellant's left temple with no palpable bony defect and tenderness to his right fifth metatarsal. No deformity or lacerations were noted. Dr. Geib diagnosed head and foot contusion.

In a January 26, 2011 letter, Peter Lawrie, a safety and occupational health manager, requested that OWCP reconsider accepting appellant's claim. He stated that he witnessed a contusion on appellant's head and noted his complaints of leg pain about one hour after he had a

physical altercation with an inmate. Appellant was treated in the emergency room and returned to full duty on November 26, 2010.

In an appeal request form dated February 6, 2012 and received on February 17, 2012, appellant requested reconsideration. He stated that, due to a misunderstanding with the employing establishment, he did not file his request on time. Appellant also resubmitted the November 24, 2010 diagnostic and emergency room records.

By decision dated March 6, 2012, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁴ 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.⁵ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁶

OWCP may still reopen a claimant's case for merit review, even if the claimant's applications was not filed within the one-year time limitation, if claimant's application demonstrates 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 relevant to the issue decided by OWCP.⁷ The evidence must be positive, precise and explicit, and it must manifest on its face that OWCP committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ This entails a limited review by OWCP of

⁴ 20 C.F.R. § 10.607(a).

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

⁶ *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁷ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *Dean D. Beets*, 43 ECAB 1153 (1992).

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

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

the evidence previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The last merit decision in this case was issued on January 6, 2011. Appellant submitted a request for reconsideration on February 6, 2012. Because more than one year passed between January 6, 2011 and February 6, 2012, OWCP properly determined that the reconsideration request was not timely filed.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. Appellant submitted new evidence following the January 6, 2011 denial decision and the Board must conduct a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.

In its January 6, 2011 decision, OWCP denied appellant's traumatic injury claim on the grounds that the medical evidence did not establish that he sustained an injury as a result of the November 24, 2010 incident. Following the decision, it received a November 24, 2010 hospital report from Dr. Geib. Although Dr. Geib diagnosed head and foot contusions and described the November 24, 2010 incident, she did not address the issue of causal relationship, which was the underlying issue of the January 6, 2011 decision. As noted, evidence that is not relevant to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.¹⁵ Mr. Lawrie's January 26, 2011 letter is not relevant to the issue on which the claim was denied and is insufficient to establish clear evidence of error. The clear evidence of error standard requires that appellant submit evidence that raise, a substantial question as to the correctness of OWCP's decision. It is intended to represent a difficult standard. It is not enough to show merely that the evidence can be construed as to produce a contrary conclusion. Because the new evidence did not raise a substantial question as to the correctness of the January 6, 2011 decision, the Board finds that OWCP properly determined that the untimely request failed to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

¹² *Id.*

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

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

¹⁵ *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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