

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

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M.T., Appellant)	
)	Docket No. 15-744
and)	Issued: May 19, 2015
)	
DEPARTMENT OF THE ARMY, ARMY)	
CORPS OF ENGINEERS, ENSLEY SHIPPING)	
YARD, Memphis, TN, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 12, 2015 appellant filed a timely appeal from an August 18, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of October 19, 2012 and the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3. Appellant also submitted new evidence on appeal. The Board, however, cannot consider evidence that was not before OWCP at the time of the final decision.²

¹ 5 U.S.C. § 8101 *et seq.*

² See 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration because it was not timely filed and failed to demonstrate clear evidence of error.

On appeal, appellant contends that he sustained a work-related injury on July 10, 2012 and that the medical evidence shows the treatment he received for his back injury. He further contends that his supervisor and plant manager supervisor both concur that his injury is work related.

FACTUAL HISTORY

On July 10, 2012 appellant, then a 56-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that he sustained a lumbar strain on that date when he tried to secure a winch that broke hold.

By letter dated August 28, 2012, OWCP advised appellant about the deficiencies of his claim and requested that he submit factual and medical evidence. It requested that the employing establishment submit medical evidence if he was treated at its medical facility.

In an October 10, 2012 letter, appellant described the medical treatment he received for his July 10, 2012 back and left elbow injuries and requested authorization for additional treatment.

In progress notes dated July 10 and 13, 2012, Dr. Cary C. Anderson, an occupational medical specialist, provided findings on physical and x-ray examination. He diagnosed lumbar strain and sciatica. Dr. Anderson released appellant to return to work restrictions.

In a February 2, 2011 lumbar magnetic resonance imaging (MRI) scan report, Dr. Dale E. Hansen, Jr. a Board-certified radiologist, provided an impression of degenerative spondylosis with degenerative disc disease involving multiple levels. He also found mild disc bulges, but no focal extruded disc fragments were identified. There was a possible small annular tear involving the L4-5 annulus. There was no evidence of vertebral body fracture or spondylolisthesis.

In an October 19, 2012 decision, OWCP denied appellant's claim because the medical evidence had not established a diagnosed condition causally related to the accepted July 10, 2012 work-related incident.

In a July 31, 2014 appeal request form, received by OWCP on August 8, 2014, appellant requested reconsideration. He resubmitted Dr. Anderson's July 10 and 13, 2012 progress notes, and Dr. Hansen's February 2, 2011 lumbar MRI scan report. Appellant also submitted a July 17, 2012 progress note and a December 4, 2012 authorization for examination and/or treatment (Form CA-16), in which Dr. Anderson provided examination findings and reiterated his diagnoses of lumbar strain and sciatica and work restrictions. He advised that appellant was partially disabled from July 10 to 17, 2012.

In reports dated August 13, 2012 and March 25, 2014, Dr. John W. Ellis, a Board-certified family practitioner, provided a history of appellant's May 22, 2010 back injury under

File No. xxxxxx659. He reviewed appellant's medical records and a description of his electrician position. Dr. Ellis provided examination findings and diagnosed a muscle tendon unit strain of the lumbar spine, deranged disc at L4-5, bilateral L5 and S1 spinal nerve root impairment, sexual impairment, bilateral carpal tunnel syndrome with tendinitis of the wrists, bilateral medial epicondylitis, bilateral cubital tunnel syndrome, and bilateral radial tunnel syndrome due to the May 22, 2010 injury. He stated that appellant's diagnosed conditions were permanent and expected to last more than one year. The conditions were disabling and prevented him from successfully continuing to perform useful and efficient service in the critical and/or essential elements of his position. Dr. Ellis stated that, if appellant continued to work, he would be a danger to himself and his coworkers. Appellant's conditions would continue to deteriorate over time. Dr. Ellis opined that the diagnosed conditions arose out of and in the course of appellant's employment and that his work duties contributed to, aggravated, and/or caused the stated injuries, disabilities, and impairments set forth in his report. He related that appellant's July 2012 Form CA-1 was not necessary as his current back pain was a continuation of his May 22, 2010 injury. In a September 27, 2012 report, Dr. Ellis referenced his prior reports dated August 13 and September 17, 2012 which recommended that appellant continue with the restrictions set forth by Dr. Anderson, and reiterated his diagnoses of a muscle tendon unit strain of the lumbar spine, deranged disc at L4-5, and bilateral L5 and S1 spinal nerve root impairment. In a July 25, 2013 report, he responded to questions posed by OWCP regarding appellant's claim for a March 5, 2011 bilateral elbow and wrist injury under File No. xxxxxx506.

An unsigned progress note dated December 11, 2012 contained the printed name of Dr. Owen Tabor, Sr., a Board-certified orthopedic surgeon. The progress note provided examination findings. Appellant was diagnosed as having chronic low back pain probably facet in origin without evidence of neurologic deficit. He could perform light-duty work with restrictions.

In a January 16, 2013 MRI scan report, Dr. Alan D. Eisenberg, a Board-certified radiologist, provided impressions of moderate L3-4 and moderate L4-5 spinal stenosis, multilevel foraminal stenosis, including a possible small left L3-4 and left T4-L5 intraforaminal herniations, and degenerative changes elsewhere.

In a January 30, 2013 report, Dr. Phillip E. Green, a Board-certified anesthesiologist, stated that appellant received a medial branch block to the lumbar facets on the left at L4 and L5, and sacral ala with fluoroscopy to treat his lumbar spondylosis, stenosis, and herniated nucleus pulposus, and low back, lower extremity, and myofascial pain with spasm.

In treatment notes dated February 7 and March 6, 2013, Dr. Carlos E. Rivera-Tavarez, a Board-certified physiatrist, provided examination findings and diagnosed appellant as having lumbar stenosis, spondylosis, and degenerative disc disease, and symptoms suggestive of lumbar radiculitis, more on the left side. In a February 19, 2013 report, Dr. Rivera-Tavarez indicated that appellant received a bilateral transforaminal epidural steroid injection under fluoroscopy to treat his lumbar stenosis and radiculopathy. On April 1, 2013 he reiterated his diagnoses of lumbar stenosis with radiculitis and provided appellant's work restrictions.

A March 11, 2013 electromyogram (EMG) study authenticated by Dr. Mark L. Cunningham, a Board-certified physiatrist, found that appellant had mild generalized peripheral

neuropathy and possible etiologies that included metabolic (diabetes, renal, thyroid), peripheral vascular disease, anemia, vitamin B deficiency, and other less likely causes. Dr. Cunningham also found minimal abnormal irritability in the left L5 paraspinal muscle. The remainder of the EMG was normal. He advised that there was no electrodiagnostic evidence of an active lumbosacral radiculopathy, plexopathy, or myopathy in either lower extremity musculature.

In a January 16, 2014 report, Dr. Lingyi Chen, a Board-certified internist, noted appellant's need to undergo back surgery due to L4-5 disc herniation. He stated that appellant had a significant amount of pain with radiculopathy and persistent leukocytosis that appeared reactive in nature.

In a February 3, 2014 lumbar MRI scan report, Dr. Andy Ellzey, a Board-certified radiologist, found severe canal stenosis at L4-5 and moderate canal stenosis at L3-4.

In reports dated January 29, February 20, and April 22, 2014, Dr. Raymond J. Gardocki, a Board-certified orthopedic surgeon, addressed appellant's back condition, physical limitations, and disability for work before and after his lumbar surgery. In a March 11, 2014 report, he indicated that he performed surgery to treat appellant's L4-5 stenosis.

In an August 18, 2014 decision, OWCP denied appellant's request for reconsideration, without a merit review. It found the request was not filed within one year of its October 19, 2012 merit decision and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right.³ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which review is sought.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁷

³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁵ 20 C.F.R. § 10.607(a).

⁶ See *Jesus D. Sanchez*, *supra* note 3; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

⁷ 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.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 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.¹²

To establish 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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁵ As appellant's request for reconsideration was not received by OWCP until August 8, 2014, more than one year after issuance of the most recent merit decision dated October 19, 2012, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its October 19, 2012 decision denying his claim for a traumatic injury.¹⁶

The Board finds that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error. In its October 19, 2012 decision, OWCP denied appellant's traumatic injury claim as he failed to submit sufficient medical evidence establishing that he sustained a back injury causally related to the accepted July 10, 2012 employment-related incident. Thereafter, appellant submitted Dr. Ellis' August 13, 2012 and March 25, 2014 reports which found that he had a muscle tendon unit strain of the lumbar spine, deranged disc at L4-5,

⁸ See *Nancy Marciano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

¹⁰ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

and bilateral L5 and S1 spinal nerve root impairment due to a May 22, 2010 injury under File No. xxxxxxx659. Dr. Ellis also found that appellant should not continue to work as he would be a danger to himself and his coworkers. He opined that the disabling diagnosed conditions were caused, contributed to and/or aggravated by his work duties. 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.¹⁷ The Board finds that his reports do not establish clear evidence of error or shift the weight of the evidence in favor of appellant's claim.¹⁸ Dr. Ellis' reports dated September 27, 2012 and July 25, 2013 do not address the underlying issue of causal relationship.¹⁹ They are, therefore, irrelevant to the basis on which appellant's claim was denied and do not demonstrate clear evidence of error in the October 19, 2012 decision. The test results, reports, and progress and treatment notes of Drs. Eisenberg, Cunningham, Ellzey, Anderson, Green, Chen, Rivera-Tavarez, and Gardocki have no opinion on causal relationship.²⁰ Consequently, these reports do not raise a substantial question as to the correctness of OWCP's decision or shift the weight in favor of appellant's claim. The remaining progress notes of Dr. Anderson and diagnostic test results of Dr. Hansen were duplicative of reports previously of record and do not show clear evidence of error with respect to the October 19, 2012 decision. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim.²¹

The December 11, 2012 progress note which contained Dr. Tabor's typed name lacks probative value as it is unsigned and the author cannot be identified as a physician.²² The Board finds that this evidence does not establish clear evidence of error.

Although appellant contends on appeal that he sustained a work-related injury on July 10, 2012 as supported by his supervisors, the medical evidence, as discussed above, was not sufficient to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision.

CONCLUSION

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

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); see *T.B.*, Docket No. 13-1827 (issued December 2, 2013); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁸ *D.G.*, 59 ECAB 455 (2008).

¹⁹ See *F.R.*, *supra* note 3 (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

²⁰ *Id.*

²¹ *A.F.*, Docket No. 11-1297 (issued December 20, 2011).

²² *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004); *Merton J. Sills*, 39 ECAB 572 (1988).

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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