

<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3.

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated April 5, 1990, the Board affirmed an August 9, 1989 Office decision granting appellant a schedule award.<sup>2</sup> On March 10, 1999 the Board affirmed an August 10, 1996 decision finding that he did not establish an employment-related recurrence of disability on March 16, 1989 and a November 13, 1996 decision denying his request for further merit review under 5 U.S.C. § 8128.<sup>3</sup> The Board determined that appellant was not required to work outside of his restrictions of his limited-duty position. The Board also found that he had not established that he was disabled from his limited-duty employment.<sup>4</sup> By decision dated October 22, 2002, the Board affirmed March 14 and November 29, 2001 and March 5, 2005 decisions denying appellant's request for reconsideration under section 8128.<sup>5</sup> In a decision dated May 2, 2005, the Board affirmed a January 15, 2004 decision denying his request for reconsideration as it was untimely and did not establish clear evidence of error.<sup>6</sup> The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On August 12, 2005 appellant again requested reconsideration. By decision dated December 7, 2005, the Office denied his request for reconsideration after finding that it was untimely and did not demonstrate clear evidence of error. Appellant continued to request reconsideration and, by decisions dated June 27, 2006, July 31 and September 11, 2006 and May 10, 2007, the Office denied his requests as untimely and insufficient to demonstrate clear evidence of error.<sup>7</sup>

On May 28, 2008 appellant again requested reconsideration. He contended that the Office erred in its August 10, 1996 decision in finding that he was removed from the employing establishment for being absent without leave from March 18 through June 9, 1989. Appellant asserted that the Office should have notified the employing establishment that he was not absent without leave but instead receiving compensation payments in the form of a schedule award. He argued that a schedule award was considered compensation under the Federal Employees'

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<sup>2</sup> Docket No. 90-321 (issued April 5, 1990).

<sup>3</sup> Docket No. 97-670 (issued March 10, 1999). The Office accepted that appellant sustained left carpal tunnel syndrome due to factors of his federal employment. Appellant returned to limited-duty employment on November 5, 1988. He stopped work on March 16, 1989 and did not return. The employing establishment terminated appellant from employment on June 9, 1989 for failing to report to duty.

<sup>4</sup> The Board noted that appellant turned in a letter of resignation on March 16, 1989 indicating that he would not return to work unless he was reassigned to a different work schedule. The Board further indicated that he did not seek medical treatment until 17 months after his March 16, 1989 work stoppage.

<sup>5</sup> Docket No. 02-1032 (issued October 22, 2002).

<sup>6</sup> Docket No. 04-757 (issued May 2, 2005).

<sup>7</sup> Appellant appealed many of these decisions to the Board. In orders dated March 21, 2006, January 29, 2007 and May 21, 2008, the Board granted his requests to dismiss his appeals. Order Dismissing Appeal, Docket No. 06-457 (issued March 21, 2006); Order Dismissing Appeal, Docket No. 07-68 (issued January 29, 2007); Order Dismissing Appeal, Docket No. 07-1774 (issued May 21, 2008).

Compensation Act.<sup>8</sup> Appellant cited regulations pertinent to the Office of Personnel Management finding that an individual is credited with time during which he receives compensation.

Appellant submitted a copy of the Act defining compensation as including all money payable under the Act, a March 17, 1989 letter from the employing establishment advising him that he was abandoning a suitable position, a September 14, 1989 letter from the employing establishment noting that he was removed on June 9, 1989 for being absent without leave since March 18, 1989 and part of an Employee and Labor Relations Manual. He also submitted a January 19, 2007 response from the employing establishment to his petition for review in his Merit Systems Protection Board (MSPB) case. The employing establishment concurred with the administrative law judge's finding that appellant failed to establish jurisdiction.

By decision dated October 8, 2008, the Office denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.<sup>9</sup> As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>10</sup>

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office'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 the case on the Director's own motion.<sup>11</sup> To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>12</sup>

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<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> *Id.*

<sup>10</sup> 20 C.F.R. § 10.607.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

<sup>12</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

## ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>13</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>14</sup> As appellant's May 28, 2008 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.<sup>15</sup>

Appellant argued that he was not absent without leave from the employing establishment but instead received compensation from the Office in the form of a schedule award. He maintained that the Office erred in failing to inform the employing establishment that he was paid compensation for a schedule award during the period in which he was found absent without leave, March 18 through June 9, 1989. Appellant noted that compensation under the Act included schedule award compensation. He submitted a March 17, 1989 letter from the employing establishment informing him that he was abandoning a suitable position, a September 14, 1989 letter advising that he was removed on June 9, 1989 for being absent without leave, and a January 19, 2007 letter submitted by the employing establishment response to his petition for review in his MSPB case.

The Office, in its last merit decision dated August 10, 1996, found that appellant did not establish a recurrence of disability beginning March 16, 1989 as he did not establish that he was either working outside his restrictions or that he was disabled from his limited-duty work as a result of his accepted employment injury. By decision dated March 10, 1999, the Board affirmed the Office's August 10, 1996 decision. The fact that he received a schedule award during a period in which the employing establishment found that he was absent without leave is not relevant to the question of whether he was disabled from employment during the period in question. A schedule award is not compensation for wage loss or potential wage loss and is made without regard to whether or not there is a loss of wage-earning capacity resulting from the injury.<sup>16</sup> The evidence submitted in support of appellant's untimely reconsideration request does not address the pertinent issue of whether he was disabled due to his work injury beginning March 16, 1989 or whether the employing establishment withdrew his limited-duty assignment; thus, it is insufficient to establish clear evidence of error. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>17</sup> The evidence must further be of sufficient probative value to shift the weight of evidence in

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<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> *Robert F. Stone*, *supra* note 12.

<sup>15</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>16</sup> *Renee M. Straubinger*, 51 ECAB 667 (2000).

<sup>17</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

favor of the claimant and raise a substantial question as to the correctness of the Office's decision.<sup>18</sup> The evidence appellant submitted on reconsideration fails to meet this standard.

On appeal appellant contends that the employing establishment erred in finding him absent without leave while he was in receipt of compensation for a schedule award. He also argues that the employing establishment should have restored him to service after he recovered from his injury. Appellant asserts that he did not resign or leave his position. The employing establishment's termination of his employment after finding that he was absent without leave is not a matter within the jurisdiction of the Board. The Board's jurisdiction is limited to reviewing final decisions of the Office issued under the Act.<sup>19</sup>

Appellant also argues that the employing establishment did not have limited-duty work available for him after it terminated his employment. However, the withdrawal of a modified-duty position by the employing establishment due to misconduct by the employee does not constitute a recurrence of total disability.<sup>20</sup>

Appellant further argues that the Office failed to send him the memorandum to the Director accompanying its October 8, 2008 decision. It does not appear, however, that the Office prepared a memorandum to the Director. The Office considered his argument in its decision but properly found that it was not relevant and thus not sufficient to show clear evidence of error.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

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<sup>18</sup> See *Jack D. Jackson*, 57 ECAB 593 (2006); *Andrew Fullman*, 57 ECAB 574 (2006).

<sup>19</sup> 20 C.F.R. § 501.2(c).

<sup>20</sup> *Id.* at § 10.5(x); *K.C.*, 60 ECAB \_\_\_\_ (Docket No. 08-2222, issued July 23, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 8, 2008 is affirmed.

Issued: October 21, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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