

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

E.B., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Chula Vista, CA, Employer**

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**Docket No. 12-84
Issued: May 15, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 17, 2011 appellant filed a timely appeal from a September 19, 2011 nonmerit decision of the Office of Workers' Compensation Programs' (OWCP) which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. The Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board's prior decision issued on July 22, 2011, affirming OWCP's July 22 and September 2, 2010 decisions, was the last merit decision in this case.

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, then a 59-year-old program manager/customs and border protection officer, alleged chest pains, shortness of breath and severe fatigue while running uphill during a training exercise on June 30, 2009. He submitted reports from Dr. Weilee E. Yeh, a Board-certified family practitioner. The reports, however, did not contain a diagnosis of the claimed condition or a rationalized, medical opinion attributing the alleged injury to the June 30, 2009 work incident. By decision dated January 22, 2010, OWCP denied appellant's claim, finding that he did not submit medical evidence sufficient to establish that he sustained an injury in the performance of duty. By decision dated July 22, 2010, an OWCP hearing representative affirmed the January 22, 2010 decision. In a nonmerit decision dated September 2, 2010, OWCP denied reconsideration. By decision dated July 22, 2011,³ the Board affirmed OWCP's July 22 and September 2, 2010 decisions. The facts of this case as set forth in the Board's July 22, 2011 decision are incorporated herein by reference.

By letter dated August 4, 2011, appellant requested reconsideration.

In an August 8, 2011 report, Dr. Yeh related that on June 30, 2009 appellant was commanded to run up a hill without warning. Due to his advanced age and physical condition, appellant developed dizziness and chest pain, which he continued to experience after he was admitted to a local emergency room at Hemet Valley Medical Center. After being evaluated by an emergency room physician, he was admitted to the hospital on July 7, 2009, where Dr. Yeh examined him. Appellant also underwent a cardiac examination. He submitted the results of an echocardiogram, nuclear medicine tests, a radiology examination and a chest workup which he underwent at the hospital on July 7 and 8, 2009.

On August 10, 2011 OWCP received a report dated July 22, 2009 from Dr. Betty Grant-Anderson, Board-certified in internal medicine, who examined appellant at the hospital on July 8, 2009 after he became extremely faint and nearly passed out while running the obstacle course at work. Dr. Grant-Anderson noted that he had experienced severe chest pain and was admitted to the emergency room for further evaluation and management. She advised that appellant had palpitations and questionable arrhythmias. Dr. Grant-Anderson diagnosed Type 2 diabetes mellitus and hypertension, with chest pain, questionable coronary artery disease or unstable angina versus musculoskeletal pain.

By decision dated September 19, 2011, OWCP denied appellant's request for reconsideration. It found that he did not timely request reconsideration and failed to submit factual or medical evidence sufficient to establish clear evidence of error.

³ Docket No. 10-2323 (issued July 22, 2011).

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle an employee to a review of an OWCP decision as a matter of right.⁵ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ As one such limitation, OWCP has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁷ 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).⁸

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, but does not include prerecoupment hearing decisions.⁹

ANALYSIS

OWCP improperly determined that appellant failed to file a timely application for review. It found that the most recent merit decision in this case was issued on July 22, 2010, therefore, as appellant requested reconsideration on August 4, 2011, his request for reconsideration was

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ Thus, although it is a matter of discretion on the part of OWCP of whether to review an award for or against payment of compensation, it has stated that a claimant may obtain review of the merits of a claim by (1) showing that OWCP erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by OWCP, or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁷ *Id.* at § 10.607(b).

⁸ *See* cases cited *supra* note 2.

⁹ *See D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997).

untimely filed. The Board finds that appellant's August 4, 2011 request for reconsideration was timely filed.

The Board conducted a merit review of this case in the decision dated July 22, 2011. The Board's decision constitutes the most recent merit review of this case. Appellant therefore had one year from July 22, 2011 to request reconsideration. His request for reconsideration dated August 4, 2011 was therefore timely filed.

With his timely request for reconsideration, appellant submitted reports from Dr. Yeh and Dr. Grant-Anderson. OWCP evaluated these reports under the clear evidence of error standard, which is an improper standard of review for timely requests for reconsideration. This case will be remanded to OWCP for further review and issuance of an appropriate decision.

CONCLUSION

The Board finds that appellant did submit a timely request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 19, 2011 is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: May 15, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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