



## **FACTUAL HISTORY**

This case has previously been before the Board. On December 14, 1995 the Board granted appellant's request to dismiss his appeal.<sup>3</sup> The Board issued an order on April 27, 1998 remanding the case for completion of the case record.<sup>4</sup> On April 19, 2004 the Board affirmed a September 10, 2003 decision which denied appellant's request for a merit review,<sup>5</sup> and on November 4, 2005 the Board affirmed OWCP's January 3, 2005 decision which denied appellant's request for a merit review on the grounds that it was untimely filed and failed to establish clear evidence of error. Again on March 11, 2008 the Board affirmed OWCP's March 7, 2007 decision denying appellant's request for a merit review on the grounds that it was untimely filed and failed to establish clear evidence of error.<sup>6</sup> The facts of this case are set forth in the Board's prior decisions and are hereby incorporated by reference.<sup>7</sup>

Subsequent to the Board's decision, appellant submitted letters dated May 14 and August 28, 2008 to OWCP requesting that it issue a decision on his request for reconsideration "dated on or about [August 2005]," contending that he had submitted evidence showing that his (Form CA-1) had been maliciously and intentionally altered. In response to these letters, OWCP on October 9, 2008 informed appellant that it was unclear as to what decision he wanted reconsidered and that the record contained no request for reconsideration in August 2005.

In response to OWCP's letter, appellant, in an October 18, 2008 letter, contended that OWCP had not issued a decision on his August 26, 2006 reconsideration request and requested that a decision be issued. He submitted copies of his Form CA-1, the employing establishment's controversion in support of his contention that his Form CA-1 had been altered and his August 26, 2006 letter. OWCP subsequently received an April 20, 2008 report by Dr. John P. Masciale, a Board-certified orthopedic surgeon, indicating that appellant continued to suffer from the symptomatology of a September 28, 1994 injury involving cervical and upper and lower back sprains.

On February 13, 2009 appellant requested reconsideration reiterating his contention that his original Form CA-1 had been altered without his consent.

In an August 28, 2009 letter, appellant requested reconsideration. He contended that OWCP failed to issue a decision on his August 28, 2006 reconsideration request.

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<sup>3</sup> *R.G.*, Docket No. 96-197 (issued December 14, 1995).

<sup>4</sup> *Id.* at Docket No. 97-339 (issued April 27, 1998).

<sup>5</sup> *Id.* at Docket No. 04-422 (issued April 19, 2004).

<sup>6</sup> *Id.* at Docket No. 07-2433 (issued March 11, 2008).

<sup>7</sup> On September 28, 1994 appellant, then a 51-year-old aircraft mechanical parts work leader, filed a traumatic injury claim alleging that he sprained his cervical and lumbar regions when he attempted to control an automated guided vehicle that rammed against a stationary scooter with a flatbed. By decision dated March 23, 1995, OWCP denied his claim on the basis that he failed to establish an injury in the performance of duty. By decision dated July 26, 1995, it denied appellant's request for modification. OWCP found the medical evidence contained inconsistencies in the way the injury occurred when compared with the Form CA-1 and the witness report.

On December 22, 2009 OWCP requested appellant to identify the date of decision over which he was requesting reconsideration as there were several decisions in the record.

In an August 12, 2010 letter, appellant again requested OWCP to issue a decision on his August 28, 2006 reconsideration request.

By decision dated October 6, 2010, OWCP determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error on the part of OWCP in its issuance of the July 3, 2002 merit decision. It noted that the October 6, 2010 decision was in reference to the August 26, 2006 request for reconsideration and further noted that his "subsequent letters also reference your August 26, 2006 request for reconsideration."

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>8</sup> 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.<sup>9</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.<sup>10</sup> Its procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>11</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>12</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>13</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>14</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed

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<sup>8</sup> 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. See *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

<sup>9</sup> 20 C.F.R. § 10.607; see also *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>10</sup> *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>11</sup> See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>14</sup> See *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>15</sup> See *Leon J. Modrowski*, 55 ECAB 196 (2004); *Jesus D. Sanchez supra* note 10.

so as to produce a contrary conclusion.<sup>16</sup> 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.<sup>17</sup> To show 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>18</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>19</sup>

### ANALYSIS

OWCP found that appellant failed to file a timely application for review. In implementing the one-year time limitation, its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>20</sup> The last merit decision in this case, was OWCP's July 3, 2002 merit decision denying appellant's claim for modification of the denial of his claim on the grounds that he failed to establish that he sustained an injury in the performance of duty. As appellant's August 26, 2006, May 14, August 28 and October 18, 2008, February 13 and August 28, 2009 and August 10, 2010 letters requesting reconsideration were submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error on the part of OWCP in denying his claim for compensation.<sup>21</sup>

The question for determination is whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of OWCP in its July 3, 2002 merit decision. Appellant's requests for reconsideration fail to demonstrate clear evidence of error on the part of OWCP in its July 3, 2002 decision. OWCP denied his claim for neck and back injuries of September 28, 1994 on the basis that fact of injury was not established due to the inconsistencies in statements regarding how the injury occurred and the failure by him to submit any evidence resolving the inconsistencies between the medical evidence, witness statement and his Form CA-1. In support of his requests for reconsideration, appellant resubmitted his Form CA-1 and the employing establishment's controversion. He has not submitted any new evidence that had not been previously considered on this issue which shows OWCP erred in the previous decisions. In addition, appellant reiterates arguments made in his prior requests for reconsideration, which have been considered by both OWCP and the Board. Nothing in his

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<sup>16</sup> See *Leona N. Travis*, *supra* note 14.

<sup>17</sup> See *Nelson T. Thompson*, *supra* note 12.

<sup>18</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>19</sup> See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>20</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>21</sup> 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB 241 (2004).

August 26, 2006, May 14, August 28 and October 18, 2008, February 13 and August 28, 2009 and August 10, 2010 requests for reconsideration establish that OWCP's October 6, 2010 decision was erroneous in finding that fact of injury had not been established.

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's claim for review on October 6, 2010. The Board further finds that appellant's reconsideration requests were untimely and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 6, 2010 is affirmed.

Issued: August 15, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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