

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

A.F., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Philadelphia, PA, Employer**

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**Docket No. 11-1297
Issued: December 20, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 4, 2011 appellant filed a timely appeal from a February 17, 2011 decision of the Office of Workers' Compensation (OWCP) that denied his request for reconsideration because it was untimely filed and did not establish clear evidence of error. As there is no merit decision within one year of the filing of this appeal, 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 denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 501.2(c).

On appeal appellant asserts that OWCP erred in its denial because he submitted a new argument on reconsideration.

FACTUAL HISTORY

This case has previously been before the Board. By order dated July 20, 2001, the Board dismissed appellant's appeal at his request.³ In a February 5, 2003 decision, the Board affirmed a November 16, 2001 OWCP decision that denied his request for reconsideration.⁴ In an August 1, 2006 decision, the Board found that appellant's request for reconsideration was untimely filed and he failed to establish clear evidence of error and affirmed a September 19, 2005 OWCP decision.⁵ On January 16, 2007 the Board denied his petition for reconsideration. The law and facts of the previous Board decisions and orders are incorporated herein by reference.

On February 3, 2011 appellant requested reconsideration before OWCP, asserting that because the employing establishment did not provide him with an offer of suitable work in writing following the July 31, 1995 employment injury, he should be compensated for the period August 23 through September 21, 1995.

By decision dated February 17, 2011, OWCP denied appellant's reconsideration request on the grounds that his request was untimely filed and that he failed to present clear evidence of error. It noted that he failed to present relevant evidence that established clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. 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.⁶ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁷ Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,⁸ if the claimant's application for review shows "clear evidence of error" on the part of OWCP. In this

³ Docket No. 01-1331 (issued July 20, 2001). On May 31, 1995 appellant, then a 29-year-old mail handler, sustained an employment-related lumbosacral strain. He received continuation of pay from June 1 to July 15, 1995, and returned to work on July 17, 1995. Appellant stopped work on August 23, 1995, and on September 21, 1995 was issued a Notice of Removal for failure to maintain a regular schedule.

⁴ Docket No. 03-307 (issued February 5, 2003).

⁵ Docket No. 06-239 (issued August 1, 2006).

⁶ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁸ 20 C.F.R. § 10.607.

regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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.¹⁰

OWCP's procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as 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.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

The only decision before the Board is the February 17, 2011 decision which denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. The Board finds that as more than one year had elapsed from the date of issuance of the last merit decision dated January 16, 2001 and his request for reconsideration dated February 3, 2011 his request for reconsideration was untimely.¹³

The Board further finds that appellant failed to establish clear evidence of error. In order to establish clear evidence of error, a claimant must submit evidence that is positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁴ In the case at hand, with his reconsideration request appellant did not submit any new evidence. He submitted

⁹ *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *James R. Mirra*, 56 ECAB 738 (2005).

¹² *Nancy Marcano*, 50 ECAB 110 (1998).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Id.*

correspondence in which he asserted that, because the employing establishment did not provide him with an offer of suitable work in writing following the July 31, 1995 employment injury, he should be compensated for the period August 23 through September 21, 1995. The Board notes that appellant made similar arguments in his August 17, 2005 reconsideration request that was reviewed by the Board in its August 1, 2006 decision. Appellant's argument in this regard was cumulative. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim.¹⁵

The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.¹⁶ As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the January 16, 2001 OWCP decision, he has not established that OWCP committed error by its February 17, 2011 decision.¹⁷ The Board therefore finds that in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the argument submitted by appellant with his February 3, 2011 reconsideration request to ascertain whether it demonstrated clear evidence of error in the January 16, 2001 decision and correctly determined that it did not, and thus denied his untimely request for a merit reconsideration on that basis.¹⁸

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and that he failed to establish clear evidence of error. OWCP, therefore, properly denied a merit review of his claim.

¹⁵ See *Shirley Rhynes*, 55 ECAB 703 (2004); *James A. England*, 47 ECAB 115 (1995).

¹⁶ *Robert G. Burns*, *supra* note 10.

¹⁷ *Nancy Marcano*, *supra* note 12.

¹⁸ 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: December 20, 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