

² For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. See 20 C.F.R. § 501.3(d)(2). An appeal of final adverse Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. §§ 501.3(e).

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated April 5, 1990, the Board affirmed an August 9, 1989 schedule award decision.³ On March 10, 1999 the Board affirmed an August 10, 1996 decision finding that appellant did not establish a recurrence of disability on March 16, 1989 and a November 13, 1996 decision denying his request for further merit review of his claim pursuant to 5 U.S.C. § 8128.⁴ In an October 22, 2002 decision, the Board affirmed March 14 and November 29, 2001 and March 5, 2005 decisions denying his request for further merit review of his claim under section 8128.⁵ By decision dated May 2, 2005, the Board affirmed a January 15, 2004 decision denying appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.⁶ On October 21, 2009 the Board affirmed an October 8, 2008 decision denying his request for reconsideration on the grounds that it was not timely and did not demonstrate clear evidence of error.⁷ The facts and circumstances of the case as set forth in the prior decisions are hereby incorporated by reference.

On June 4, 2010 appellant requested reconsideration. He argued that OWCP should have followed the procedural requirements set forth in section 8106 to see if he was justified in abandoning his modified employment. Appellant related that he began working in his limited-duty job on November 6, 1988 but abandoned the position on March 16, 1989. He cited a March 17, 1989 letter from the employing establishment informing him that he had abandoned his modified custodial position and notifying him of the provisions of section 8106(c) of the Act. Appellant argued that OWCP erred in failing to contact him to see if his refusal was justified, failed to set a 30-day deadline before applying the sanctions of section 8106(c) and failed to ensure that the employing establishment held open his position. He noted that the employing establishment did not hold his job open and thus OWCP should have not considered sanctions. Appellant maintained that OWCP investigated whether he abandoned suitable work, citing an April 27, 1992 report from a rehabilitation specialist indicating that his file was closed because his job offer was suitable. He argued that on July 29, 1991 OWCP found that his position was suitable but did not inform him of its determination and apply the provisions of section 8106 or

³ Docket No. 90-321 (issued April 5, 1990).

⁴ Docket No. 97-670 (issued March 10, 2005). OWCP accepted that appellant sustained left carpal tunnel syndrome causally related to factors of his federal employment. Appellant resumed modified work on November 5, 1988 but stopped work on March 16, 1989. He submitted a letter of resignation on March 16, 1989 stating that he would not return to work unless assigned a different work schedule. On June 9, 1989 the employing establishment terminated appellant's employment because he failed to report for duty. The Board found that the employing establishment did not require appellant to work outside of his restrictions and that the medical evidence was insufficient to show that he was disabled from his modified employment.

⁵ Docket No. 02-1032 (issued October 22, 2002).

⁶ Docket No. 04-757 (issued May 2, 2005).

⁷ Docket No. 09-151 (issued October 21, 2009). In orders dated March 21, 2006, January 29, 2007 and May 21, 2008 the Board granted appellant's request to dismiss appeals of OWCP decisions denying his requests for reconsideration as untimely and insufficient to show clear evidence of error. On April 13, 2010 the Board denied his petition for reconsideration of its October 21, 2009 decision.

provide him time to accept the position following its July 29, 1991 decision. Appellant further contended that OWCP should have formally terminated his compensation under section 8106(c)(2). He referenced a July 6, 1992 OWCP decision which he alleged contained insufficient factual findings. Appellant additionally maintained that OWCP should have provided him with an additional 15 days to accept the position in accordance with its procedures regarding the refusal of suitable work.

On July 1, 2010 OWCP notified the employing establishment that appellant had submitted a reconsideration request that warranted merit review and provided time for comments.

On July 13, 2010 appellant asserted that OWCP could terminate compensation only through the provisions of section 8106(c)(2).

By decision dated September 9, 2010, OWCP denied appellant's request for reconsideration after finding that it was untimely and did not show clear evidence of error. It found that his argument on reconsideration essentially duplicated his prior arguments that it had mishandled his case.

On appeal, appellant argues that OWCP erred in denying his request for further merit review. He maintains that the July 1, 2010 OWCP letter informing the employing establishment that his reconsideration request warranted merit review granted his request for merit review under section 10.609(a).

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁸ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁹

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to OWCP'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.¹⁰ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The

⁸ *Supra* note 1.

⁹ 20 C.F.R. § 10.607.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹¹

ANALYSIS

OWCP 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 OWCP decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ As appellant's June 4, 2010 request for reconsideration was submitted more than one year after the last merit decision, issued by the Board on March 10, 1999, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁴

In his request for reconsideration, appellant argued that OWCP erred in failing to apply the provisions of section 8106(c), relevant to determining if a claimant has refused or abandoned suitable work. Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation benefits.¹⁵ Section 8106(c) is a penalty provision as it may bar an employee's entitlement to compensation and, for this reason, is narrowly construed.¹⁶ Appellant was not in receipt of compensation at the time that he stopped work. Instead, he returned to work on November 5, 1988 and stopped work on March 16, 1989. Appellant submitted a letter of resignation on March 16, 1989 indicating that he would not return to work unless the employing establishment changed his work schedule. As he stopped work after working in a limited-duty position, he has the burden of proof to establish a recurrence of disability due to either a material change in his injury-related condition or the withdrawal of his limited-duty employment. The Board previously found that appellant did not submit sufficient medical evidence to show that he was disabled from his modified employment or that the employing establishment made his work outside his restrictions.¹⁷ Appellant's arguments regarding OWCP's failure to apply the provisions of section 8106(c) in his case are not relevant as the issue is whether he has established an employment-related recurrence of disability.

Appellant asserted that OWCP found that he was not entitled to vocational rehabilitation as he was working in a suitable position. By letter dated April 27, 1992, OWCP's rehabilitation specialist, in response to an inquiry from appellant, noted that the rehabilitation file was closed

¹¹ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹² 20 C.F.R. § 10.607(a).

¹³ *Robert F. Stone*, *supra* note 11.

¹⁴ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ 5 U.S.C. § 8106(c)(2).

¹⁶ *See Stephen R. Lubin*, 43 ECAB 564 (1992).

¹⁷ Docket No. 97-670 (issued March 10, 2005).

on August 22, 1991 after he received a suitable job offer. The fact that it found that appellant was not entitled to rehabilitation services is not relevant to the issue of whether he has established an employment-related recurrence of disability. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁸

Appellant further argued that OWCP's July 6, 1992 decision contained insufficient factual findings. By decision dated July 6, 1992, OWCP denied his claim for compensation beginning March 16, 1989. It found that appellant resigned for reasons unrelated to his work injury. The Board has already reviewed and affirmed OWCP decisions denying modification of the July 6, 1992 decision. Appellant's allegations regarding the July 6, 1992 decision do not show that the decision was erroneous and thus do not constitute clear evidence of error.

Appellant additionally maintained that on July 29, 1991 OWCP found that the position was suitable but did not inform him of the provisions of section 8106. As discussed, the issue is whether he has established a recurrence of disability as of March 16, 1989. OWCP has not issued a suitable work termination and thus had no need to advise appellant of the penalty provision set forth in section 8106(c).

On appeal, appellant asserts that OWCP found that his request for reconsideration met the requirements for merit review in its July 1, 2010 letter to the employing establishment. OWCP's July 1, 2010 letter to the employing establishment was informational in nature, provided so that the employing establishment could comment on appellant's reconsideration request. It is not determinative of the issue of whether appellant established clear evidence of error by OWCP.

The arguments raised in support of appellant's untimely reconsideration request are irrelevant and thus insufficient to establish clear evidence of error. In order to establish clear evidence of error, the evidence submitted must raise a substantial question as to the correctness of OWCP's decision.¹⁹ The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and insufficient to establish clear evidence of error.

¹⁸ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁹ *See G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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