



## ISSUE

The issue is whether OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

The history of this case is set forth in the Board's prior decisions and is hereby incorporated by reference.<sup>3</sup> The relevant facts are hereinafter set forth. Appellant filed a claim alleging that he sustained a recurrence of disability on July 3, 1989 as a result of his July 14, 1988 employment injury.<sup>4</sup> OWCP denied this claim on January 16, 1990, finding that he failed to submit evidence sufficient to establish that his current back condition was causally related to his July 14, 1988 employment injury. On November 19, 1990 appellant made a timely request for reconsideration. On March 15, 1991 OWCP granted his request, reviewed the merits of his claim and denied modification of the prior decision. It found that the medical evidence failed to demonstrate that the claimed condition or disability for work was causally related to appellant's accepted employment injury.

This was the last decision on the merits of appellant's claim of recurrence. The statement of appeal rights accompanying OWCP's March 15, 1991 merit decision notified appellant that any further request for reconsideration must be made within one year of the date of the decision or within one year of March 15, 1991. The last Board decision was an August 4, 2010 order dismissing appellant's appeal on the grounds that it was untimely filed.<sup>5</sup> On January 18, 2011 the Board issued an order dismissing appellant's petition for reconsideration on the grounds that appellant established no error of fact or law warranting further consideration.

On February 22 and June 8, 2011 appellant requested reconsideration of OWCP's March 15, 1991 decision denying his recurrence claim. He argued that OWCP erred in finding he had filed an untimely request for reconsideration. Appellant contended that he was entitled to compensation benefits as he never healed from his original injury and OWCP erred in failing to consider this. He also argued his mental condition prevented him from exercising his appeal right in a timely fashion and that OWCP erred in failing to consider this when it denied his requests for reconsideration.

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<sup>3</sup> Docket No. 94-544 (issued July 19, 1995) (not in record, copy attached); Docket No. 01-798 (issued October 9, 2001) (not in record, copy attached); Docket No. 03-887 (issued January 21, 2004); Docket No. 03-905 (issued January 21, 2004); Docket No. 04-64 (issued August 9, 2005); Docket No. 06-875 (issued September 8, 2006); Docket No. 07-55 (issued March 27, 2007); Docket No. 07-1970 (issued January 15, 2008); Docket No. 08-1121 (issued November 3, 2008); Docket No. 10-334 (issued August 4, 2010).

<sup>4</sup> On July 25, 1988 appellant, then a 38-year-old computer operator, filed a traumatic injury claim alleging that on July 14, 1988 he injured his back when he tripped and fell over a box. OWCP accepted the claim for a low back strain.

<sup>5</sup> Docket No. 10-334 (issued August 4, 2010). On November 17, 2009 appellant filed an appeal with the Board of a nonmerit OWCP decision dated May 15, 2009. As appellant's appeal was filed more than 180 days after OWCP issued its most recent decision, the Board found his appeal to be untimely filed.

By decision dated June 21, 2011, OWCP determined that appellant's request for reconsideration was untimely filed and failing to show clear evidence of error.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>6</sup> OWCP 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>7</sup> 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.<sup>8</sup> OWCP procedures state that OWCP 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 OWCP.<sup>9</sup> In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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>15</sup> To show clear

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<sup>6</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 J.S.*, Docket No. 10-385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

<sup>7</sup> 20 C.F.R. § 10.607; *see also Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>8</sup> *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>9</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>10</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *See Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *See Leon J. Modrowski*, 55 ECAB 196 (2004); *Jesus D. Sanchez supra* note 8.

<sup>14</sup> *See Leona N. Travis, supra* note 12.

<sup>15</sup> *See Nelson T. Thompson, supra* note 10.

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 *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.<sup>16</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>17</sup>

### ANALYSIS

This is appellant's eleventh appeal to the Board. He seeks reconsideration of a March 15, 1991 decision denying his request for modification of the denial of his recurrence claim. In the March 15, 1991 decision, OWCP denied appellant's request for modification of the denial of his claim that he sustained a recurrence of disability on July 3, 1989 as a result of his accepted July 14, 1988 employment injury. Appellant continues to disagree with the denial of his claim and filed his request for consideration in a letter dated June 8, 2011. Because he filed his request more than one year after OWCP's March 15, 1991 merit decision, the Board finds that appellant filed an untimely request for reconsideration. Thus, appellant must demonstrate clear evidence of error on the part of OWCP in denying his claim.<sup>18</sup>

The Board further finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of compensation was erroneous. In addition appellant presented no evidence with his request. He has not shown how OWCP committed any error in denying his recurrence claim. Appellant again argues that he never healed from his original injury and that a mental condition prevented him from timely exercising his appeal rights. Nothing in his June 8, 2011 request for reconsideration remotely suggests that OWCP's March 15, 1991 decision was erroneous in finding that a recurrence of disability had not been established. The Board will, therefore, affirm the June 21, 2011 decision denying appellant's request.

### CONCLUSION

OWCP properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that his requests for reconsideration were not timely filed and failed to demonstrate clear evidence of error.

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<sup>16</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>17</sup> See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>18</sup> 20 C.F.R. § 10.607(b). See *S.D.*, 58 ECAB 713 (2007); *Jack D. Johnson*, 57 ECAB 593 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 5, 2011 is affirmed.

Issued: February 14, 2012  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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