



## ISSUES

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.

On appeal, appellant asserts that OWCP erred in finding that he refused an offer of suitable work in view of the determinations by the Department of Veterans Affairs and the Social Security Administration, which found him to be totally disabled from working.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The Board issued a decision on April 1, 1998 in which it reversed decisions of OWCP dated June 11 and September 11, 1997 on the grounds that it improperly terminated appellant's compensation.<sup>5</sup> In a decision dated July 15, 2003, the Board reversed a February 3, 2003 hearing representative's decision affirming a September 6, 2002 decision terminating appellant's compensation benefits on the grounds that he no longer had any continuing disability due to his accepted September 7, 1989 employment injury.<sup>6</sup> The Board found that the record contained an unresolved conflict in the medical evidence. On April 17, 2006 the Board affirmed an August 31, 2005 decision in which OWCP terminated appellant's compensation effective September 4, 2005 on the grounds that he refused an offer of suitable work.<sup>7</sup> On May 23, 2008 the Board affirmed a May 3, 2007 OWCP hearing representative's decision finding an overpayment of compensation and denying waiver of the recovery of the overpayment.<sup>8</sup> The Board issued an order dismissing appellant's appeal on March 24, 2010 as no person adversely affected by OWCP's final decision or authorized representative had filed an appeal with the Board.<sup>9</sup> On June 30, 2010 the Board issued an order

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<sup>4</sup> On September 7, 1989 appellant, then a 43-year-old mail processor clerk, filed a traumatic injury claim alleging that he injured his back that date while breaking down mail. OWCP accepted the claim for a low back strain. It was assigned File No xxxxxx808. On February 23, 1990 appellant filed an occupational disease claim alleging that on September 7, 1989 he first realized his lower back, left lumbar and left hip conditions were employment related. This was assigned claim File No. xxxxxx173, which was deleted on May 31, 1990 as OWCP determined appellant's February 23, 1990 claim was actually a claim for a recurrence of disability. The Office of Personnel Management (OPM) approved appellant's application for disability retirement on October 2, 1990. Appellant retired from the employing establishment effective October 1, 1990. On July 22, 1991 OWCP accepted his recurrence claim and expanded his claim to include the condition of herniated nucleus pulposus. On October 2, 1991 appellant filed an election form opting to receive benefits under FECA effective September 11, 1990. By letter dated September 27, 1991, he was placed on the periodic rolls for temporary total disability.

<sup>5</sup> Docket No. 98-75 (issued April 1, 1998).

<sup>6</sup> Docket No. 03-1009 (issued July 15, 2003).

<sup>7</sup> Docket No. 06-73 (issued April 17, 2006).

<sup>8</sup> Docket No. 07-2010 (issued May 23, 2008).

<sup>9</sup> Docket No. 09-1939 (issued March 24, 2010).

denying his petition for reconsideration. The facts and the circumstances of the case up to that point as set forth in the Board's prior decisions are incorporated herein by reference.<sup>10</sup>

On April 22, 2011 appellant requested reconsideration. He argued that OWCP erred in finding that he refused an offer of suitable work as both the Department of Veterans Affairs and the Social Security Administration issued findings that he was totally disabled. Appellant contended that the offered job was not suitable as documentation from the employing establishment found him to be a poor candidate for rehabilitation services. He also argued that his psychiatric condition was not considered by OWCP in the suitability determination and it erred in finding that he was capable of performing the offered position and that it was suitable. Appellant submitted factual evidence including his statements, correspondence and disability determinations by the Department of Veterans Affairs and Social Security Administration.

By decision dated May 11, 2011, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present 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>11</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>12</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that the final merit decision was in error.<sup>13</sup> 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,<sup>14</sup> if the claimant's application for review shows clear evidence of error.<sup>15</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>16</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>17</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial

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<sup>10</sup> On July 3, 1998 and October 17, 2003 appellant filed election forms opting to receive compensation benefits under FECA.

<sup>11</sup> See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

<sup>12</sup> 20 C.F.R. § 10.607; see *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>13</sup> *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>14</sup> 20 C.F.R. § 10.607.

<sup>15</sup> See *Robert G. Burns*, 57 ECAB 657 (2006); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

<sup>16</sup> *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>17</sup> *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006); *F.R.*, Docket No. 09-575 (issued January 4, 2010).

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 of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error. 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.<sup>18</sup>

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.<sup>19</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>20</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. The Board procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>21</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>22</sup> As appellant's April 22, 2011 request for reconsideration was submitted more than one year following the most recent merit decision issued by the Board on April 17, 2006, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>23</sup>

Appellant argued that OWCP erroneously determined that the offered position was suitable without taking into consideration his psychological condition, disability findings by the Department of Veterans Affairs and the Social Security Administration and the employing establishment's finding that rehabilitation was not suitable for him. He had raised the argument that he was totally disabled due to his psychological condition previously and the Board noted in the April 17, 2006 decision that there was no rationalized medical evidence explaining how the position violated his work restrictions. Moreover, appellant has not presented any additional evidence to establish that the position was outside a specific work restriction. As to his

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<sup>18</sup> *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 15; *J.S.*, Docket No. 10-385 (issued September 15, 2010).

<sup>19</sup> *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(c) (October 2011).

<sup>20</sup> *See G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006); *M.L.*, *supra* note 15.

<sup>21</sup> 20 C.F.R. § 10.607(a).

<sup>22</sup> *Robert F. Stone*, 57 ECAB 393 (2005).

<sup>23</sup> 20 C.F.R. § 10.607(a); *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

contentions regarding disability determinations by the Social Security Administration and the Department of Veterans Affairs, the Board notes that findings of other administrative agencies are not determinative of his level of disability under FECA. It is well established that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes which have varying standards for establishing eligibility for benefits.<sup>24</sup> Thus, appellant's contention is not meritorious.

The arguments raised in support of appellant's untimely reconsideration request were previously considered or 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.<sup>25</sup> The arguments and evidence presented by appellant on reconsideration failed 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.

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<sup>24</sup> *Andrew Fullman*, 57 ECAB 574 (2006).

<sup>25</sup> *See G.H.*, *supra* note 20; *Jack D. Johnson*, *supra* note 20.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 11, 2011 is affirmed.

Issued: January 5, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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