



into a mail container. By decisions dated May 19 and August 9, 1989, OWCP denied his traumatic injury claim on the grounds that he had not established that the March 20, 1989 employment incident occurred as alleged. By decision dated January 3, 2005, it denied appellant's request for reconsideration as untimely and insufficient to show clear evidence of error. In a May 12, 2006 decision, the Board affirmed the January 3, 2005 nonmerit decision.<sup>2</sup> The Board found that the medical evidence submitted by appellant was not relevant to the underlying issue of whether he established the March 20, 1989 employment incident. The Board further found that he failed to show that the witnesses who provided statements pertaining to the incident were biased. By nonmerit decision dated August 10, 2006, OWCP denied appellant's request for reconsideration as untimely and insufficient to show clear evidence of error. In a February 7, 2007 decision, the Board affirmed the January 3, 2005 nonmerit decision.<sup>3</sup> By decision dated February 24, 2009, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and that appellant had not established clear evidence of error. In a decision dated February 23, 2010, the Board affirmed the February 24, 2009 nonmerit decision.<sup>4</sup>

By decisions dated December 17, 2010 and April 15, 2011, OWCP denied appellant's request for reconsideration without a merit review, finding the requests were untimely and that he had not established clear evidence of error. In a decision dated May 18, 2012, the Board affirmed the December 17, 2010 and April 15, 2011 nonmerit decisions.<sup>5</sup> The facts of this case as set forth in the Board's prior decisions are incorporated by reference.

Appellant requested reconsideration on August 20, 2012. He stated that he initially submitted a new request for reconsideration to OWCP on March 26, 2012; however, OWCP informed him that the request was not valid because at the time of the filing ECAB had jurisdiction over his case until it rendered its formal decision on May 18, 2012. Appellant alleged that OWCP misled him, which resulted in a five-month delay in processing his claim. He submitted a November 30, 2011 report from Dr. Christopher Plastaras, an attending specialist in physical medicine and rehabilitation. Dr. Plastaras opined that appellant's low back symptoms began as a result of a March 20, 1989 work incident. In addition, appellant requested a schedule award.

By decision dated September 10, 2012, OWCP denied appellant's request for reconsideration without a merit review, finding that he untimely requested reconsideration and that appellant had not established clear evidence of error.<sup>6</sup>

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<sup>2</sup> Docket No. 05-967 (issued May 12, 2006).

<sup>3</sup> Docket No. 06-2139 (issued February 7, 2007).

<sup>4</sup> Docket No. 09-1556 (issued February 23, 2010).

<sup>5</sup> Docket Nos. 11-1355 and 11-1389 (issued May 18, 2012).

<sup>6</sup> By letter dated September 17, 2012, OWCP advised appellant that the claim for a schedule award, was without merit as it had never accepted a work-related injury.

## LEGAL PRECEDENT

Section 8128(a) of FECA<sup>7</sup> does not entitle an employee to a review of OWCP's decision as a matter of right.<sup>8</sup> This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at anytime on his or her own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>9</sup> As one such limitation, OWCP has stated that 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>10</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).<sup>11</sup>

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>12</sup> OWCP procedures state that OWCP will reopen appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows “clear evidence of error” on the part of OWCP.<sup>13</sup>

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP.<sup>14</sup> The evidence must be positive, precise and explicit and must be

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>9</sup> Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

<sup>10</sup> 20 C.F.R. § 10.607(b).

<sup>11</sup> *See* cases cited *supra* note 2.

<sup>12</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>14</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

manifest on its face that OWCP committed an error.<sup>15</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>16</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>17</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>18</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 *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>19</sup> The Board makes an independent determination of whether appellant 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>20</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on August 9, 1989. Appellant requested reconsideration on August 20, 2012; thus, his request was untimely as it was more than one year following the August 9, 1989 merit decision.

On appeal, appellant alleged that Dr. Plastaras' November 30, 2011 report clearly established a work factor and the causal relationship of his current back condition to the alleged March 20, 1989 employment incident. He also alleged that he is entitled to a schedule award.

The Board finds that appellant's August 20, 2012 request for reconsideration failed to show clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. He, however, did not submit any new factual evidence with his request, relevant to the underlying issue in this case. As the Board noted in its prior decisions, the issue is whether the March 20, 1989 employment incident occurred at the time, place and in the manner alleged. This is factual in nature. Appellant did not submit any new factual evidence with his request for reconsideration. His August 20, 2012 letter merely restates his own arguments previously rejected by the Board and OWCP, that he has submitted sufficient medical evidence to establish his claim. Therefore, appellant has failed

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<sup>15</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>16</sup> See *Jesus D. Sanchez*, *supra* note 8.

<sup>17</sup> See *Leona N. Travis*, *supra* note 15.

<sup>18</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>19</sup> *Leon D. Faidley, Jr.*, *supra* note 8.

<sup>20</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

to demonstrate clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review.<sup>21</sup>

**CONCLUSION**

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in his August 20, 2012 reconsideration request. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review in its September 10, 2012 decision.<sup>22</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 10, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2013  
Washington, DC

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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

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

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<sup>21</sup> The Board also notes that OWCP properly advised appellant that he was not entitled to a schedule award because his claim was not accepted.

<sup>22</sup> The Board notes that appellant requested oral argument in his September 19, 2012 appeal. By letter dated October 4, 2012, the Clerk of the Board advised appellant that oral arguments were only held in Washington, DC and that the Board was not responsible for travel or incidental expenses. Appellant was requested to confirm his request for oral argument. He did not respond. The Board, in its discretion, denies appellant's request for oral argument.