

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

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C.W., Appellant )

and )

DEPARTMENT OF AGRICULTURE, ANIMAL )  
& PLANT HEALTH INSPECTION SERVICE, )  
Brooklyn, NY, Employer )

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**Docket No. 14-59  
Issued: April 22, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 17, 2013 appellant filed a timely appeal from the July 23, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's June 10, 2013 reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board has no jurisdiction to review OWCP's February 3, 2012 decision to terminate his compensation benefits or the hearing representative's June 12, 2012 decision to affirm that termination, as more than 180 days has elapsed from the dates of those decisions to the filing of this appeal. *See* 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

On April 21, 1994 appellant, then a 31-year-old plant protection and quarantine officer, sustained a traumatic injury in the performance of duty when he jumped off a swaying gangway as he disembarked from a cargo vessel and fell upon a landing. OWCP accepted his claim for the condition of lumbosacral sprain. Appellant received compensation for temporary total disability on the periodic rolls.

On February 3, 2012 OWCP terminated appellant's compensation benefits on the grounds that the medical evidence, as represented by the examination and opinion of Dr. Samuel D. Young, a Board-certified orthopedic surgeon and second opinion physician, established that he no longer had any residuals or disability due to the work injury.

In a decision dated June 12, 2012, OWCP's hearing representative affirmed the termination. The hearing representative noted that none of the treating physicians' reports offered a well-reasoned opinion on whether appellant continued to have a condition related to the April 21, 1994 work incident. The hearing representative also found that Dr. Young's well-reasoned opinion represented the weight of the medical opinion evidence and supported that appellant no longer had residuals of the April 21, 1994 work injury.

On June 17, 2013 OWCP received appellant's June 10, 2013 reconsideration request. Appellant disagreed with the hearing representative's decision and stated that the weight of the medical evidence already on file showed a permanent disability from the April 21, 1994 work injury. He added that the work injury accelerated and permanently aggravated his back pain from muscular dystrophy.

Appellant argued that OWCP did not meet its burden to terminate his compensation benefits, as it did not offer rationalized medical opinion evidence based on a proper factual and medical documentation contained in the record. He asserted that he did have residuals from the April 21, 1994 employment injury.

Appellant explained that he received regular treatments from October 2008 to April 2011, though not through OWCP. As he previously stated in a January 1, 2012 letter, there was a permanent disabling injury, one that had not ceased and from which there had been no recovery, as the medical evidence clearly showed.

Appellant took issue with Dr. Young's opinion. He argued that medical documentation from his physicians indicated that he could not perform the physical demands of his position description. Appellant added that OWCP confirmed his disability in a letter dated March 10, 2003.

Appellant provided excerpts from a number of medical reports, including objective findings, diagnoses and opinions on disability for work.

Appellant argued that "all the other [magnetic resonance imaging] (MRI)" scans were not normal, and that OWCP's interpretation of the 1995 and 2006 electromyograms (EMG) correct.

It was unreasonable and illogical, appellant further argued, to expect that anything would change in terms of how much leave without pay he was required to take due to the pain from his injury when the condition had only worsened over the years.

Appellant observed that prior to the 1994 employment injury he was in no pain at all and had none of the problems that developed as a result. “This injury is the cause of the pain.” As a result of appellant’s muscular dystrophy, he did not recuperate from the fall and injury, “hence, permanent aggravation and acceleration.”

Medical documentation received on or about the same date as appellant’s reconsideration request addressed the possibility that he had an inherited muscle disease. He was diagnosed with facioscapulohumeral (FSHD) muscular dystrophy or FSHD, in April 2012. Appellant submitted several articles on the nature of the condition. Diagnostic testing included an abnormal EMG and nerve condition study in September 2012, found to be most consistent with a diffuse myopathic process; a cervical MRI scan in January 2011; a cervical MRI scan in March 2007; a lumbar MRI scan in October 2004; abnormal EMG and nerve conduction studies in February and March 2012; and a lumbar MRI scan in December 2001.

In a decision dated July 23, 2013, OWCP denied appellant’s reconsideration request. It found the request untimely and also found that the request did not present clear evidence of error in the hearing representative’s June 12, 2012 decision.

On appeal, appellant argues that his June 10, 2013 reconsideration request was timely, as it was postmarked on June 11, 2013. He argues that at least four documents from his physicians stated that his condition was permanent. Appellant also argues that OWCP was required by regulation to provide a referee or impartial examination by a qualified specialist.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

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

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>3</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought. OWCP will consider an untimely application only

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<sup>3</sup> 5 U.S.C. § 8128(a).

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.<sup>4</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>5</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>6</sup>

### ANALYSIS

The most recent decision on the merits of appellant’s case was OWCP’s hearing representative’s June 12, 2012 decision to affirm the termination of his compensation benefits. Appellant had one year or until June 12, 2013, to ensure receipt by OWCP of any reconsideration request. He argues his request was dated June 10, 2013 and that it was postmarked on June 11, 2013, but OWCP did not receive the request until June 17, 2013. Regulations make clear that an application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought. Accordingly, the Board finds that appellant did not file his reconsideration request in a timely manner.

The question for determination is whether appellant’s untimely reconsideration request shows clear evidence of error on the part of OWCP in its termination of his compensation benefits. Appellant’s request must establish, on its face, that such decision was erroneous.

OWCP accepted appellant’s claim for the medical condition of lumbosacral sprain and it paid compensation benefits on the basis of that specific medical condition. It terminated those benefits in 2012 when, in its judgment, the weight of the medical opinion evidence established that he no longer had any residuals or disability due to the accepted medical condition. OWCP’s acceptance of the claim and its termination of benefits dealt only with the lumbosacral sprain appellant sustained on April 21, 1994.

Appellant based his disagreement with the termination largely on his opinion that the April 21, 1994 employment injury caused something more than the accepted lumbosacral sprain. He believed the incident aggravated his muscular dystrophy. This is an entirely different issue than the one OWCP adjudicated. The burden of proof to establish additional medical conditions causally related to the April 21, 1994 employment injury lies with appellant. OWCP’s burden was to establish by the weight of the medical opinion evidence that he no longer suffered from the accepted lumbosacral sprain sustained on April 21, 1994. Although appellant argued that he still had residuals from the employment injury, that he received regular treatments, that he was permanently disabled and that he could not perform the physical demands of his position, the issue raised by the termination was much narrower. The issue was whether he still suffered from

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<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

<sup>6</sup> *Id.* at Chapter 2.1602.5.b.

the accepted lumbosacral sprain and whether that soft-tissue injury in 1994 still caused any disability for work.

Appellant disagreed with OWCP's weighing of the medical opinion evidence, in particular the opinion offered by Dr. Young, the second opinion orthopedic surgeon. Assigning evidentiary weight to medical opinions is a matter of judgment. Appellant's personal assessment of the evidence to support a different result does not show, on its face, that OWCP's decision was erroneous. He argued that OWCP was required to refer the case to an impartial medical specialist, but he did not identify what conflict existed in the medical opinion evidence or how its resolution was necessary to support the termination of compensation benefits for the accepted lumbosacral sprain.

Whether appellant had any problems before the 1994 employment injury and whether he continues to have problems as a result of medical conditions OWCP has not accepted, is wholly immaterial to whether he continues to suffer from the lumbosacral sprain he sustained on April 21, 1994.

The medical documentation that OWCP received on or about the date of appellant's reconsideration request did not address whether he continues to suffer from that lumbosacral sprain. The evidence related instead to the possibility of an inherited muscle disease and to FSHD. None of the diagnostic testing determined that the 1994 soft-tissue injury was still present and disabling. Published articles on FSHD were irrelevant to OWCP's termination of benefits for lumbosacral sprain.

Having reviewed appellant's untimely reconsideration request, together with the medical documentation received on or about the same date, the Board finds that the request failed to demonstrate clear evidence of error in OWCP's decision to terminate compensation benefits for the accepted medical condition. The Board will therefore affirm OWCP's July 23, 2013 decision to deny a merit review of appellant's case.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's June 10, 2013 reconsideration request as untimely filed and failing to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 22, 2014  
Washington, DC

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

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

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