

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

B.H., Appellant

and

**DEPARTMENT OF STATE, NEAR EASTERN
AFFAIRS, Washington, DC, Employer**

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**Docket No. 15-0978
Issued: October 22, 2015**

Appearances:
Matthew T. Singer, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 31, 2015 appellant, through counsel, filed a timely appeal from the December 10, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ The last merit decision in this case was issued by OWCP on November 15, 2013. As more than 180 days have elapsed between the last merit decision by OWCP and the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

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

¹ Appellant also filed a timely request for oral argument in this case. By order dated August 14, 2015, the Board denied appellant's request for oral argument because the matter on appeal pertains to an analysis of the factual evidence of record. It would further delay issuance of a Board decision and not serve a useful purpose. Docket No. 15-0978 (issued August 14, 2015).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 17, 2012 appellant, then a 30-year-old Foreign Service Security Protective Specialist, filed a traumatic injury claim (Form CA-1) alleging injury to his right knee while playing rugby outside the compound where he worked, the United States Embassy in Baghdad, Iraq. He stopped work on October 17, 2012 and did not return. OWCP accepted the claim for medial meniscus tear of the right knee and paid compensation benefits, including right knee surgery on April 25, 2013. On August 10, 2013 appellant's limited noncareer appointment as a Foreign Service Security Protective Specialist expired. He received medical benefits and wage-loss compensation payments from OWCP as a result of his disability from work.

In a September 25, 2013 report, Dr. Stephen Benz, a Board-certified orthopedic surgeon, released appellant to full duty and indicated that he could perform activities as tolerated without any restrictions. Appellant returned to nonfederal work as a teacher and reinjured his knee on October 6, 2013.

On October 10, 2013 OWCP issued a notice of proposed termination of appellant's wage-loss compensation based on Dr. Benz's September 25, 2013 report. By decision dated November 15, 2013, it finalized the termination of appellant's wage-loss compensation effective November 15, 2013.

On December 2, 2013 OWCP received appellant's request for reconsideration of the November 15, 2013 termination decision and submitted additional evidence. By decision dated February 28, 2014, it denied his request for reconsideration, as the evidence submitted was insufficient to warrant review of the November 15, 2013 merit decision.

On November 21, 2014 OWCP received appellant's November 14, 2014 request for reconsideration. Appellant's counsel requested that wage-loss compensation be reinstated as appellant had not returned to his previous position because he could not perform the strenuous requirements of that position due to pain and the teaching position in which he currently works pays significantly less than his previous active employment. He also indicated that appellant continues to have pain and requires medical treatment.

By decision dated December 10, 2014, OWCP denied appellant's reconsideration request finding it was untimely 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. It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.³ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification

³ 20 C.F.R. § 10.607(a) (2011).

following reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.⁴

OWCP regulations state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of its regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁵ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial 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 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. 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.⁷

OWCP 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.⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.⁹

ANALYSIS

OWCP issued its most recent merit decision on November 15, 2013 which terminated appellant's wage-loss compensation benefits. Appellant's request for reconsideration dated November 14, 2014 was received on November 21, 2014, more than one year after the November 15, 2013 merit decision, and was therefore untimely filed.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (October 2011).

⁵ 20 C.F.R. § 10.607(b) (2011); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ *See Alberta Dukes*, 56 ECAB 247 (2005).

⁷ *Robert G. Burns*, 57 ECAB 657 (2006).

⁸ *Supra* note 4 at Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

⁹ *Nancy Marcano*, 50 ECAB 110 (1998).

Appellant's counsel alleges on appeal that the request for reconsideration was sent in a timely manner, or in the alternative, if the mail service delayed delivery, justice requires that the request be considered timely. However, the regulations are clear that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁰ Appellant's reconsideration request was therefore untimely filed. Thus, he must establish clear evidence of error in OWCP's November 15, 2013 decision.

The Board finds that appellant has not established clear evidence of error in OWCP's November 15, 2013 decision. In his request for reconsideration, appellant's counsel alleged that appellant was still disabled because he could not return to his date-of-injury position. The lay opinion of appellant's counsel has no evidentiary value regarding a medical issue.¹¹ Counsel's assertion thus does not show clear evidence of error in OWCP's November 15, 2013 decision, which was based upon the medical evidence of record.

Appellant's counsel also noted that appellant still required medical benefits. The November 15, 2013 decision, however, only terminated appellant's wage-loss compensation. Therefore, counsel's assertion does not establish error in the November 15, 2013 decision.

The arguments submitted on reconsideration do not raise a substantial question as to the correctness of OWCP's decision in its termination of appellant's wage-loss compensation benefits. Consequently, the Board finds that OWCP properly found that the untimely reconsideration request did not establish clear evidence of error.

On appeal, appellant's counsel alleges that OWCP based its decision on erroneous hearsay evidence regarding a nonexistent intervening injury, and that OWCP further mischaracterized Dr. Benz's reports which released appellant to full duty with no restrictions despite the reports stating that he was released as tolerated. However, he is arguing the merits of the case, of which the Board does not have jurisdiction.¹²

CONCLUSION

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

¹⁰ 20 C.F.R. § 10.607(a) (2011).

¹¹ See *Patricia Stanley*, Docket No. 92-1755 (issued August 20, 1993).

¹² 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board