



## ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant, through his attorney, argued that he was not late in filing his reconsideration request; that OWCP erred in not processing appellant's reconsideration request; and (3) that appellant has a substantive right to benefits because he submitted evidence that showed the nexus between his cancer or emotional condition and the hostile treatment he received at work.

## FACTUAL HISTORY

On October 31, 2006 appellant, then a 59-year-old readjustment counseling therapist, filed an occupational disease claim alleging that as a result of the continuous hostile employment environment caused by stressful interactions with his supervisor, he contracted prostate cancer, now in remission. In support of his claim, he submitted an October 25, 2006 report by Dr. Jay H. Lee, a Board-certified internist, wherein he diagnosed appellant with work stress. Appellant also submitted reports dated October 31 and November 13, 2006 by Dr. John C. Norton, a physician Board-certified in occupational medicine, wherein he diagnosed acute work stress disorder and acute cervical myofascial strain and trapezius muscle strain. He also submitted notes from the emergency department at Kaiser Permanente dated April 9, 2002.

By decision dated May 2, 2007, OWCP denied appellant's claim as the evidence did not establish that he sustained cancer or an emotional condition in the performance of his regular or specially assigned duties as a federal employee or that he was discriminated or retaliated against, abused or harassed as alleged. On May 12, 2007 appellant requested a telephonic hearing. By decision dated February 5, 2008, the hearing representative affirmed but modified OWCP's decision to reflect that, whereas appellant had established compensable factors of employment, denial was based upon lack of causal relationship rather than performance of duty. On May 18, 2008 appellant requested reconsideration. OWCP denied appellant's request for reconsideration was denied without merit review on June 10, 2008.

On June 5, 2009 appellant, through his attorney, submitted a document entitled "Claimant's **Resubmission** of his February 2009 Request for Reconsideration." (Emphasis in the original.) In this pleading, counsel contended that he filed a request for reconsideration with new medical records showing the nexus between appellant's injuries and the stress he experienced at work on February 2, 2009, but that, as nothing had been received from OWCP, he was "resubmitting" his reconsideration request. With this request, he resubmitted Dr. Norton's reports of October 31 and November 13, 2006, Dr. Lee's report of October 25, 2006 and medical records from Kaiser Permanente's Emergency Department.

By decision dated June 29, 2010, OWCP denied appellant's request for reconsideration, finding that it was not timely filed and did not demonstrate clear evidence of error.

## LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file an application for review within one year of the date of that decision.<sup>3</sup> 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.<sup>4</sup>

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>5</sup> Its regulations and procedure provide 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(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>8</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>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</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>11</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

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>5</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>6</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedure further provides 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. *Id.* at Chapter 2.1602.3c.

<sup>7</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>8</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>9</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> See *Leona D. Travis*, *supra* note 8.

<sup>11</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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>12</sup>

### ANALYSIS

The Board finds that as more than one year had elapsed from the date of issuance of the last merit decision in this case, *i.e.*, the February 5, 2008 decision denying appellant's claim, appellant's request for reconsideration filed on June 5, 2009 was not timely filed. Although appellant's attorney contends that he filed a request for reconsideration on February 2, 2009, there is no evidence in the record of this filing. Appellant has not submitted any official record showing that he timely filed his request for reconsideration on February 2, 2009 such as a receipt for certified mail nor any affidavit indicating a timely filing. There is no copy of a February 2, 2009 filing in the record, only the document labeled "Claimant's **Resubmission** of his February 2009 Request for Reconsideration." As there is nothing in the record suggesting a timely request for reconsideration of the February 5, 2008 decision, OWCP properly found that the claim was not timely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim.<sup>13</sup>

In this case, appellant's attorney alleged that he submitted new medical evidence on reconsideration. The Board notes that with his reconsideration request counsel submitted Dr. Norton's reports of October 31 and November 13, 2006, Dr. Lee's report of October 25, 2006 and medical records from Kaiser Permanente's Emergency Department. However, all of these documents had been in the record prior to the issuance of the May 2, 2007 merit decision by OWCP and were previously considered. These reports are therefore cumulative and duplicative in nature.<sup>14</sup> Accordingly, these documents do not establish that OWCP erred in denying appellant's claim and are insufficient to establish clear evidence of error.<sup>15</sup>

To establish clear evidence of error, appellant must submit evidence or argument that is positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>16</sup> The term clear evidence of error is intended to represent a difficult standard.<sup>17</sup> Appellant's request would have to establish on its face that OWCP's denial of appellant's claim was erroneous. Therefore, the Board finds that appellant has not established clear evidence of error in OWCP's decision of June 29, 2010.

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<sup>12</sup> *Leon D. Faidley, Jr., supra* note 4.

<sup>13</sup> 20 C.F.R. § 10.607(b).

<sup>14</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

<sup>15</sup> At oral argument, appellant's attorney contended that the medical reports submitted by appellant were sufficient to establish causal relationship as no evidence was submitted to counter these reports. As noted, the Board does not have jurisdiction over the merits of this appeal.

<sup>16</sup> *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>17</sup> *D.L.*, Docket No. 08-1057 (issued June 23, 2009).

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 29, 2010 is affirmed.

Issued: December 8, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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