



## **FACTUAL HISTORY**

On September 22, 1982 appellant, then a 28-year-old aircraft worker, injured his low back as he was lifting a canopy from a stand. OWCP accepted his claim for lumbar subluxations at L3-4, aggravation of herniated disc at L5-S1 and lumbar strain. Appellant worked intermittently and stopped on February 15, 1984.

By decision dated September 12, 1994, OWCP terminated appellant's compensation benefits effective that date. It found that the opinions of a multi-specialty panel consisting of Dr. Barry Friedman, a Board-certified orthopedic surgeon, Dr. David Hubbard, a Board-certified neurologist, and Dr. William Hughson, a Board-certified internist, who provided second opinion examinations, established that he had no further residuals of his September 22, 1982 work injury.

On September 23, 1994 appellant requested an oral hearing. In a decision dated February 5, 1996, an OWCP hearing representative affirmed the September 12, 1994 OWCP decision. On March 23, 1996 and April 21, 1997 appellant requested reconsideration and submitted additional medical evidence. In decisions dated May 23, 1996 and May 14, 1997, OWCP denied modification of the prior decision. On August 18, 1997, August 30, 1998 and July 18, 2003 appellant requested reconsideration and submitted additional medical evidence. In decisions dated December, 10, 1997, September 24, 1998 and October 29, 2003, OWCP denied appellant's reconsideration request finding that the request was insufficient to warrant merit review of the prior decision. In an October 25, 2005 decision, OWCP denied appellant's August 10, 2005 reconsideration request finding that the request was untimely filed and that it did not establish clear evidence of error.

On July 31, 2010 appellant requested reconsideration. He argued that OWCP made a clear error in terminating his benefits in 1994. Appellant noted that neither x-rays nor physician examinations were done to show a cessation of residuals of the accepted neck and thoracic injury prior to termination. He indicated that federal law required that benefits for a work injury cannot be stopped unless OWCP proves by the weight of the evidence that the injury no longer exists. Appellant requested OWCP provide documentation that his residuals of his accepted condition ceased.

Appellant submitted a Doctor's First Report of Occupational Injury or Illness from Dr. Debbie Goldring, a chiropractor, dated October 1, 1987, who noted that he sustained a low back injury on February 14, 1984 while working on an aircraft while at work. Dr. Goldring diagnosed cervical, thoracic sprain with neuritis, intervertebral disc syndrome and lumbosacral sprain with radiculitis bilaterally. Also submitted was a July 11, 1988 progress report from her, which noted that appellant was under active care and was showing slow improvement due to damaged spinal ligaments. Also submitted was an OWCP record of telephone call dated August 23, 1988 authorizing Dr. Goldring to perform chiropractic treatments pending a second opinion examination. All of these documents were previously of record.

Appellant was seen by Dr. Richard Thien Nguyen, a Board-certified internist, on April 23, 2008, to obtain a referral to a neurologist to follow up on an electromyogram performed in 2002. Dr. Nguyen diagnosed cervical spondylosis with myelopathy. Also submitted was a November 26, 2008 report from Dr. David E. Gaussoin, a chiropractor, who

treated appellant for low back pain caused by reaching overhead at work on February 14, 1984. Appellant reported a history of injury on February 14, 1984 and two other work-related back injuries in September and October 1982. Dr. Gaussoin noted reviewing x-rays and diagnosed lumbar subluxations at L3-4 and L4-5. He noted that appellant remained totally disabled as a result of the injuries sustained while employed at the employing establishment. Dr. Gaussoin opined that appellant's back condition began following the industrial accident on September 22, 1982 to his low back and that his condition was subsequently aggravated by the work-related accident on February 14, 1984. He noted that appellant was asymptomatic prior to the industrial injuries and that a 100 percent of appellant's injury involving the lower back was the result of the industrial injuries described while working. Dr. Gaussoin noted that the diagnosed subluxations at L3-4 and L4-5 that arose following the February 14, 1984 injury were treated successfully with chiropractic modalities.

Appellant also submitted correspondence through his congressional representatives dated April 30 and May 5, 2010 requesting assistance with his compensation claim. He reiterated a history of his claim and accepted injuries and asserted that OWCP wrongfully terminated his compensation based on a second opinion examination. Also submitted was an excerpt from the OWCP's procedure manual regarding the termination of benefits.

By decision dated August 13, 2010, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

### **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>2</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(a) provides that it will not review a decision unless the application for review is filed within one year of the date of that decision.<sup>3</sup> However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>4</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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>5</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>6</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>7</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>8</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>9</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>10</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>11</sup> As appellant's July 31, 2010 request for reconsideration was submitted more than one year after the most recent merit decision of May 14, 1997, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>12</sup>

Appellant's correspondence on reconsideration asserts that OWCP committed clear error in terminating his benefits for his accepted condition. As the reports of the second opinion physicians neither took x-rays nor performed an examination.<sup>13</sup> He asserted that benefits for a work injury cannot be stopped unless OWCP proves by the weight of the evidence that the injury no longer exists. While appellant addressed his disagreement with OWCP's decision to

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<sup>4</sup> *Id.*; *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>5</sup> *Annie L. Billingsley*, *supra* note 3.

<sup>6</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

<sup>10</sup> 20 C.F.R. § 10.607(a).

<sup>11</sup> *Robert F. Stone*, 57 ECAB 292 (2005);

<sup>12</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>13</sup> A review of Dr. Friedman's January 14, 1994 and Dr. Hubbard's February 24, 1994 reports indicates that each physician conducted a physical examination and reviewed the medical record which included diagnostic testing.

terminate his compensation benefits, his general allegations do not establish clear evidence of error as his arguments do not raise a substantial question as to the correctness of OWCP's decision. He has not established any specific error in OWCP's most recent merit decision that warrants a finding of clear evidence of error. Appellant did not explain how any of his arguments or any of the evidence of record raised a substantial question concerning the correctness of OWCP's decision.

The Board notes that the underlying issue is medical in nature and that, on reconsideration, appellant submitted a Doctor's First Report of Occupational Injury or Illness from Dr. Goldring dated October 1, 1987, a July 11, 1988 progress report from Dr. Goldring and an OWCP record of telephone call dated August 23, 1988. However, OWCP had previously considered this evidence and he, in submitting these documents, did not explain how this evidence was positive, precise and explicit in manifesting on its face that OWCP committed an error in terminating his benefits in 1994 because he had no residuals of his work injury. It is not apparent how resubmission of these documents is sufficient to raise a substantial question as to the correctness of the OWCP's decision.

Appellant submitted an April 23, 2008 report from Dr. Nguyen, who diagnosed cervical spondylosis with myelopathy. Also submitted was a November 26, 2008 report from Dr. Gaussoin, who reviewed appellant's history of treatment and noted that appellant remained totally disabled from work as a result of the injuries sustained at work. However, this report is insufficient to establish clear evidence of error. To establish clear evidence of error, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. The submission of 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>14</sup> This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. Consequently, the Board finds that Drs. Nguyen and Gaussoin's reports submitted on reconsideration are insufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error by OWCP in its September 12, 1994 decision.

The excerpt from OWCP's procedure manual does not establish that OWCP committed an error. Appellant has not explained how there was a breach of specific OWCP procedures that raises a substantial question as to the correctness of OWCP's decision

On appeal, appellant asserts that he was disabled due to his work injury when benefits were terminated and disagreed with the findings of the second opinion physician's who opined that his work-related condition had resolved. As discussed, however, he has not raised any argument or submitted any evidence sufficient to raise a substantial question regarding the correctness of OWCP's last merit decision. On appeal, appellant reiterated his arguments that OWCP failed to meet its burden of proof in terminating his benefits. The issue of whether there is clear evidence of error in OWCP's most recent merit decision is the only matter over which

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<sup>14</sup> *D.G.*, 59 ECAB 455 (2008); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

the Board has jurisdiction. As explained, appellant has not established clear evidence of error in OWCP's decision.

Appellant, therefore, has not submitted evidence on reconsideration that meets the standard for establishing clear evidence of error.

**CONCLUSION**

The Board finds that appellant's request for reconsideration dated July 31, 2010 was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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