



## **FACTUAL HISTORY**

This is the second appeal in the present case.<sup>2</sup> In a December 2, 1998 decision, the Board affirmed the decisions dated March 5 and August 2, 1996 denying appellant's claim for a recurrence of disability on November 20, 1995. The facts and circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.<sup>3</sup>

Thereafter, appellant submitted a copy of an October 7, 1994 OWCP decision reversing a December 18, 1993 decision denying his claim for compensation and a November 4, 1994 letter from OWCP accepting his claim for Hepatitis C. In a November 20, 1995 report, Dr. Frank Westmeyer, a family practitioner, noted treating appellant since 1992 for Hepatitis C. He stated that appellant's history of chronic fatigue was related to the Hepatitis C and opined that he was either cured or in prolonged remission. Dr. Westmeyer noted that until appellant's chronic fatigue was resolved, he would not have the endurance to work as a firefighter. Appellant submitted a February 8, 1996 letter from James A. Glover, assistant fire chief, who worked with appellant since 1981. Mr. Glover noted that in 1994 appellant reported that he did not feel safe fighting fires due to fatigue and was later terminated from employment because of an inability to perform his duties.

In a letter dated January 28, 2010, OWCP responded to appellant's telephone inquiry as to the status of his claim and advised him of his appeal rights.

On April 7, 2010 appellant requested reconsideration and contended that there had been clear evidence of error in his case. He referenced a March 3, 1996 decision in which a claims examiner concluded that he did not have any symptoms of his disease or disability for work. Appellant contended that this constituted evidence of error. He noted that at a June 9, 1994 hearing, he testified that he felt tired all the time and believed that his statement was misinterpreted by OWCP to mean that he never had any symptoms of his accepted Hepatitis C. Appellant advised that he had chronic Hepatitis C for 10 years without knowledge and underwent a liver biopsy on June 25, 1992 which revealed lobular and severe portal hepatitis, piecemeal necrosis with portal to portal bridging. He stated that his life was changed by his Hepatitis C.

By decision dated April 22, 2010, OWCP denied appellant's application for reconsideration on the grounds that the request was not timely and he did not establish clear evidence of error by OWCP.

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<sup>2</sup> On September 2, 1992 appellant, then a 38-year-old firefighter and emergency medical technician filed an occupational disease claim alleging that he developed Hepatitis C as a result of performing his work duties. OWCP accepted his claim for contraction of Hepatitis C.

<sup>3</sup> Docket No. 97-330 (issued December 2, 1998).

## LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.<sup>4</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 the Act.<sup>5</sup>

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 OWCP. The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.<sup>6</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 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>7</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>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</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>10</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>11</sup>

## ANALYSIS

In its April 22, 2010 decision, OWCP properly determined that appellant failed to file timely applications for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.<sup>12</sup> A right to reconsideration within one year also accompanies

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<sup>4</sup> 20 C.F.R. § 10.607(a).

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

<sup>6</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>7</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>8</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>12</sup> *Supra* note 4.

any subsequent merit decision on the issues, including a merit decision of the Board.<sup>13</sup> The most recent merit decision in this claim is the Board's December 2, 1998 decision. Appellant's request for reconsideration was dated April 7, 2010, more than one year after December 2, 1998. His reconsideration request was not timely filed.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. Appellant's April 7, 2010 request contended that, in a March 3, 1996 decision, a claims examiner incorrectly concluded that he did not have any symptoms of his accepted Hepatitis C condition and therefore had no disability from work. He noted that at a June 9, 1994 hearing, he testified that he felt tired all the time and OWCP misinterpreted his statement to mean that he did not have symptoms of his accepted condition. While appellant addressed his disagreement with OWCP's decision to deny his recurrence claim, his contentions do not establish clear evidence of error or raise a substantial question as to the correctness of OWCP's decision. The Board notes that the underlying issue is medical in nature. Appellant did not submit any new medical evidence sufficient to shift the weight of the evidence in his favor or establish that OWCP erred in denying his recurrence of disability beginning November 20, 1995. Therefore OWCP properly found that his statement of April 7, 2010 did not establish clear evidence of error.

Appellant submitted a copy of an October 7, 1994 OWCP decision reversing a December 18, 1993 determination denying his claim for compensation and a November 4, 1994 acceptance letter from OWCP. He also submitted a November 20, 1995 report from Dr. Westmeyer, who treated appellant since 1992 for Hepatitis C. Dr. Westmeyer noted appellant's history of chronic fatigue was related to Hepatitis C. He opined that appellant would not have the endurance to work as a firefighter until his chronic fatigue was resolved. Appellant submitted a February 8, 1996 letter from Mr. Glover, assistant fire chief, who noted that in 1994 appellant reported that he did not feel safe fighting fires due to fatigue and was later terminated from employment because of an inability to perform his duties. OWCP previously considered this evidence. Appellant did not address how this evidence was positive, precise and explicit in manifesting on its face that OWCP erred in denying his recurrence of disability beginning November 20, 1995. The resubmission of this evidence does not raise a substantial question as to the correctness of OWCP's decision.<sup>14</sup> The Board notes that 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>15</sup>

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision.

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

<sup>14</sup> Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error. *F.R.*, Docket No. 09-575 (issued January 4, 2010).

<sup>15</sup> *D.G.*, 59 ECAB 455 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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