

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated October 21, 2009, the Board affirmed an October 21, 2008 nonmerit decision denying appellant's request for reconsideration as it was not timely filed neither established clear evidence of error.³ By decision dated March 10, 2011, the Board affirmed a March 2, 2010 nonmerit decision denying his untimely request for reconsideration on the grounds that he failed to establish clear evidence of error.⁴ The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

On April 13, 2011 appellant requested reconsideration. He argued that OWCP failed to follow the October 24, 2003 instructions of OWCP's hearing representative to reinstate his compensation. Instead, OWCP paid appellant compensation for partial disability for four hours a day based on a loss of wage-earning capacity even though the position was not suitable or offered by the employing establishment. Appellant also asserted that OWCP improperly contacted the impartial medical examiner in violation of its procedures.

In support of his request for reconsideration, appellant submitted part of the October 24, 2003 decision by OWCP's hearing representative, who reversed OWCP decisions terminating his compensation for refusal of suitable work, affirmed reinstatement of compensation as already paid and remanded the case for a new impartial medical examiner regarding the extent of disability. He also submitted a copy of OWCP's calculation of its informal determination of his wage-earning capacity based on partial disability and a March 29, 2004 report of telephone call from a claims examiner indicating that he had contacted the impartial medical examiner's office several times to see when OWCP would receive a copy of the referee's report.

By decision dated July 19, 2011, OWCP denied appellant's request for reconsideration after finding that it was not timely filed and did not demonstrate clear evidence of error. It found that it had paid him compensation for disability as instructed by OWCP's hearing representative in the October 24, 2003 decision. OWCP determined that appellant's arguments regarding the wage-earning capacity finding were irrelevant to the issue of whether he sustained a recurrence of total disability beginning April 14, 2003. It further found that a claims examiner permissibly

³ Docket No. 09-435 (issued October 21, 2008). On July 29, 1985 appellant, then a 30-year-old letter carrier, sustained acute lumbar strain and a herniated disc at L5 in the performance of duty. He returned to part-time work on September 12, 2002 and received compensation from OWCP for two hours a day. By decision dated October 24, 2003, OWCP's hearing representative reopened appellant's case for review under 5 U.S.C. § 8128 and reversed OWCP decisions terminating his compensation for refusing suitable work. The hearing representative instructed OWCP to refer appellant for an impartial medical examination. OWCP paid appellant compensation for total disability from July 15, 2000 to September 6, 2002 and compensation for four hours a day effective September 6, 2002. By decision dated May 24, 2004, it found that he did not establish an employment-related recurrence of disability beginning April 16, 2003. OWCP continued to pay appellant compensation for four hours a day. On April 20, 2005 the hearing representative vacated the May 24, 2004 decision and remanded the case for clarification from Dr. Paul Liebert, a Board-certified orthopedic surgeon, regarding whether appellant sustained a recurrence of disability beginning April 16, 2003. Based on Dr. Liebert's opinion, by decisions dated November 29, 2005 and April 21, 2006, OWCP found that appellant did not establish a recurrence of disability beginning April 16, 2003.

⁴ Docket No. 10-1278 (issued March 10, 2011).

contacted the impartial medical examiner to determine when his report would be ready rather than to discuss substantive matters.

On appeal, appellant argued that he returned to an unsuitable position and that OWCP did not fully reinstate his compensation but instead paid him for a 50 percent loss of wage-earning capacity. Citing the OWCP procedure manual, he argued that a part-time wage-earning capacity determination was not appropriate as he was a full-time employee.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁵ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. OWCP will consider an untimely application only 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.⁶

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.⁷ 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 it committed an error.⁸

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁰ As appellant’s April 13, 2011 request for reconsideration was submitted more than one year after the last merit decision

⁵ *Supra* note 2.

⁶ 20 C.F.R. § 10.607.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

⁸ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁹ *Supra* note 6 at § 10.607(a).

¹⁰ *Robert F. Stone*, *supra* note 8.

April 21, 2006 it was therefore untimely. Consequently, he must establish clear evidence of error by OWCP in denying his claim for compensation.¹¹

Appellant argued that OWCP failed to reinstate his compensation as instructed by OWCP's hearing representative in an October 24, 2003 decision. He submitted a copy of the last page of the decision from the hearing representative remanding the case for an impartial medical examination regarding appellant's ability to perform work and reversing prior decisions terminating his compensation for refusal of suitable work. The hearing representative reinstated compensation as already paid. OWCP noted that it had paid appellant appropriate compensation. Further, the underlying issue in this case is whether OWCP clearly erred in finding that he did not establish an employment-related recurrence of disability beginning April 16, 2003. The hearing representative's findings in the October 24, 2003 decision are not relevant to the issue at hand. Evidence or argument not relevant to the issue decided by OWCP is insufficient to show clear evidence of error.¹²

Appellant further contended that OWCP erred when it paid him compensation for partial disability based on an unsuitable position that was not offered by the employing establishment. He submitted a copy of its informal reduction of his compensation based on its finding that he could work four hours a day. As noted, however, the issue is whether appellant was totally disabled due to his work injury as of April 16, 2003. He has not provided any evidence that OWCP erred in finding that he was not entitled to compensation for total disability.

Appellant also argued that OWCP improperly contacted Dr. Liebert, the impartial medical examiner. He submitted a March 29, 2003 notation by a claims examiner, who advised that he had contacted Dr. Liebert's office several times to find out when OWCP could expect a copy of the requested report. The Board has held that a report should be excluded if OWCP has telephone contact with a physician.¹³ OWCP's procedure manual provides that a referee report must be excluded if the claims examiner engages in verbal contact with Dr. Liebert regarding a substantive issue.¹⁴ There is no evidence, however, that the claims examiner spoke with the impartial medical examiner about any substantive matter. Consequently, appellant has not shown clear evidence of error.

On appeal, appellant argued that OWCP erred in failing to pay him compensation for total disability. He maintained that it should not have paid him compensation for a wage-earning capacity based on a part-time position. OWCP's procedure manual provides that a part-time position may not represent a claimant's wage-earning capacity unless the claimant worked part time on the date of injury.¹⁵ In this case, however, OWCP did not issue a formal wage-earning

¹¹ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹² See *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹³ See *Carlton L. Owens*, 36 ECAB 608 (1985) (the Board excluded the medical report obtained from an impartial medical specialist following telephone contact between the impartial specialist and OWCP personnel).

¹⁴ *Supra* note 7 at Claims, *Developing and Evaluating the Medical Evidence*, Chapter 2.810.12 (September 2010).

¹⁵ *Id.* at Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

capacity based on actual earnings but instead informally reduced his compensation. Additionally, as discussed, the underlying issue in this case is whether appellant has established a recurrence of total disability as of April 16, 2003. In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.¹⁶ The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁶ See *Veletta C. Coleman*, 48 ECAB 367 (1997).