

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

---

**B.W., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
U.S. COAST GUARD, Baltimore, MD, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 12-701  
Issued: August 15, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

On February 9, 2012 appellant filed a timely appeal from a September 23, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as it was untimely and did not establish clear evidence of error. The Board docketed the appeal as No. 12-701.<sup>1</sup>

The Board has reviewed the record on appeal and finds that the case must be remanded to OWCP for application of the appropriate standard of review to appellant's timely request for reconsideration of a May 16, 2008 schedule award decision. By decision dated July 8, 2004, OWCP granted him a schedule award for a 10 percent permanent impairment of the right lower extremity. In a merit decision dated February 10, 2005, it denied modification of its July 8, 2004

---

<sup>1</sup> Appellant submitted a timely request for oral argument before the Board under 20 C.F.R. § 501.5(b). Pursuant to 20 C.F.R. § 501.5(a), oral argument may be held in the discretion of the Board. The Board has duly considered the matter and finds that his request for oral argument is denied. The Board finds that oral argument would delay issuance of a Board decision and would not serve a useful purpose. Appellant's contentions are addressed in this decision based on the record as submitted.

decision.<sup>2</sup> On October 26, 2007 OWCP denied appellant's request for reconsideration of the February 10, 2005 decision after finding it untimely and not sufficient to demonstrate clear evidence of error. In November 2007, appellant appealed the October 26, 2007 decision to the Board. By decision dated May 16, 2008, OWCP denied his claim for a schedule award for the upper extremities.<sup>3</sup>

On May 23, 2008 appellant made a timely request for reconsideration of the May 16, 2008 schedule award decision finding that he had not established a permanent impairment of the upper extremity. OWCP, however, informed him that, as the schedule award issue was presently before the Board, it could not take any action on his request.

On February 17, 2009 appellant questioned why OWCP could not consider his May 23, 2008 request for reconsideration given that it had issued the May 16, 2008 decision while his appeal of the October 26, 2007 decision was pending before the Board. On December 23, 2009 he noted that he had requested reconsideration of the May 16, 2008 decision on May 23, 2008. On May 29, 2010 and September 12, 2011 appellant again requested reconsideration of the May 16, 2008 decision.<sup>4</sup> He referenced his previously submitted request for reconsideration on May 23, 2008.

By decision dated September 23, 2011, OWCP denied appellant's request for reconsideration as it was untimely and insufficient to establish clear evidence of error.

The Board finds that appellant timely requested reconsideration of the May 16, 2008 decision on May 23, 2008. In its September 23, 2011 decision, OWCP determined that he was requesting reconsideration of the last merit decision issued, which it found was the Board's August 15, 2008 decision affirming a nonmerit denial of reconsideration. Appellant, however, clearly requested that OWCP adjudicate his timely request for reconsideration of the May 16, 2008 schedule award decision.<sup>5</sup> As his May 23, 2008 request for reconsideration was made within a year of the May 16, 2008 decision, it was timely. In its September 23, 2011 decision, OWCP applied the clear evidence of error standard. This standard is the appropriate standard

---

<sup>2</sup> In a nonmerit decision November 1, 2004, OWCP denied appellant's request for reconsideration of the July 8, 2004 decision. On August 1, 2006 it denied his request for reconsideration of the February 10, 2005 decision as it was untimely and insufficient to show clear evidence of error. Appellant appealed to the Board. In an order dated February 9, 2007, the Board vacated the August 1, 2006 decision after finding that OWCP failed to transmit the case record for review. Docket No. 06-1852 (issued February 9, 2007).

<sup>3</sup> In a decision dated August 15, 2008, the Board affirmed the October 26, 2007 nonmerit decision. Docket No. 08-331 (issued August 15, 2008); *petition for recon. denied*, Docket No. 08-331 (issued May 5, 2009).

<sup>4</sup> On May 29, 2010 appellant requested reconsideration of a purported June 24, 2009 decision; however, there is no decision on that date under this file number.

<sup>5</sup> OWCP found that it could not consider appellant's May 23, 2008 request for reconsideration as he had appealed to the Board. However, at the time of his May 23, 2008 request for reconsideration, he had appealed OWCP's October 26, 2007 nonmerit decision denying his request for reconsideration of its finding regarding the extent of his right lower extremity impairment. Appellant's May 23, 2008 request for reconsideration was on a separate issue, the question of whether he had a permanent impairment of an upper extremity. Consequently, OWCP and the Board did not have concurrent jurisdiction over the same issue in a case. 20 C.F.R. § 10.626; *see also Douglas E. Billings*, 41 ECAB 880 (1990).

only for cases in which a reconsideration request is untimely filed.<sup>6</sup> Since OWCP erroneously reviewed the request for reconsideration under the clear evidence of error standard, the Board will remand the case to OWCP for application of the standard for reviewing a timely request for reconsideration set forth at 20 C.F.R. § 10.606(b)(2).<sup>7</sup> After such development as OWCP deems necessary, it should issue an appropriate decision.

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 23, 2011 is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: August 15, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

---

<sup>6</sup> See *Donna M. Campbell*, 55 ECAB 241 (2004).

<sup>7</sup> Section 10.606(b)(2) provides that an application for reconsideration must show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or include the submission of relevant and pertinent new evidence not previously considered by OWCP. 20 C.F.R. § 10.606(b)(2).