

FACTUAL HISTORY

This case has previously been before the Board. By decision dated April 5, 1990, the Board affirmed an August 9, 1989 schedule award decision.³ In a decision dated March 10, 1999, the Board affirmed an August 10, 1996 decision finding that appellant did not establish a recurrence of disability on March 16, 1989 and a November 13, 1996 decision denying his request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).⁴ By decision dated October 22, 2002, the Board affirmed the March 14 and November 29, 2001 and March 5, 2002 OWCP decisions denying his request for further merit review.⁵ On May 2, 2005, October 21, 2009 and July 19, 2011, the Board affirmed OWCP decisions denying appellant's requests for reconsideration on the grounds they were not timely filed and did not show clear evidence of error.⁶ The facts and circumstances of the case as set forth in the prior decisions are hereby incorporated by reference.

On January 30, 2012 appellant requested reconsideration. He argued that OWCP erred in its August 10, 1996 decision by failing to make factual findings regarding whether the employing establishment withdrew his modified employment. Appellant asserted that the employing establishment withdrew his job when it changed his July 6, 1988 work assignment. He maintained that OWCP found that he worked additional duties from November 5, 1988 to March 16, 1989 and thus should have determined that the employing establishment withdrew his limited-duty position. Appellant alleged that his physician did not sign a job offer dated March 1, 1989 as he found that it was outside his work restrictions.

By decision dated February 3, 2012, OWCP denied appellant's request for reconsideration after finding that it was untimely and failed to establish clear evidence of error.

On appeal, appellant argued that OWCP, in its August 10, 1996 decision, failed to consider whether the employing establishment withdrew an offer of limited-duty work. He asserts that OWCP found that his work assignment changed from November 5, 1988 through March 16, 1989. Appellant maintained that his physician refused to approve a March 1, 1989 job offer with increased duties.

³ Docket No. 90-321 (issued April 5, 1990).

⁴ Docket No. 97-670 (issued March 10, 1999). OWCP accepted appellant's occupational disease claim for left carpal tunnel syndrome. Appellant returned to limited-duty employment on November 5, 1988 but resigned from work on March 16, 1989 because he did not want to work his assigned schedule. On June 19, 1989 the employing establishment terminated his employment due to his failure to report for work. The Board found that the employing establishment did not require appellant to work outside his restrictions and that the medical evidence did not establish that he was disabled from his modified employment.

⁵ Docket No. 02-1032 (issued October 22, 2002).

⁶ Docket No. 10-2320 (issued July 19, 2011); Docket No. 09-151 (issued October 21, 2009); Docket No. 04-757 (issued May 2, 2005). On January 25, 2010 the Board denied appellant's petition for reconsideration of its July 19, 2011 decision. *Order Denying Petition for Reconsideration*, Docket No. 10-2320 (issued January 25, 2012).

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁷ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁹ Its procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

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 OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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 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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹⁴

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

⁷ *Supra* note 1.

⁸ 20 C.F.R. § 10.607; *see also* *Alan G. Williams*, 52 ECAB 180 (2000).

⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁰ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[OWCP] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

¹³ *Id.*

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

begins on the date of the original OWCP decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ As appellant's January 30, 2012 request for reconsideration was submitted more than one year after March 10, 1999, the date of the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁷

On reconsideration, appellant argued that, in its August 10, 1996 decision, OWCP failed to adjudicate whether the employing establishment withdrew his limited-duty employment. He further contended that his July 6, 1988 work assignment changed and that his physician refused to sign a job offer dated March 1, 1989 as it was outside his physical limitations. In its August 10, 1996 decision, however, OWCP concluded that the evidence was insufficient to show that appellant performed work duties outside his physical limitations. It found that, while he might have performed duties not specifically listed in the job offer, these duties were within his work restrictions. OWCP declined to address appellant's arguments regarding the wording of the job offer as it had been approved in 1988 and as he had worked in the position until March 16, 1989. It further considered the medical evidence and determined that it was insufficient to show that he was disabled from his limited-duty employment. On March 10, 1999 the Board affirmed OWCP's August 10, 1996 decision.¹⁸ The Board found that there was no evidence that appellant worked outside his restrictions and that the medical evidence was insufficient to show that he was disabled from his light-duty position beginning March 16, 1989. Absent further merit review of this issue by OWCP pursuant to section 8128, these issues are *res judicata*.¹⁹

On appeal, appellant again contends that OWCP did not consider whether the employing establishment withdrew his limited-duty assignment and found that his work assignment changed from November 5, 1988 through March 16, 1989. He also argues that his physician did not sign a March 1, 1989 job offer. As discussed, the issue of whether appellant's limited-duty job was withdrawn and whether the medical evidence established disability were addressed in OWCP's merit decision of August 10, 1996 and affirmed by the Board in the last merit decision of record dated March 10, 1999. Without further merit review of these issues, this is not before the Board.²⁰

As the arguments raised by appellant are insufficient to raise a substantial question as to the correctness of OWCP's last merit decision, he has not established clear evidence of error.²¹

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Robert F. Stone*, 57 ECAB 292 (2005).

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

¹⁸ Docket No. 97-670 (issued March 10, 1999).

¹⁹ *See Robert G. Burns*, 57 ECAB 657 (2006); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

²⁰ *Id.*

²¹ *See Veletta C. Coleman*, *supra* note 9.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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