



## **FACTUAL HISTORY**

This case was previously before the Board. By decision dated August 3, 2011, the Board affirmed a September 22, 2010 nonmerit decision of OWCP which denied appellant's reconsideration request on the grounds it was untimely filed and failed to present clear evidence of error.<sup>3</sup> The findings of fact and conclusions of law from the prior decision and order are hereby incorporated by reference. The relevant facts are set forth.

On February 2, 2006 appellant, then a 59-year-old criminal investigator, filed an occupational disease claim alleging that factors of his federal employment had aggravated his post-traumatic stress syndrome (PTSD) for the period beginning September 11, 2001.

By decision dated December 22, 2006, OWCP denied the claim on the grounds that the medical evidence failed to establish that the accepted compensable factor of employment had aggravated or contributed to appellant's emotional condition. It found that his presence at the Pentagon to provide counter intelligence support for one day in the aftermath of the September 11, 2001 attacks was a compensable factor of employment under *Cutler*. By decision dated July 5, 2007, an OWCP hearing representative affirmed the prior decision.

On August 30, 2010 appellant, through his legal counsel, requested reconsideration of the denial of his claim and submitted a July 16, 2009 report from James Medling, Ph.D., a clinical psychologist. By decision dated September 22, 2010, OWCP denied appellant's request for reconsideration finding it was not timely filed and failed to present clear evidence of error. As noted, in an August 3, 2011 decision, the Board affirmed the September 22, 2010 decision.<sup>4</sup>

On September 6, 2011 appellant, through counsel of record, again requested reconsideration of OWCP's July 5, 2007 decision. Counsel cited the case of *T.S.*, Docket No. 10-1362 (issued April 26, 2011), in which OWCP terminated appellant's wage-loss and medical compensation benefits. The Board found that appellant established clear evidence of error on the part of OWCP when it failed to provide an accurate statement of accepted facts to both the second opinion physician and the impartial medical examiner with regard to appellant's accepted medical conditions as they did not have the complete information to make a reasoned and informed opinion. Appellant's counsel argued that, since the Board found that there was a compensable factor of employment in this case, the case should have been further developed by OWCP to resolve the causal relationship issue.

By decision dated September 19, 2011, OWCP denied reconsideration on the grounds that appellant's request was untimely filed and did not present clear evidence of error. It found that the case of *T.S.* was not relevant to the claim.

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<sup>3</sup> Docket No. 11-62 (issued August 3, 2011).

<sup>4</sup> *Id.*

## LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or his application for review within one year of the date of that decision.<sup>5</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 FECA.<sup>6</sup>

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>7</sup> OWCP regulations and procedure provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> 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.<sup>13</sup>

## ANALYSIS

In its September 19, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on July 5, 2007. Appellant's request for reconsideration was dated September 6, 2011, more than one year after July 5, 2007. Accordingly, his request for reconsideration was not timely filed. Appellant must

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>8</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide, 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 that a schedule award was miscalculated).

<sup>9</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>12</sup> *See Leona N. Travis*, *supra* note 10.

<sup>13</sup> *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

therefore demonstrate clear evidence of error on the part of OWCP in issuing its July 5, 2007 decision.

Appellant's request for reconsideration does not establish clear evidence of error. OWCP denied his claim on the grounds that the medical evidence did not establish that his emotional condition was causally related to compensable work factors. While appellant subsequently submitted a report from Dr. Medling, OWCP found, and the Board affirmed, that Dr. Medling's report was insufficient to establish clear evidence of error. In an emotional condition claim, appellant's burden of proof is not discharged when a compensable work factor is established. He must also submit rationalized medical evidence to establish that his emotional condition is causally related to the accepted compensable employment factor.<sup>14</sup> In this case, appellant never discharged his burden of proof to establish that his emotional condition was causally related to the accepted compensable work factor. The Board previously affirmed OWCP's finding that Dr. Medling's report was insufficient to establish clear evidence of error. It is not enough to point out that there may be a theoretical possibility of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.

This case is distinguishable from the facts in *T.S.*, where the Board found clear evidence of error as OWCP did not provide accurate information to the physicians on which a termination of compensation was based. In this case, the underlying issue is not termination of benefits, as appellant never met his burden of proof to establish his claim. There is no evidence that OWCP provided inaccurate information about any significant aspects of the claim. Appellant's assertions do not raise a substantial question concerning the correctness of OWCP's decision. He has not established clear evidence of error.

On appeal, appellant's counsel asserts OWCP's decision is contrary to fact and law. However, for the reasons articulated herein, appellant has not established clear evidence of error.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

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<sup>14</sup> *Charles D. Gregory*, 57 ECAB 322 (2006).

**ORDER**

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

Issued: June 1, 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