

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

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**R.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
San Diego, CA, Employer**

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**Docket No. 11-1721  
Issued: March 20, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 19, 2011 appellant filed a timely appeal from a January 27, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as it was untimely filed and failed to establish clear evidence of error. Because more than one year elapsed from the last OWCP merit decision of June 21, 2006 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

On appeal, appellant contends that he cooperated fully with vocational rehabilitation in 2005 but that his physicians had not released him to return to work. He submitted new evidence accompanying his request for appeal.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case was previously before the Board. OWCP issued a June 21, 2006 merit decision reducing appellant's wage-loss compensation to zero as he failed to comply with preliminary vocational rehabilitation efforts beginning in 2005. Appellant requested reconsideration on September 9, 2008. OWCP denied the request by nonmerit decision issued on October 1, 2008 on the grounds that it was untimely filed and failed to present clear evidence of error. By decision dated September 30, 2009,<sup>2</sup> the Board affirmed the October 1, 2008 nonmerit decision. The law and the facts of the case as set forth in the Board's prior decision are incorporated by reference.

In November 23, 2009 and January 14, 2010 reports, Dr. Noah C. Johnson, an attending Board-certified family practitioner, opined that appellant could return to a modified-duty position.<sup>3</sup> Based on Dr. Johnson's opinion that appellant was no longer totally disabled for work, OWCP referred appellant for vocational rehabilitation in February 2010. Appellant attended an OWCP-approved computer training course from July to October 2010 and continuing.

In an October 25, 2010 letter, received by OWCP on October 29, 2010, appellant requested reconsideration. He contended that he could not participate in vocational rehabilitation in 2005 as Dr. Johnson did not release him from care. Appellant submitted a September 27, 2010 letter from Dr. Johnson stating that he had not released appellant from care and that he was not "physically able to participate in work or Vocational Rehabilitation program for the periods of November 2005 through June 2008."

By decision dated January 27, 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 his October 29, 2010 request was not filed within one year of its June 21, 2006 decision, the final merit decision in the case. OWCP further found that Dr. Johnson's September 27, 2010 letter was insufficient to establish clear evidence of error as it was irrelevant. Dr. Johnson did not address any deficiency in the report of Dr. Thomas Sabourin, a second opinion physician, on whom OWCP relied in determining that appellant could return to work in 2005.

## **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>4</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>5</sup> This section vests OWCP with discretionary authority to determine whether

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<sup>2</sup> Docket No. 09-622 (issued September 30, 2009). During the pendency of the prior appeal, appellant submitted medical reports, grievance documents and letters asserting that he wished to return to work

<sup>3</sup> Appellant submitted periodic treatment notes from Dr. Johnson and Dr. Ian Purcell, an attending Board-certified neurologist, dated from September 25, 2009 through January 12, 2011. These reports address appellant's condition from September 25, 2009 onward.

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

it will review an award for or against compensation.<sup>6</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP 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.<sup>7</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to OWCP under 5 U.S.C. § 8128(a).<sup>8</sup>

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>9</sup> OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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 by OWCP.<sup>15</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>16</sup>

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<sup>6</sup> *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>7</sup> 20 C.F.R. §§ 10.607, 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>8</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 5, *Jesus D. Sanchez*, *supra* note 6.

<sup>9</sup> *Supra* note 5.

<sup>10</sup> 20 C.F.R. § 10.607(b).

<sup>11</sup> *Supra* note 5.

<sup>12</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *Jesus D. Sanchez*, *supra* note 6.

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>16</sup> *Gregory Griffin*, *supra* note 7

### ANALYSIS

In its January 27, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on June 21, 2006. Appellant's request for reconsideration was received on October 29, 2010, more than one year after June 21, 2006. Accordingly, his request for reconsideration was not timely filed.

In his October 25, 2010 letter, appellant contended that he did not cooperate with vocational rehabilitation in 2005 as Dr. Johnson, an attending Board-certified family practitioner, had not released him to work. The Board finds that appellant's October 25, 2010 letter does not raise a substantial question as to whether OWCP's June 21, 2006 decision was in error or shift the weight of the evidence in her favor. Therefore, it is insufficient to establish clear evidence of error. Dr. Johnson's September 27, 2010 letter is irrelevant to the claim as it did not discuss any deficiency in the opinion of Dr. Sabourin, a second opinion physician, on whose reports OWCP relied in finding appellant able to return to work in 2005. Dr. Johnson merely expressed a contrary opinion, which is insufficient to establish clear evidence of error.<sup>17</sup>

Appellant has not 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 June 21, 2006 decision. Consequently, OWCP properly denied appellant's reconsideration request as his request does not establish clear evidence of error.

On appeal, appellant contends that he cooperated fully with vocational rehabilitation in 2005 but that his physicians had not released him to return to work. As stated, the evidence submitted was not sufficient to establish that OWCP erred in its June 21, 2006 decision. Regarding the new medical evidence appellant submitted accompanying his request for appeal, the Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the last merit decision in the case. Such evidence may be submitted to OWCP pursuant to a valid request for reconsideration.<sup>18</sup>

### CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

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<sup>17</sup> *Supra* note 12.

<sup>18</sup> 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 27, 2011 is affirmed.

Issued: March 20, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board