



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> By decision dated August 14, 2008, the Board reversed an October 12, 2006 decision terminating appellant's compensation benefits effective June 12, 2005 on the grounds that he refused an offer of suitable work.<sup>4</sup> The Board found that OWCP had not established that he refused suitable work as he returned to work on June 11, 2005. The facts and the circumstances surrounding the prior decision of the Board are hereby incorporated by reference.

By decision dated September 9, 2008, OWCP granted appellant schedule awards for a 50 percent permanent impairment of each lower extremity. The period of the awards ran from November 30, 2005 to June 7, 2011 for a total of 288 weeks.

In a decision dated October 14, 2008, OWCP found that appellant had not established a recurrence of disability beginning June 12, 2005 causally related to his November 4, 1996 employment injury. In a June 1, 2009 decision, a hearing representative affirmed the October 14, 2008 decision. He found that the medical evidence was insufficient to establish that appellant was disabled from his limited-duty employment as of June 12, 2005.

On December 28, 2009 appellant filed an appeal from the June 1, 2009 decision to the Board; however, the Board dismissed the appeal as it was not made within 180 days of the date of OWCP's decision.<sup>5</sup>

By letter dated May 28, 2010, appellant informed OWCP that he wished to appeal the prior decision. In a June 9, 2010 response, OWCP noted that he had previously filed an appeal with the Board that was dismissed and advised him that his only appeal right was to request reconsideration. On June 23, 2010 appellant requested that OWCP review his appeal and inform him whether he could remain on compensation if he was still disabled. He also asked that OWCP explain why he was removed from the periodic rolls.

In a letter received on June 6, 2011, appellant requested reconsideration. He argued that OWCP stopped his compensation based on incorrect information by Dr. Menachem M. Meller, a Board-certified orthopedic surgeon. Appellant contended that the claims examiner took him off compensation after telling him that he would be entitled to it as long as he remained disabled. He maintained that his attending physician, Dr. Bruce Vannett, a Board-certified orthopedic surgeon, found that he could no longer work.

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<sup>3</sup> Docket No. 06-742 (issued August 14, 2008). In an August 28, 2005 order remanding case, the Board set aside decisions denying appellant's compensation under 5 U.S.C. § 8106(c), denying his schedule award claim and finding that he did not establish a recurrence of disability. The Board found that the case record as assembled was incomplete and that it was thus unable to render an informed adjudication.

<sup>4</sup> OWCP accepted that on November 4, 1996 appellant, then a 61-year-old mailhandler, sustained bilateral knee contusions and bilateral primary osteoarthritis of the lower leg in the performance of duty.

<sup>5</sup> Order Dismissing Appeal, Docket No. 10-580 (issued April 5, 2010).

By decision dated June 13, 2011, OWCP denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

On appeal, appellant argues that OWCP erred in finding that his prior appeal to the Board was made in January 2010 and was untimely. He maintains that OWCP erroneously stopped his compensation and listed dates of actions taken by OWCP prior to the Board's August 14, 2008 decision.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>6</sup> 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 OWCP's decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

### **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 OWCP decision.<sup>10</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>11</sup> On May 28, 2010 appellant informed OWCP that he wanted to appeal its prior decision. OWCP advised him on June 9, 2010 to file a request for reconsideration, but he did not request reconsideration until June 6, 2011. As appellant's June 6, 2011 request for reconsideration was submitted more than

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<sup>6</sup> 5 U.S.C. § 8101 *et seq.*

<sup>7</sup> 20 C.F.R. § 10.607.

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

<sup>9</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>10</sup> 20 C.F.R. § 10.607(a).

<sup>11</sup> *Robert F. Stone*, *supra* note 9.

one year after 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.<sup>12</sup>

Appellant maintained that OWCP relied upon incorrect evidence from Dr. Meller in failing to pay him compensation.<sup>13</sup> He further argued that Dr. Vannett, his attending physician, found that he was totally disabled. The relevant issue, however, is whether the medical evidence established that appellant sustained a recurrence of disability beginning June 12, 2005 causally related to the November 4, 1996 employment injury. As this issue is medical in nature, it can only be resolved through the submission of medical evidence.<sup>14</sup> Appellant's lay opinion regarding the weight of the medical evidence is not relevant as the Board has held that lay individuals are not competent to render a medical opinion.<sup>15</sup> Consequently, his contentions are insufficient to establish clear evidence of error by OWCP.

On appeal appellant alleges that OWCP erred in finding the date of his prior appeal to the Board was January 2010. In the prior appeal, the Board dismissed his appeal of a June 1, 2009 decision after finding that his December 28, 2009 appeal was untimely as it was not made within 180 days. Any error by OWCP in listing the date of the prior appeal is harmless as it does not alter the disposition of the case. Appellant further asserts that OWCP erroneously removed him from compensation and cites actions taken prior to its October 12, 2006 decision terminating his compensation for refusing suitable work. The issue currently on appeal, however, is whether he has established clear evidence of error in OWCP's finding that he did not establish a recurrence of disability on June 12, 2005 due to his November 4, 1996 employment injury. As the evidence submitted by appellant is insufficient to shift the weight of evidence in his favor and raise a substantial question as to the correctness of OWCP's last merit decision, he has not established clear evidence of error.<sup>16</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely and insufficient to establish clear evidence of error.

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<sup>12</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>13</sup> On September 22, 2009 appellant underwent a left knee removal an antibiotic spacer insertion due to a left knee infection. The issue before the Board is whether he has established clear evidence of error in OWCP's finding that he did not establish an employment-related recurrence of disability beginning June 12, 2005. The issue of whether he has any disability due to his September 22, 2009 surgery is not before the Board.

<sup>14</sup> *George C. Vernon*, 54 ECAB 319 (2003).

<sup>15</sup> *Gloria J. McPherson*, 51 ECAB 441 (2000).

<sup>16</sup> See *Veletta C. Coleman*, 48 ECAB 367 (1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 13, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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