



## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

## FACTUAL HISTORY

This case was previously before the Board. By decision dated March 11, 2011, the Board affirmed a March 11, 2010 nonmerit OWCP decision which found that it properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).<sup>3</sup> In another decision dated August 8, 2011, the Board denied his petition for reconsideration of the March 11, 2011 Board decision.<sup>4</sup> The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

On September 14, 2011 appellant submitted a request for an oral hearing.

In a decision dated November 10, 2011, an OWCP hearing representative denied appellant's request for an oral hearing. He found that the Board previously issued an August 8, 2011 decision regarding appellant's request for reconsideration. The hearing representative determined that the Branch of Hearings and Review did not have jurisdiction to review decisions of the Board. OWCP also exercised its discretion and determined that the issue in this case could equally well be addressed by requesting reconsideration from OWCP.

On November 22, 2011 appellant filed a request for reconsideration alleging again that on March 24, 2008 he sustained a lower back injury while he was on the clock and reasonably fulfilling the duties of his limited-duty assignment.

Appellant submitted various e-mails from his employing establishment discussing his return to work status regarding when he was authorized to return to work and his work restrictions.

Appellant also submitted a deposition transcript of Victor Arroyo, appellant's supervisor, regarding an Equal Employment Opportunity Commission (EEOC) complaint that he filed. Mr. Arroyo described appellant's duties under the April 13, 2007 limited-duty job offer and acknowledged that he received appellant's medical restrictions.

Appellant also resubmitted the April 13, 2007 limited-duty job offer, Dr. Arroyo's February 20, 2008 report which determined that the job offer was within his restrictions,

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<sup>3</sup> Docket No. 10-1567 (issued March 11, 2011). On March 27, 2008 appellant, then a 54-year-old electronic technician, filed a traumatic injury claim alleging that on March 24, 2008 he sustained a lower back injury when he bent down to retrieve his bag from his toolbox in the locker room. By decisions dated May 13 and December 15, 2008, OWCP denied his claim finding insufficient evidence to establish that he sustained a back injury causally related to the March 24, 2008 employment incident. In a decision dated November 16, 2009, OWCP modified its December 15, 2008 decision and denied appellant's claim finding that he was not performing any work-related duties at the time of the March 24, 2008 incident.

<sup>4</sup> Docket No. 10-1567 (issued August 8, 2011).

appellant's various narrative statements, a March 4, 2008 letter from appellant refusing the offer for modified assignment because it was not reasonably accommodating, a March 27, 2008 OWCP letter informing him that his limited-duty job offer was found suitable and that he had 30 days from the date of the letter to either accept or deny the job offer and a May 17, 2007 employee assignment sheet.

By decision dated February 27, 2012, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file 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 time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>6</sup> OWCP may still reopen a claimant's case for merit review, even if the claimant's applications was not filed within the one-year time limitation, if claimant's application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>7</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> The evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>10</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.<sup>11</sup> In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>12</sup> The Board makes an

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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 (1989).

<sup>7</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

<sup>8</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>9</sup> *Id.*

<sup>10</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>11</sup> *Id.*

<sup>12</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

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.<sup>13</sup>

### **ANALYSIS**

In its February 27, 2012 decision, OWCP properly determined that appellant failed to file a timely application for merit review. It had issued its most recent merit decision on November 16, 2009. Appellant's request for reconsideration was dated November 22, 2011, more than one year after November 16, 2009. Accordingly, his request for reconsideration was not timely filed. Appellant must therefore demonstrate clear evidence of error on the part of OWCP in issuing its November 16, 2009 decision.

The Board finds that appellant's request for reconsideration does not establish clear evidence of error. OWCP denied his traumatic injury claim on the grounds that the record did not establish that the March 24, 2008 employment incident occurred in the performance of duty as he was not performing any duty or function required by his employment in connection with his alleged injury. The record reveals that appellant had refused an offer of limited duty and was not expected to report to work at the time of the March 24, 2008 employment incident. In support of reconsideration request, appellant submitted e-mails from his employing establishment and EEOC deposition transcripts regarding his medical restrictions and ability to return to limited duty. This evidence, however, is insufficient to establish that OWCP erred in denying appellant's claim as it does not raise a substantial question as to the correctness of OWCP's decisions. Appellant asserts that he was asked to report to work. This assertion alone does not demonstrate clear evidence of error on the part of OWCP.<sup>14</sup> None of the evidence, including the documents submitted with the untimely request for reconsideration, demonstrated that he actually was working on March 24, 2008 or performing any duties required by his employment at the time of the incident.

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 November 16, 2009 decision. Consequently, OWCP properly denied his reconsideration request as his request does not establish clear evidence of error.

### **CONCLUSION**

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

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<sup>13</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

<sup>14</sup> *See D.W.*, Docket No. 08-2318 (issued May 20, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 27, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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