



## **FACTUAL HISTORY**

On May 24, 2007 OWCP accepted that appellant sustained post-traumatic stress disorder due to his employment as a supervisory personnel management specialist.

On September 23, 2008 appellant filed a claim for wage-loss compensation Form CA-7 commencing December 12, 2005. Medical records dated August 29, 2001 to March 16, 2010 addressed his emotional conditions and work capacity.

In a February 7, 2011 decision, OWCP denied appellant's claim for compensation commencing December 12, 2005. It found that the medical evidence was not contemporaneous to the claimed period of disability and did not address his disability during this period. The attached notice of appeal rights advised that any request for reconsideration had to be received within one calendar year of the date of the decision.

By letter dated May 7, 2011, appellant requested reconsideration.

In an August 11, 2011 decision, OWCP denied his request for reconsideration, finding that he did not show that OWCP erroneously applied or interpreted a point of law, advance a point of law not previously considered by OWCP or include pertinent new and relevant evidence sufficient to warrant merit review of its prior decision.

In an appeal request form dated February 6, 2012 and received by OWCP on February 10, 2012, appellant requested reconsideration of the February 7, 2011 merit decision. He submitted additional evidence which included an undated medical report from Dr. Eric W. Garby, an attending Board-certified psychiatrist, and a February 4, 2012 report from Dr. William G. Campbell, a Board-certified psychiatrist, which addressed the treatment and cause of his emotional conditions.

In a February 15, 2012 decision, OWCP denied appellant's request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated February 7, 2011. It found that his February 6, 2012 request was not received until February 10, 2012. OWCP further found that the submitted medical evidence did not address the basis on which appellant's claim was denied on February 7, 2011.

## **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>2</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>3</sup>

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<sup>2</sup> 20 C.F.R. § 10.607(a).

<sup>3</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>4</sup> OWCP regulations and procedures 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>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>6</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>7</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>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> 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>10</sup> 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 *prima facie* 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>11</sup>

OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.<sup>12</sup> OWCP procedures, however, provide that, for decisions issued on or after June 1, 1987 through August 28, 2011, the one-year period begins on the date of the original decision and the

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<sup>4</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>5</sup> *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide that 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). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

<sup>6</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>7</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>8</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>9</sup> See *supra* note 7.

<sup>10</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>11</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>12</sup> 20 C.F.R. § 10.607.

application for reconsideration must be mailed to OWCP within one year of the date of OWCP's decision for which review is sought.<sup>13</sup>

### ANALYSIS

In its most recent merit decision dated February 7, 2011, OWCP denied appellant's claim for wage-loss compensation commencing December 12, 2005. The one-year time limitation for reconsideration began to run on the date following the date of that decision. Therefore, as the statement of appeal rights attached to the February 7, 2011 decision advised, appellant had one year from February 7, 2011 to submit a timely request for reconsideration to OWCP.<sup>14</sup>

As the decision was issued on February 7, 2011, appellant's appeal rights attached at that time and the regulations in place on the date of the February 7, 2011 decision should be determinative as to whether his appeal request was timely filed. At the time that OWCP's February 7, 2011 decision was issued, OWCP's regulations provided that a request must be sent within one year of the date of OWCP's decision for which review was sought. If submitted by mail, the regulations provide that the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed.<sup>15</sup> These procedures provided that if the postmark or other evidence establishing the date of mailing was not available, the date of the letter itself should be used.<sup>16</sup> The Board finds that since the case record does not contain a copy of the envelope in which appellant's request for reconsideration arrived, and there is no other evidence to establish the date of mailing, the timeliness of the request will be determined by the date of the request for reconsideration, *i.e.*, February 6, 2012. As appellant's request for reconsideration was timely, the Board finds that OWCP improperly denied his request by applying the legal standard reserved for cases where reconsideration is requested after one year.

Since OWCP erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of the evidence under the proper standard of review for a timely reconsideration request.<sup>17</sup>

### CONCLUSION

The Board finds that OWCP improperly found that appellant's request for reconsideration of OWCP's February 7, 2011 decision was untimely filed.

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4e (August 2011).

<sup>14</sup> *See C.K.*, Docket No. 10-1665 (issued May 25, 2011).

<sup>15</sup> *Supra* note 12.

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004); *L.R.*, Docket No. 10-2410 (issued April 6, 2011).

<sup>17</sup> In light of the disposition of this case, the Board will not address appellant's arguments on appeal.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 15, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: March 27, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board