

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

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T.H., Appellant )

and )

DEPARTMENT OF JUSTICE, FEDERAL )  
BUREAU OF PRISONS, FEDERAL )  
CORRECTIONAL COMPLEX, Butner, NC, )  
Employer )

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**Docket No. 13-1507**  
**Issued: November 13, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 11, 2013 appellant filed a timely appeal from a January 3, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than 180 days elapsed from the most recent merit decision dated June 9, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.<sup>2</sup>

**ISSUE**

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

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

<sup>2</sup> *See* 20 C.F.R. § 501.3(e).

On appeal, appellant contends that he is entitled to leave buyback compensation for December 2005 as a result of his October 20, 2005 employment-related injuries.

### **FACTUAL HISTORY**

OWCP accepted that on October 20, 2005 appellant, then a 46-year-old correctional officer, sustained a burn of the right hand/wrist and a second-degree burn to the palm and two or more digits including the thumb on his right hand due to the malfunction of a grenade. In a decision dated May 5, 2008, it granted him a schedule award for eight percent impairment of the right hand.<sup>3</sup>

On March 17, 2010 appellant filed a claim to buyback leave (Form CA-7) from December 26, 2005 to January 6, 2006. In a time analysis form (Form CA-7a) and worksheet (Form CA-7b) dated April 14, 2010, he claimed 64 hours or \$1,490.82 in leave buyback for the stated period.

In a June 9, 2010 decision, OWCP denied appellant's claim to buyback leave for the period December 26, 2005 to January 6, 2006. It found that the medical evidence of record failed to establish that he was totally disabled during the claimed period.

In a December 20, 2012 letter, appellant requested reconsideration. He submitted an April 25, 2009 Form CA-7, an April 25, 2012 Form CA-7a and an April 26, 2012 Form CA-7b requesting to buyback leave for medical visits and therapy from December 26, 2005 to January 6, 2006. Appellant also submitted earnings and leave statements for the period December 11, 2005 through January 7, 2006. Correspondence dated May 1 to October 12, 2012 between appellant, the employing establishment and OWCP addressed his leave buyback claim.

In a February 16, 2006 medical report, Dr. Michael D. Peck, an attending Board-certified surgeon, advised that appellant could perform 95 percent of his regular job duties. He restricted appellant from ladder climbing and rope work. Appellant was required to wear a compression garment. In an August 27, 2012 report, Dr. Peck advised that appellant was not 100 percent ready to perform the essential functions of his job from December 27, 2005 to January 6, 2006.

In a January 3, 2013 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 its June 9, 2010 decision. It found that his request was not timely filed within one year of the June 9, 2010 decision. OWCP also found that the evidence submitted failed to establish clear evidence of error.

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<sup>3</sup> By letter dated October 31, 2011, OWCP accepted appellant's claim for bilateral sensorineural hearing loss. In a November 8, 2011 decision, it granted him a schedule award for 17 percent binaural hearing loss.

## LEGAL PRECEDENT

Section 8128(a) of FECA<sup>4</sup> does not entitle a claimant to a review of OWCP's decision as a matter of right.<sup>5</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.<sup>6</sup>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</sup>

To establish 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>13</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> *Id.* at § 10.607(b).

<sup>8</sup> *F.R.*, Docket No. 09-575 (issued January 4, 2010); *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>9</sup> *Supra* note 7; *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>10</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>11</sup> *Leona N. Travis*, *supra* note 9.

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

<sup>13</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

## ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on June 9, 2010. OWCP received appellant's request for reconsideration on December 27, 2012; thus, the request was outside the one-year time limit.<sup>15</sup> Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for leave buyback.<sup>16</sup>

The Board finds that the evidence submitted by appellant in support of his December 20, 2012 request for reconsideration does not raise a substantial question as to the correctness of OWCP's June 9, 2010 decision or shift the weight of the evidence of record in his favor. OWCP denied appellant's claim to buyback leave used from December 26, 2005 to January 6, 2006 because there was insufficient medical evidence to establish that the claimed total disability during the stated period was related to the accepted October 20, 2005 employment-related injuries.

Dr. Peck's reports found that appellant was not fully capable of performing his regular work duties from December 27, 2005 to January 6, 2006. A detailed, well-rationalized medical report which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.<sup>17</sup> While the reports of Dr. Peck are generally supportive of appellant's claim, they do not establish clear error on the part of OWCP in issuing its June 9, 2010 decision. Dr. Peck's reports were insufficient as they did not address the issue of whether appellant's total disability during the claimed period was caused or contributed to by the accepted October 20, 2005 employment-related injuries.<sup>18</sup> The evidence does not raise a substantial question concerning the correctness of OWCP's decision.

Similarly, the leave buyback claim forms, earnings and leave statements and correspondence submitted with appellant's reconsideration request are of limited probative value and insufficient to establish clear evidence of error. This factual evidence does not contain an opinion on the relevant underlying medical issue of causal relationship.<sup>19</sup>

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is

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<sup>15</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(4)(b) (October 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

<sup>16</sup> *Supra* note 6; see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

<sup>17</sup> *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>18</sup> See *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

<sup>19</sup> *Id.*

intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, appellant contended that he was entitled to leave buyback compensation for December 2005 as a result of his October 20, 2005 employment-related injuries. As stated, he did not support his reconsideration request with evidence or argument relevant to the underlying issue of the causal relationship between the claimed total disability and the accepted work injuries, and thus his request was insufficient to raise a substantial question as to the correctness of OWCP's June 9, 2010 decision or shift the weight of the evidence of record in his favor.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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