



## **FACTUAL HISTORY**

This case has previously been before the Board. On September 23, 1975 appellant, then a 37-year-old stock clerk, sustained an injury to his back while lifting a steel conveyor belt. OWCP accepted his traumatic injury claim for right lumbar muscle strain under File No. xxxxxx397. Appellant also sustained injuries to his head and left shoulder on April 26, 1978. OWCP accepted his traumatic injury claim for hematoma of the scalp and contusion of the left shoulder under File No. xxxxxx587.

By decision dated October 7, 2005, the Board dismissed appellant's appeal at his request.<sup>2</sup> On November 30, 2006 the Board dismissed an appeal, finding that he did not intend to appeal a decision in this case.<sup>3</sup> In a December 11, 2006 decision, the Board affirmed OWCP's August 10, 2005 decision, finding that appellant failed to establish that he sustained a recurrence of disability in March 1980 that was causally related to his accepted April 26, 1978 employment injury.<sup>4</sup> In a March 23, 2007 order, the Board dismissed appellant's appeal, again finding that he had not intended to file an appeal in this case.<sup>5</sup> By decision dated February 20, 2009, the Board affirmed OWCP's July 15, 2008 decision denying his request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.<sup>6</sup> In a March 5, 2009 order, the Board set aside an August 12, 2008 decision denying reconsideration of a June 27, 2007 decision denying appellant's recurrence claim and remanded the case to OWCP for merit review.<sup>7</sup> By merit decision dated February 16, 2011, the Board affirmed OWCP's August 14 and June 26, 2009 decisions in File No. xxxxxx397 and its August 13, 2009 decision in File No. xxxxxx587, finding that: (1) appellant failed to establish that he sustained a recurrence disability commencing March 3, 1980 due to his accepted September 23, 1975 employment injury; (2) OWCP properly refused to reopen his claim for reconsideration of the merits in File No. xxxxxx397 pursuant to 5 U.S.C. § 8128(a); and (3) it properly refused to reopen appellant's claim for reconsideration of the merits in File No. xxxxxx587 on the grounds that the request was untimely and failed to establish clear evidence of error.<sup>8</sup> In a July 29, 2011 order, the Board denied appellant's petition for reconsideration.<sup>9</sup> In an order dated June 21, 2012, the Board

---

<sup>2</sup> Docket No. 05-1682 (issued October 7, 2005).

<sup>3</sup> Docket No. 06-1338 (issued November 30, 2006).

<sup>4</sup> Docket No. 06-1337 (issued December 11, 2006). By order dated June 15, 2007, the Board denied appellant's petition for reconsideration. Docket No. 06-1337 (issued June 15, 2007). In an order dated April 16, 2008, the Board dismissed appellant's appeal of the December 11, 2006 decision on the grounds that he did not have the right to appeal from the final decision of the Board. Docket No. 07-2155 (issued April 16, 2008).

<sup>5</sup> Docket No. 07-0684 (issued March 23, 2007).

<sup>6</sup> Docket No. 09-47 (issued February 20, 2009).

<sup>7</sup> Docket No. 09-18 (issued March 5, 2009).

<sup>8</sup> Docket No. 10-634 (issued February 16, 2011).

<sup>9</sup> Docket No. 10-634 (issued July 29, 2011).

dismissed his appeal of the February 16, 2011 decision on the grounds that he did not have the right to appeal from the final decision of the Board.<sup>10</sup>

On February 20, 2013 appellant requested reconsideration and submitted a report dated September 1975 from Dr. Robert L. Shore, a Board-certified orthopedic surgeon, who diagnosed right lumbar muscle strain and a June 23, 1987 report from Dr. Hans Von Bauchitsch, a psychiatrist, who found appellant so severely mentally impaired that he was totally unable to pursue gainful employment.

By decision dated May 23, 2013, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>11</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>12</sup> One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which review is sought.<sup>13</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>14</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>15</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>16</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>17</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish

---

<sup>10</sup> Docket No. 11-1976 (issued June 21, 2012).

<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>12</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> See *F.R.*, Docket No. 09-575 (issued January 4, 2010); *Jesus D. Sanchez*, *supra* note 11.

<sup>15</sup> 20 C.F.R. § 10.607(b).

<sup>16</sup> See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

<sup>17</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

clear evidence of error.<sup>18</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>19</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>20</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>21</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>22</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP regulations<sup>23</sup> and procedures<sup>24</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues,<sup>25</sup> including any merit decision by the Board and any merit decision following action by the Board.<sup>26</sup> The most recent merit decision was dated February 16, 2011. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since he did not file his request until February 20, 2013, approximately two years later it was filed outside the one-year time period and was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his claim.<sup>27</sup>

In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>28</sup> The February 16, 2011 decision found that: appellant

---

<sup>18</sup> See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>19</sup> See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>20</sup> See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>21</sup> See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>22</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>23</sup> 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>24</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (January 2004); see *supra* note 21.

<sup>25</sup> See *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>26</sup> See n.24 *supra* at Chapter 2.1602.3.b (January 2004).

<sup>27</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>28</sup> See *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

failed to establish that he sustained a recurrence disability commencing March 3, 1980 due to his accepted September 23, 1975 employment injury; OWCP properly refused to reopen his claim for reconsideration of the merits in File No. xxxxxx397 pursuant to 5 U.S.C. § 8128(a); and it properly refused to reopen his claim for reconsideration of the merits in File No. xxxxxx587 on the grounds that the request was untimely and failed to establish clear evidence of error.

Along with his request for reconsideration, appellant submitted a report dated September 1975 from Dr. Shore, who diagnosed right lumbar muscle strain and a June 23, 1987 report from Dr. Von Bauchitsch who found appellant so severely mentally impaired that he was totally unable to pursue gainful employment. Medical evidence submitted by appellant is insufficient to establish that OWCP committed an error. The reports were not relevant to the issue decided by OWCP, namely whether appellant's current conditions were causally related to the accepted work injury. Therefore, they cannot establish clear evidence of error.<sup>29</sup> The reports dated from Drs. Shore and Von Bauchitsch essentially repeat information contained in prior documents and fail to raise a substantial question as to the correctness of the Board's decision. The term clear evidence of error is intended to represent a difficult standard. The submission of 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.<sup>30</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 intended to represent a difficult standard.<sup>31</sup> The evidence submitted does not manifest 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.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

---

<sup>29</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>30</sup> See *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>31</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 16.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 29, 2013  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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