

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

E.P., Appellant)	
)	
and)	Docket No. 13-734
)	Issued: September 10, 2013
DEPARTMENT OF THE AIR FORCE, ROBINS)	
AIR FORCE BASE, Warner Robins, GA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 13, 2013 appellant filed a timely appeal of a February 1, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his January 10, 2013 requests for reconsideration as untimely filed and failing to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 and because more than one year elapsed between the most recent OWCP merit decision dated March 15, 1991 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.²

ISSUE

The issue is whether OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2) (2008). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e) (2009).

FACTUAL HISTORY

This case has previously been before the Board. The history of this case is set forth in the Board's prior decisions and is hereby incorporated by reference.³ The relevant facts are hereinafter set forth. Appellant filed a claim alleging that he sustained a recurrence of disability on July 3, 1989 as a result of his July 14, 1988 employment injury.⁴ OWCP denied this claim on January 16, 1990, finding that he had failed to submit evidence sufficient to establish that his back condition was causally related to his July 14, 1988 employment injury. On November 19, 1990 appellant made a timely request for reconsideration. On March 15, 1991 OWCP granted his request, reviewed the merits of his claim and denied modification of the prior decision. It found that the medical evidence failed to demonstrate that the claimed condition or disability for work was causally related to appellant's accepted employment injury.

The March 15, 1991 decision was the last decision on the merits of appellant's claim of recurrence issued by OWCP. The statement of appeal rights accompanying OWCP's March 15, 1991 merit decision notified appellant that any further request for reconsideration must be made within one year of the date of the decision, *i.e.*, within one year of March 15, 1991.

On March 14, 2012 Dr. Stella I. Tsai, an examining Board-certified neurologist and psychiatrist, provided a telephonic response to a letter from appellant regarding his condition. She related that appellant had been seen for left arm and neck pain consistent with cervical radiculopathy.

³ Docket No. 94-544 (issued July 19, 1995) (the Board affirmed a November 9, 1993 nonmerit OWCP decision denying reconsideration of the March 15, 1991 OWCP decision); Docket No. 01-798 (issued October 9, 2001) (the Board affirmed a November 27, 2000 decision denying appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error); Docket No. 03-887 (issued June 5, 2003) (the Board affirmed a February 11, 2003 OWCP decision denying appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error); Docket No. 03-905 (issued January 21, 2004) (the Board issued an order remanding the case for reconstruction of the record); Docket No. 04-64 (issued August 9, 2005) (the Board affirmed OWCP's October 7, 2003 decision denying appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error); Docket No. 06-875 (issued September 8, 2006) (the Board affirmed OWCP's January 23, 2006 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely and failed to establish clear evidence of error); Docket No. 07-55 (issued March 27, 2007) (the Board affirmed OWCP's September 29, 2006 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely and failed to establish clear evidence of error); Docket No. 07-1907 (issued January 15, 2008) (the Board issued an order dismissing appellant's appeal on the grounds that he had not appealed a final decision of OWCP); Docket No. 08-1121 (issued November 3, 2008) (the Board affirmed OWCP's February 28, 2008 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely and failed to establish clear evidence of error); Docket No. 10-334 (issued August 4, 2010) (the Board issued an order dismissing appellant's appeal as he had failed to file a timely appeal of OWCP's May 15, 2009 nonmerit decision); Docket No 11-1626 (issued February 14, 2012) (the Board affirmed OWCP's July 5, 2011 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely filed and failed to establish clear evidence of error), *Erratum* Docket No. 11-1626 (issued April 26, 2012), *petition for recon. denied* Docket No. 11-1626 (issued July 26, 2012).

⁴ On July 25, 1988 appellant, then a 38-year-old computer operator, filed a traumatic injury claim alleging that on July 14, 1988 he injured his back when he tripped and fell over a box. OWCP accepted the claim for a low back strain.

In a letter dated March 14, 2012, appellant requested reconsideration of OWCP's March 15, 1991 decision denying his recurrence claim.

In a March 14, 2012 report, Dr. Benjamin M. Johnston, a treating Board-certified internist, related that appellant had been under his care for recurrent lumbosacral pain, which appellant attributed to his 1988 employment injury. In concluding, he opined that appellant's current spinal problems were due to the July 14, 1988 employment injury.

By decision dated April 9, 2012, OWCP determined that appellant's request for reconsideration was untimely filed and failing to show clear evidence of error.

On January 10, 2013 appellant requested reconsideration of OWCP's March 15, 1991 decision denying his recurrence claim. He argued that OWCP made a legal error when it denied his claim. Appellant contended that he was entitled to compensation benefits as he never healed from his original injury and OWCP erred in failing to consider this. He argued that he has met his burden with medical and factual evidence which OWCP failed to properly consider.

By decision dated February 1, 2013, OWCP determined that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.⁵ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁷ OWCP's procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

⁵ 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. *See J.S.*, Docket No. 10-385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

⁶ 20 C.F.R. § 10.607; *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000).

⁷ *B.W.*, Docket No. 10-323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

Appellant seeks reconsideration of a March 15, 1991 merit decision denying modification of his claim that he sustained a recurrence of disability on July 3, 1989 as a result of his accepted July 14, 1988 employment injury. He continues to disagree with the denial of his claim and filed his request for reconsideration in a letter dated January 10, 2013. Because appellant filed his request more than one year after OWCP's March 15, 1991 merit decision, the Board finds that he filed an untimely request for reconsideration. Thus, appellant must demonstrate clear evidence of error on the part of OWCP in denying his claim.¹⁷

The Board further finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of compensation was erroneous. While appellant presented no evidence with his January 10, 2013 request, he resubmitted a March 14, 2012 report from Dr. Johnston prior to the January 10, 2013 reconsideration request. However, OWCP had previously considered this report in its April 9, 2012 nonmerit decision when it found the evidence and argument submitted insufficient to establish clear evidence of error. Appellant has not shown how OWCP committed any error in

¹⁰ See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Leon J. Modrowski*, *supra* note 7; *Jesus D. Sanchez* *supra* note 7.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *supra* note 9.

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁶ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁷ 20 C.F.R. § 10.607(b). See *S.D.*, 58 ECAB 713 (2007); *Jack D. Johnson*, 57 ECAB 593 (2006).

denying his recurrence claim. He again asserts that he never healed from his original injury and argues that the medical evidence he submitted is sufficient to establish his claim. Nothing in appellant's January 10, 2013 request for reconsideration establishes that OWCP's March 15, 1991 decision was erroneous in denying a claim for recurrence of disability. The Board will, therefore, affirm the February 1, 2013 decision denying his request.

CONCLUSION

OWCP properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that his requests for reconsideration were not timely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2013 is affirmed.

Issued: September 10, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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