

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

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**J.R., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL  
SUPPLY STATION, Oakland, CA, Employer**

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**Docket No. 13-1284  
Issued: September 16, 2013**

*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 May 7, 2013 appellant filed a timely appeal from the April 4, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision. Since more than one year has elapsed between the last merit decision on September 17, 1993 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's case.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

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

<sup>2</sup> 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).

## **FACTUAL HISTORY**

On January 11, 1980 appellant, a 32-year-old warehouseman, was driving a truck and changing gears when the stick shift jumped out of gear and struck him on the palm of his right hand and thumb. OWCP accepted his claim for right carpal tunnel syndrome and authorized a surgical release on May 27, 1980, performed by Dr. James E. Damon, a Board-certified orthopedic surgeon. On November 26, 1982 it issued a schedule award for a 10 percent impairment of the right upper extremity resulting from the accepted employment injury. On March 4, 1987 OWCP terminated appellant's compensation on the grounds that the medical evidence failed to establish that he had any continuing disability causally related to his accepted work injury.

Appellant requested reconsideration numerous times. OWCP reviewed the merits of his case on September 28, 1988, July 12, 1989 and September 17, 1993 but denied modification of its decision to terminate compensation.

On April 21, 1998 and August 10, 2000 OWCP denied appellant's claim for an additional schedule award. On March 6, 2002 the Board affirmed.<sup>3</sup>

On February 22, 2007 OWCP again denied appellant's claim for an additional schedule award. The Board reviewed this decision on March 11, 2009 and again affirmed.<sup>4</sup>

On January 4, 2013 OWCP received appellant's December 24, 2012 reconsideration request. He described four medical records from 1980. They related to causalgia in appellant's right hand, a change of physicians, and a finding of right hand pinched motor branch, right median nerve. Appellant alleged that OWCP suppressed this evidence and also removed CA-20 forms dated September 16 and 29, 1980 from his case file. "The OWCP personnel has suppressed all of my pertinent medical records and has caused my medical and compensation benefits to be terminated."

In support of his request, appellant submitted a copy of a report from Dr. Alix J. Magloire, a Board-certified internist. The date of this report was originally December 20, 1995. OWCP received this report several times through the years, but it appears that appellant changed the date of the report to December 20, 2012.

In his 1995 report, Dr. Magloire related what appellant had told him. He stated that appellant's diagnosis was causalgia from carpal tunnel surgery, right hand motor branch of the median nerve release, 1980. Dr. Magloire added that appellant was not able to perform any gainful employment with the right hand. "He wears a brace on his right hand and he suffers decreased hand grip, and decreased function of the right thumb due to pain. I consider his condition to be permanent."

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<sup>3</sup> Docket No. 00-2708 (issued March 6, 2002).

<sup>4</sup> Docket No. 07-1058 (issued March 11, 2009). The Board also found that OWCP properly denied appellant's January 28, 2008 untimely reconsideration request. Docket No. 08-1697 (issued March 11, 2009).

Appellant also submitted a December 19, 2012 letter from his health care provider acknowledging his request to have his medical records amended to reflect that he developed causalgia as a result of his May 27, 1980 surgery. “You have medical evidence from a radiology report you obtained with an outside provider. You would like for your records to be corrected.” The letter informed appellant how to submit an addendum.

Appellant submitted a December 29, 2012 statement alleging that Dr. Damon scarred the motor branch of the median nerve inside his right thumb, causing him to have causalgia. He indicated that his schedule award was not for the accepted carpal tunnel syndrome. Appellant argued that his physical limitations were directly related to his surgery and the scarred motor branch. He added: “It is plain to see that the ECAB Boards and Reconsideration Examiner or anyone else had knowledge that the motor branch of the median nerve was scarred inside my thumb that has caused me irreversible nerve damage and causalgia my compensation would have never been terminated.”

Appellant submitted two other statements, dated January 9 and 15, 2013. He again argued that medical evidence from 1980 showed a pinching of the motor branch of the median nerve. “So therefore the right hand carpal tunnel syndrome that [OWCP] accepted as industrial, as well as a carpal tunnel release on May 27, 1980, is clearly an error of facts made by [OWCP] again.” Appellant indicated that he would like to file a new claim for causalgia of the motor branch of the median nerve starting from his surgery on May 27, 1980. “This was and is the true nature of my 1-11-80 industrial injury and surgery.”

Appellant also argued that, if early physicians had knowledge of Dr. Damon’s finding of causalgia, “their medical decisions concerning my evaluation in 1986 might have been different and my compensation would have continued.”

In a decision dated April 4, 2013, OWCP denied appellant’s reconsideration request without reviewing the merits of his case. It found that his request was untimely and failed to present clear evidence of error in the decision to terminate his compensation benefits.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>5</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a).

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought. It will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>6</sup>

The term "clear evidence of error" is intended to represent a difficult standard.<sup>7</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>8</sup>

### ANALYSIS

Appellant indicated that his December 24, 2012 reconsideration request is untimely. He labeled it as such. OWCP terminated his compensation in a decision dated March 4, 1987. It last reviewed the merits of the termination on September 17, 1993, when it denied modification of its decision. OWCP's September 17, 1993 decision stands as the most recent merit decision on the issue.

Appellant had one calendar year from the date of that decision, or until September 17, 1994, to request reconsideration. His December 24, 2012 request is untimely.

As the Board noted, the term "clear evidence of error" is intended to represent a difficult standard. Appellant's untimely request must establish, on its face, that OWCP's decision was erroneous. He has been arguing for many years that his May 27, 1980 surgery was botched, that Dr. Damon "scarred" the median nerve when he dissected out the motor branch and removed a piece of fascia from around it just before it entered the musculature. It was felt that this was the area in which the median nerve was bound. In other words, it was felt that a piece of connective tissue was entrapping the motor branch and pinching it, so Dr. Damon performed a routine release by removing the offending tissue and freeing the nerve to function normally.

It appears that appellant misunderstands what Dr. Damon meant when he reported that "the motor branch of the median nerve was found to be scarred and a routine release was performed." Appellant reads this to mean that his surgeon scarred or otherwise physically damaged the nerve.<sup>9</sup> But it simply means that during his exploration the surgeon found a bit of scar tissue wrapped around or adhered to the motor branch, possibly interfering with its function. After removing the tissue, there were no additional findings. Median nerve function was found

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<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

<sup>8</sup> *Id.* at Chapter 2.1602.5.b.

<sup>9</sup> As the Board noted on the prior appeal, appellant believed he developed causalgia on May 27, 1980 when Dr. Damon "dissected" (divided into parts or cut deeply into) the motor branch of his right median nerve. Docket No. 08-1697 (issued March 11, 2009). That was another misunderstanding of medical terminology.

to be normal prior to closure. Following surgery, two electromyogram and nerve conduction studies were found to be normal. There were no objective findings on the clinical examinations performed by multiple physicians in 1981. In 1986 a Board-certified orthopedist, Dr. William A. Reilly, and a Board-certified neurologist, Dr. Arthur E. Lyons, reviewed the medical record, examined appellant and found that he had no residual condition or disability. His neurological examination was entirely normal. The only physical limitation -- a loss of right thumb function in pinching and grasping-type activities -- was found to be unrelated to the industrial injury and surgery.<sup>10</sup>

This appears to be the crux of appellant's longstanding complaint. He disagrees with this medical opinion evidence and insists that the May 27, 1980 surgery "scarred" his median nerve and caused him to develop causalgia, which entitles him to continuing compensation. In the absence of any substantive medical report from his treating physicians since late in 1980, and with no record of ongoing medical treatment, OWCP found that the weight of the medical opinion evidence rested with Dr. Reilly and Dr. Lyons, who concluded that appellant no longer had any disability or need for medical treatment causally related to the January 11, 1980 work injury.

OWCP thus terminated appellant's compensation in 1987 based on its adjudication of the evidentiary weight of the medical opinion evidence. It found that the referral physicians were well qualified, they had reviewed the case within the framework of the statement of accepted facts and they provided medical rationale to support their conclusions. Under such circumstances, even if appellant were now to submit a detailed, well-rationalized medical opinion to the contrary, one based on a proper factual and medical background, he still would not establish "clear evidence of error."<sup>11</sup> He would establish instead a simple difference of opinion, which is not sufficient to warrant the reopening of his case.

In his most recent reconsideration request, appellant alleges that OWCP suppressed evidence and removed records from his file. He alleges that OWCP personnel suppressed all of his pertinent medical records and that this is what caused the termination of his compensation, but these are merely allegations. Appellant has submitted no proof to substantiate such a claim. He states that, if Drs. Reilly or Lyons had known of Dr. Damon's finding of causalgia, their opinions "might have been different," but that kind of speculation is no basis for reopening his case.

The 1995 report from Dr. Magloire has no direct bearing on appellant's condition in 1986 or 1987, when OWCP terminated his compensation. It appears that the physician largely repeated what appellant told him. The report gives no indication that Dr. Magloire reviewed appellant's medical record, including the reports of Dr. Reilly and Dr. Lyons, or that he ever actually examined appellant. The letter from appellant's health care provider is purely administrative and, much like Dr. Magloire's report, simply restates appellant's allegations.

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<sup>10</sup> Appellant had a small osteophyte or bone spur on his right thumb metacarpal, which was nonindustrial in etiology, perhaps congenital.

<sup>11</sup> *Dean D. Beets*, 43 ECAB 1153 (1992); *Leona N. Travis*, 43 ECAB 227 (1991).

The mere fact that Dr. Damon believed there was a great deal of causalgia involved in appellant's complaints in 1980 does not mean that appellant was disabled for work and in need of continuing medical treatment six or seven years later. Appellant may believe otherwise, but his beliefs will not furnish the proof necessary to discharge the difficult burden he faces to reopen his case.

As the Board reads Dr. Damon's notes in 1980, it appears that he used the term "causalgia" to imply a psychological or nonorganic component to appellant's ongoing complaints, which is the reason he believed that returning to work would be in appellant's best interest. "I think his problem is developing into some sort of causalgia and I am pessimistic about his ever returning to gainful employment in the future unless he is pushed severely in that direction."

Appellant wrongly makes a meaningful distinction between carpal tunnel syndrome and a pinched motor branch of the median nerve. In point of fact, carpal tunnel syndrome is a condition caused by a pinched median nerve in the wrist. Dr. Damon indicated that appellant's condition was not an "ordinary" carpal tunnel syndrome but apparently, according to an electromyogram, a pinching of the motor branch of the median nerve, for which he strongly recommended and indeed performed a carpal tunnel release. It was during the carpal tunnel release that Dr. Damon found that the motor branch was bound down by some scar tissue. Although appellant's condition was more precisely a pinched motor branch of the right median nerve, there is no error in referring to it more generally as carpal tunnel syndrome. It might not have been an ordinary carpal tunnel syndrome, but it was a carpal tunnel syndrome nonetheless, as Dr. Damon, a Board-certified orthopedic surgeon, continued to describe it.

Any allegation that the 1980 surgery was botched or that Dr. Damon scarred the nerve, causing irreversible nerve damage and causalgia is not established by the medical evidence as fact.

The Board finds that appellant's December 24, 2012 reconsideration request is untimely and fails to show clear evidence of error in the termination of his compensation. The Board will affirm OWCP's April 4, 2013 decision.

### **CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 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