

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

E.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Savannah, GA, Employer**

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**Docket No. 13-719
Issued: April 17, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On February 6, 2013 appellant filed a timely appeal from a November 5, 2012 nonmerit decision (under case file number xxxxxx367) of the Office of Workers' Compensation Programs (OWCP) which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error; and he filed an appeal from a December 18, 2012 nonmerit decision (under case file number xxxxxx170) which denied merit review on the grounds that he had failed to submit new and relevant evidence in support of his claim. Because more than 180 days elapsed between the last merit decisions dated July 19, 1990 (case file number xxxxxx367) and July 16, 2012 (case file number xxxxxx170) and the filing of this appeal on February 6, 2013, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act¹ (FECA) 20 C.F.R. §§ 501.2(c) and 501.3.

¹ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error; and (2) whether it properly refused to reopen his case for reconsideration of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY -- xxxxxx367

This case has previously been before the Board. On December 1, 1986 appellant filed an occupational disease claim alleging that he had developed bilateral tendinitis in his arms causally related to factors of his federal employment. He had worked for the employing establishment from October 6, 1973 through July 27, 1981 as a postal clerk. Appellant indicated that he first became aware of this condition in December 1978 and that it was caused or aggravated by his employment in August 1986.

By decision dated August 3, 1987, OWCP denied the claim, finding that appellant failed to submit medical evidence sufficient to establish that he sustained a bilateral tendinitis condition in his arms in the performance of duty. After a request for a hearing, its hearing representative, by decision dated November 3, 1987, vacated OWCP's decision finding the claim not in posture for decision due to an unresolved issue on whether the claim had been timely filed pursuant to Section 8122. OWCP found the claim untimely filed, by decision dated December 17, 1987, as appellant knew or should have been aware of the connection between his employment and his arm pain "as early as May 1979." It found the time for filing the claim began to run no later than his last exposure to factors of his federal employment on March 30, 1980. OWCP further found that the employing establishment did not have actual knowledge of appellant's injury within 30 days of injury. As appellant had not filed his claim until December 1, 1986, it was untimely.

Appellant requested a hearing and by decision dated May 17, 1988, OWCP's hearing representative affirmed the December 17, 1987 decision. He filed a request for reconsideration and by decision dated July 11, 1989 OWCP affirmed the May 17, 1988 decision. In a July 19, 1990 merit decision,² the Board affirmed the July 11, 1989 OWCP decision finding that the employing establishment did not have timely knowledge of appellant's alleged bilateral arm condition, causally related to his federal employment. The Board noted in that decision that "appellant had testified in the April 4, 1988 hearing that he could not understand why the 'preexisting arm condition' was mentioned in the January 31, 1980 decision (case file number xxxxxx170) as he had not filed a claim for the injury."

By nonmerit decisions dated July 22, 1999, January 13 and March 20, 2006, OWCP denied appellant's requests for reconsideration without a merit review, finding that the requests were untimely and had not established clear evidence of error.

By decision dated January 22, 2007, the Board affirmed OWCP's nonmerit decisions denying merit review on the grounds that appellant had not established clear evidence of error.

² Docket No. 89-1581 (issued July 19, 1990).

By nonmerit decisions dated January 23 and July 30, 2009 and October 5, 2010, OWCP denied appellant's requests for reconsideration without a merit review, finding that the requests were untimely and had not established clear evidence of error.

A request for reconsideration was received by OWCP on October 12, 2012. By nonmerit decision dated November 5, 2012, OWCP again denied appellant's request for reconsideration without a merit review finding the request was untimely and had not established clear evidence of error.

LEGAL PRECEDENT -- xxxxxx367

Section 8128(a) of FECA³ does not entitle an employee to a review of an OWCP decision as a matter of right.⁴ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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 or increase the compensation awarded; or (2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, it has stated that 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 The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ OWCP procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) submitting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁶ 20 C.F.R. § 10.607(b).

⁷ *See* cases cited *supra* note 2.

⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.⁹

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that it 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 an appellant 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.¹⁶

ANALYSIS -- xxxxxx367

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. The most recent merit decision under case number xxxxxx367 was issued on July 19, 1990. OWCP received appellant's request for reconsideration on October 12, 2012; thus, the request is untimely as it was outside of the one-year time limit.

The Board also finds that appellant's October 7, 2012 request for reconsideration failed to show clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. He contended that OWCP erred by failing to properly develop the case record and arrive at an appropriate decision with regards to his claim for a work-related arm condition. The underlying issue in this case was whether appellant timely filed his occupational disease claim for a right arm injury. Appellant's allegations regarding OWCP's failure to develop the claim do not address the issue of timely filing. He has failed to present any evidence sufficient to shift the weight of the evidence in

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 2.

¹³ See *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

favor of him and raise a substantial question as to the correctness of OWCP's decision. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

The Board notes that on appeal appellant alleges that his timely filing of the 1979 traumatic injury claim (case file number xxxxxx170) should establish timely filing of his 1986 occupational disease claim. In this case, these two claims pertained to distinct injuries, a traumatic incident in 1979 and continued exposure to work factors through 1986. These are two separate claims and timely filing of the traumatic injury claim in 1979 does not establish timely filing of the occupational disease claim of 1986. Further, the Board has previously noted appellant's own testimony in 1988 that he had not filed a claim for the arm injury in 1979.

FACTUAL HISTORY -- xxxxxx170

This case has previously been before the Board. Appellant, then a 26-year-old postal clerk, filed a claim for benefits on June 5, 1979 alleging that he sustained a contusion when he slipped and hit his head on a mail tray. He filed a claim for wage loss on July 27, 1979. By decision dated January 31, 1980, OWCP denied appellant's claim for wage loss due to the accepted contusion. It noted a preexisting arm injury but found no causal relationship between the fall and the arm condition. By decision dated August 7, 1980, OWCP's hearing representative affirmed the January 31, 1980 decision. By nonmerit decision dated June 9, 1981, OWCP denied reconsideration of the January 31, 1980 decision. In an October 13, 1981 decision,¹⁷ the Board affirmed the January 31, 1980 merit decision and the June 9, 1981 nonmerit OWCP decision.

By letter dated November 10, 2010, appellant requested a hearing. The hearing request was denied by the Branch of Hearings and Review on May 1, 2011. Appellant also requested reconsideration by letters dated December 7 and 13, 2010. He contended that reports he submitted from Dr. Thomas M. Stanley, Board-certified in internal medicine and neurology, established that he had a bilateral arm condition which was causally related to his employment. Appellant argued that OWCP erred in its January 31, 1980 decision and denied him due process by failing to schedule a medical evaluation after receiving reports from Dr. Stanley.

In a February 27, 1996 report, received by OWCP on January 27, 2011, Dr. Stanley stated that he had treated appellant since 1979 for complaints of pain in the dorsal hands, over the dorsal surface of the extensor arm and also to the supraclavicular area. He stated that appellant had a history of repetitive movements as a postal worker and had complained of pain while working at his clerk position. Dr. Stanley opined that appellant's arm pain and cramping might have been secondary to tendinitis brought about by repetitive injury. He noted that appellant had requested being placed on light duty in May 1979, after which time he returned to keyboard duties. Dr. Stanley diagnosed right forearm and hand pain, tendinitis, probably related to repetitive work.

¹⁷ Docket No. 81-1654 (issued October 13, 1981).

By decision dated March 23, 2011, OWCP denied appellant's request for reconsideration without a merit review, finding that the request was untimely and that he had not established clear evidence of error.

In a May 22, 2012 decision,¹⁸ the Board affirmed OWCP's March 1, 2011 decision to deny appellant a hearing, but set aside the March 23, 2011 OWCP nonmerit decision. The Board noted that, as no time limit applied to requests for reconsideration of decisions issued before June 1, 1987, a request for reconsideration from the last merit decision dated January 31, 1980 may not be denied as untimely unless the claimant had been notified of the one-year filing requirement in a later decision denying an application for reconsideration or denying modification of the contested decision. As appellant had not been notified, the Board found that the one-year time limitation did not apply. The Board remanded the case for OWCP to further review the merits of appellant's reconsideration request in accordance with its regulations and procedures. The complete facts of this case are set forth in the Board's decisions of record and are herein incorporated by reference.

By decision dated July 16, 2012, OWCP denied modification of its prior merit decisions. It reviewed the medical evidence appellant submitted in support of his claim and found that he did not have any disability stemming from the 1979 traumatic injury and was therefore not entitled to any periods of wage-loss compensation. OWCP further found that his right arm condition was not related to the 1979 traumatic injury claim and pertained to the occupational disease claim. It stated that the reports from Dr. Stanley were not relevant because they did not pertain to the accepted scalp contusion.

Appellant requested reconsideration of the July 16, 2012 merit decision. He argued that OWCP erred by failing to properly develop the case record and arrive at an "appropriate" decision with regards to his claim for a work-related arm condition. Appellant further contended that reports he submitted from Dr. Stanley established that he had a bilateral arm condition which was causally related to his employment. He argued that OWCP erred in its January 31, 1980 decision and denied him due process by failing to schedule a medical evaluation after receiving reports from Dr. Stanley which established a *prima facie* case for causation. Appellant also stated that it erred by failed to award compensation for a Form CA-2a he filed on November 11, 1980. In addition, he reiterated the arguments regarding the timeliness of his original June 5, 1979 claim and requested that OWCP consider his two claims together in order to render an appropriate judgment. Appellant did not submit any new evidence with his request.

By decision dated December 18, 2012, OWCP denied review of the merits of appellant's claim as the reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior merit decision.

LEGAL PRECEDENT -- xxxxxx170

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by OWCP; or by constituting

¹⁸ Docket No. 11-1689 (issued May 22, 2012).

relevant and pertinent evidence not previously considered by OWCP.¹⁹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²⁰

ANALYSIS -- xxxxxx170

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has he advanced a relevant legal argument not previously considered by OWCP. He submitted, with a request for reconsideration, a February 27, 1996 report from Dr. Stanley, who indicated that he had treated appellant since 1979 for bilateral hand and arm pain. Dr. Stanley diagnosed tendinitis most likely related to his work duties and attributed appellant's symptoms to a history of repetitive movements as a postal worker. The evidence appellant submitted in connection with his October 7, 2012 reconsideration request, however, is not pertinent to the issue on appeal. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.²¹ Dr. Stanley's report does not constitute medical evidence pertaining to the relevant issue of whether appellant sustained disability due to the accepted scalp contusion or whether the preexisting right arm condition was causally related to the June 5, 1979 incident. His request did not contain any new and relevant evidence for OWCP to review and was cumulative and repetitive of medical evidence previously submitted. Appellant's reconsideration request failed to show that it erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. OWCP did not abuse its discretion in refusing to reopen his claim for a review on the merits in its December 18, 2012 nonmerit decision.

CONCLUSION

The Board finds that, as appellant's reconsideration request in case file number xxxxxx367 was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on November 19, 2012. The Board further finds that OWCP properly refused to reopen appellant's case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a) in case file number xxxxxx170.

¹⁹ 20 C.F.R. § 10.606(b). *See generally* 5 U.S.C. § 8128(a).

²⁰ *Howard A. Williams*, 45 ECAB 853 (1994).

²¹ *See David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the December 18 and November 5, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 17, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board