

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

Y.B., Appellant	)	
	)	
	)	
and	)	<b>Docket No. 14-93</b>
	)	<b>Issued: April 16, 2014</b>
DEPARTMENT OF JUSTICE, U.S. MARSHALS	)	
SERVICE, Washington, DC, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 18, 2013 appellant filed a timely appeal of an October 25, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.<sup>1</sup> Because more than 180 days elapsed from the most recent merit decision dated April 24, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act<sup>2</sup>(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

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<sup>1</sup> In his application for review, appellant also requested an oral argument before the Board. In a December 5, 2013 letter, the Board requested that he confirm his request for oral argument and submit the issues to be argued. As appellant did not respond to the Board's letter, the case will be considered on the written record.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On October 11, 2011 appellant, then a 25-year-old law enforcement officer, filed a traumatic injury claim alleging that on August 26, 2011 he became engaged in a scuffle while serving process for an eviction in the performance of duty. He pulled a muscle in the right side of his back and experienced a tingling sensation that travelled to his rib cage. Appellant did not initially stop work.

By letter dated November 9, 2011, OWCP informed appellant of the evidence needed to support his claim. It requested that he submit such evidence within 30 days. No additional evidence was received.

In a December 12, 2011 decision, OWCP denied appellant's claim. It found that the evidence was not sufficient to establish that the August 26, 2011 incident occurred as alleged.

On January 23, 2012 appellant requested reconsideration. In a report dated December 6, 2011, Dr. David Walls-Kaufman, a chiropractor, noted that appellant presented with thoracic, shoulder and neck pain following a physical confrontation with a subject under arrest. He noted that appellant was a police officer who was engaged in a confrontation in the line of duty. Dr. Walls-Kaufman advised that appellant was taken violently to the ground and landed hard on his right upper back. He indicated that his physical examination of appellant included an x-ray examination of the spine. Dr. Walls-Kaufman noted that appellant was left with a shoulder condition of about 50 percent strength. He advised that the shoulder was probably weak because of the mechanical strain on the cervical nerve roots which were facilitating the nerve pathways into the shoulder/arm muscles and compromising their contractility. Dr. Walls-Kaufman recommended an electrodiagnostic procedure to determine the strength of the right shoulder/arm muscles. He advised that, given the obvious probability of this causation, it seemed an utter waste to perform this intrusive and costly test and the chiropractic program should begin based on the fairly obvious clinical guesswork. Dr. Walls-Kaufman recommended further chiropractic treatment.

By decision dated April 24, 2012, OWCP denied modification of the December 12, 2011 decision finding that the medical evidence was insufficient. It noted that Dr. Walls-Kaufman did not diagnose a spinal subluxation and that medical evidence from a chiropractor was limited to treatment of a spinal subluxation as demonstrated by x-ray.

On July 24, 2013 appellant requested reconsideration. He contended that he was injured on the job on August 26, 2011 and sought treatment with Dr. Walls-Kaufman. Appellant alleged that the chiropractic treatments helped with his pain.

In a July 6, 2012 report, Dr. Walls-Kaufman reiterated his December 6, 2011 report. He stated that his examination revealed a “vertebral subluxation.” Dr. Walls-Kaufman also advised that appellant’s x-ray examination revealed vertebral subluxation at multiple levels, namely C1, C5, T7 through T12.

By decision dated October 25, 2013, OWCP denied appellant’s request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>3</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be filed within one year of the date of OWCP’s decision for which review is sought.<sup>4</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>5</sup>

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant’s application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>7</sup> is positive, precise, and explicit, and manifests on its face that OWCP committed an error.<sup>8</sup> The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited

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<sup>3</sup> 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>4</sup> 20 C.F.R. § 10.607(a). *See also D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

<sup>5</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term “clear evidence of error” is intended to represent a difficult standard).

<sup>7</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>8</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>9</sup>

### ANALYSIS

In its October 25, 2013 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on April 24, 2012. Appellant's July 24, 2013 letter requesting reconsideration was submitted more than one year after the April 24, 2012 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening his case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by him in support of his application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. OWCP's April 24, 2012 decision denied his claim for a traumatic injury. It found that appellant did not submit sufficient medical evidence in support of his claim and that Dr. Walls-Kaufman had not diagnosed a spinal subluxation.

In his July 24, 2013 request for reconsideration, appellant contended that he was injured on the job on August 26, 2011 and sought treatment with Dr. Walls-Kaufman. He alleged that the treatments helped him with his pain. The Board finds that appellant's assertions do not raise a substantial question as to the correctness of OWCP's decision dated April 24, 2012, which denied appellant's claim for a traumatic injury. Appellant also provided a July 6, 2012 report from Dr. Walls-Kaufman, who stated that his examination revealed "vertebral subluxation" and that the x-ray examination revealed vertebral subluxations at C1, C5, T7 through T12. Although, Dr. Walls-Kaufman found a vertebral subluxation based on x-ray, he did not offer any opinion as to how the work incident contributed to a vertebral subluxation. This evidence does not manifest on its face that OWCP erred in denying appellant's claim. The Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.<sup>10</sup> The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in denying his claim for a traumatic injury. Therefore, the Board finds that appellant has not presented clear evidence of error.

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<sup>9</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>10</sup> *See D.G.*, 59 ECAB 455, 460 (2008).

On appeal, appellant argued that his treating physician had provided the updated medical evidence in a timely manner and he did not realize that he had to provide another form to request reconsideration. The Board notes that these arguments do not establish clear evidence of error by OWCP.

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2014  
Washington, DC

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

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

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