



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated October 21, 2009, the Board affirmed an October 21, 2008 nonmerit decision denying appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.<sup>3</sup> On March 10, 2011 the Board affirmed a March 2, 2010 nonmerit decision denying his untimely request for reconsideration on the grounds that he failed to establish clear evidence of error.<sup>4</sup> In a decision dated April 5, 2012, the Board affirmed a July 19, 2011 nonmerit decision denying appellant's request for reconsideration as untimely filed and insufficient to show clear evidence of error.<sup>5</sup> The facts of the claim as set forth in the prior decisions are hereby incorporated by reference.

On March 19, 2013 appellant requested reconsideration of the April 21, 2006 merit decision finding that he did not establish a recurrence of disability beginning April 16, 2003.<sup>6</sup> He argued that the employing establishment required him to work six hours a day in an unsuitable position and suspended him in 2003 because he was not working six hours per day. Appellant alleged that the additional hours required constituted a change in the nature and extent of his limited-duty position and that he established a recurrence of disability. He asserted that OWCP's hearing representative, in an April 21, 2006 decision, determined that the position was not suitable. Appellant further maintained that a May 2003 report from Dr. Robert D. Aiken, a Board-certified neurologist, established that he was unable to work for six hours a day.

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<sup>3</sup> Docket No. 09-435 (issued October 21, 2008). On July 29, 1985 appellant, then a 30-year-old letter carrier, sustained acute lumbar strain and a herniated disc at L5 in the performance of duty. He returned to part-time work on September 12, 2002 and received compensation from OWCP for two hours per day. By decision dated October 24, 2003, OWCP's hearing representative reopened appellant's case for review under section 8128 and reversed OWCP's decisions terminating his compensation for refusing suitable work. The hearing representative instructed OWCP to refer appellant for an impartial medical examination. OWCP paid appellant compensation for total disability from July 15, 2000 to September 6, 2002 and compensation for four hours per day effective September 6, 2002. By decision dated May 24, 2004, OWCP found that he did not establish an employment-related recurrence of disability beginning April 16, 2003. It continued to pay appellant compensation for four hours per day. On April 20, 2005 the hearing representative vacated the May 24, 2004 decision and remanded the case for clarification from Dr. Paul Liebert, a Board-certified orthopedic surgeon, regarding whether appellant sustained a recurrence of disability beginning April 16, 2003. Based on Dr. Liebert's opinion, by decisions dated November 29, 2005 and April 21, 2006, OWCP found that appellant did not establish a recurrence of disability beginning April 16, 2003. It subsequently issued nonmerit decisions beginning on October 21, 2008 denying appellant's request for reconsideration of its finding that he did not sustain a recurrence of disability as untimely filed and insufficient to show clear evidence of error.

<sup>4</sup> Docket No. 10-1278 (issued March 10, 2011).

<sup>5</sup> Docket No. 11-1893 (issued April 5, 2012).

<sup>6</sup> By decision dated April 29, 2013, OWCP determined that appellant received an overpayment of compensation based on his retroactive election of retirement benefits and that he was at fault in the creation of the overpayment. In a decision dated December 3, 2013, the Board affirmed in part and set aside in part, the April 29, 2013 decision. Docket No. 13-1307 (issued December 3, 2013). The Board found that appellant received an overpayment of compensation based on his retroactive election of retirement benefits but that he was not at fault in creating the overpayment. The Board remanded the case for consideration of waiver of recovery of the overpayment.

Appellant submitted a marked paragraph from the April 21, 2006 OWCP hearing representative's decision. In the paragraph, the hearing representative noted that the employing establishment did not withdraw his limited-duty position but instead tried to make him work the six hours as provided by his restrictions. He stated:

“At the time [appellant] stopped working, he was supposed to be working six hours per day and not four. The [employing establishment] did not withdraw his limited duty of four hours per day; rather, they attempted to enforce the restrictions of six hours work that were in effect at the time. When it was determined these restrictions were in question, [appellant] was compensated for the two hours per day for which he had been claiming leave. The record does not establish that a withdrawal of his limited-duty job was the case of his work stoppage since he never worked the six hours per day shown in the job offer.”

Appellant resubmitted the May 13, 2003 report from Dr. Aiken, who noted that appellant had stopped work on April 16, 2003 due to low back pain. Dr. Aiken diagnosed “intractable low back pain which radiates into both legs and is consistent with a lumbar radiculopathy.” He recommended pain management and weight loss and found that appellant did “not appear to be able to work at this time because of intractable pain.”

By decision dated July 8, 2013, OWCP denied appellant's request for reconsideration finding that it was not timely filed and did not demonstrate clear evidence of error. It determined that he had not submitted evidence or raised argument showing that it erred in finding that he had not established a recurrence of disability.

On appeal, appellant argues that OWCP previously determined that the position offered by the employing establishment was unsuitable. He maintains that it did not properly consider that a recurrence of disability includes a change in the physical requirements of a position that exceeds a claimant's work restrictions. Appellant contends that OWCP's hearing representative found that he had established that he could work four rather than six hours per day.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>7</sup> As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. OWCP 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>8</sup>

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

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<sup>7</sup> *Supra* note 2.

<sup>8</sup> 20 C.F.R. § 10.607.

medical report which, if submitted prior to the 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 the case on the Director's own motion.<sup>9</sup> To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.<sup>10</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>11</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>12</sup> As appellant's March 19, 2013 request for reconsideration was received on May 1, 2013, more than one year after the last merit decision of record dated April 21, 2006, it was untimely.<sup>13</sup> Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>14</sup>

On reconsideration appellant argued that the employing establishment withdrew his limited-duty position when it made him work six hours a day rather than four hours per day. He maintained that the alteration in work hours constituted a change in his limited-duty position and thus a recurrence of disability. The Board, however, previously addressed appellant's contention in its October 21, 2009 decision.<sup>15</sup> It found that there was no evidence that the employing establishment withdrew his limited-duty position but rather that he stopped work when he was no longer allowed to use leave for two hours per day. Appellant has not submitted sufficient evidence or argument to establish a recurrence of disability based on the employing establishment's withdrawal of his limited-duty position. Consequently, the Board finds that he

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

<sup>10</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> *Robert F. Stone*, *supra* note 10.

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

<sup>14</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>15</sup> Appellant accepted a position as a modified carrier working six hours per day. OWCP paid him compensation for two hours per day. On April 16, 2003 appellant stopped work and filed a notice of recurrence of disability beginning that date. He alleged that the employing establishment was not allowing him to use leave for two hours per day and submitted a notice of suspension for failing to meet attendance requirements. OWCP retroactively paid appellant compensation for four hours per day beginning September 6, 2002 based on an October 24, 2003 hearing representative's decision. It further developed the medical evidence and determined that he could work full-time modified employment.

did not establish clear evidence of error and the October 21, 2009 decision is *res judicata* and not subject to further consideration by the Board.<sup>16</sup>

Appellant submitted a portion of the April 21, 2006 OWCP's hearing representative's decision which he maintained showed that he was only capable of working four hours a day. The hearing representative found, however, that the employing establishment had not withdrawn his limited-duty position and noted that he had not worked six hours a day as required by the position that he accepted.

On May 13, 2003 Dr. Aiken related that appellant stopped work on April 16, 2003 as the result of low back pain. He diagnosed low back pain and bilateral lumbar radiculopathy. Dr. Aiken asserted that appellant "does not appear to be able to work at this time because of intractable pain." The Board found in the October 21, 2009 decision that his May 13, 2003 report was insufficient to establish clear evidence of error by OWCP. The Board's prior finding is *res judicata* and not subject to further consideration.<sup>17</sup>

On appeal, appellant contends that the position offered by the employing establishment was unsuitable and that OWCP did not properly consider that a recurrence of disability includes a change in the physical requirements of a position that exceed a claimant's work restrictions. Appellant alleges that OWCP's hearing representative found that he had established that he could work four rather than six hours per day. As discussed, however, the Board previously addressed appellant's contention that the employing establishment withdrew his limited-duty employment but determined that he had not supported his allegation with evidence sufficient to show clear evidence of error. Further, as discussed, the hearing representative found that appellant had not shown that the employing establishment withdrew a four-hour-per-day position.

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. None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not provided 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 untimely and failed to establish clear evidence of error.

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<sup>16</sup> See *Robert Ringo*, 53 ECAB 258 (2001); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>17</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2014  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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