

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

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S.M., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Forest Park, IL, Employer )

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**Docket No. 14-759  
Issued: July 1, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 20, 2014 appellant filed a timely appeal from a February 3, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as untimely filed and insufficient to establish clear evidence of error. As there is no merit decision within 180 days of 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>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

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

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated April 5, 1990, the Board affirmed an August 19, 1989 schedule award decision.<sup>2</sup> By decision dated March 10, 1999, the Board affirmed an August 10, 1996 decision finding that appellant had not established a recurrence of disability on March 16, 1989 and a November 13, 1996 decision denying his request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).<sup>3</sup> By decision dated October 22, 2002, the Board affirmed March 14 and November 29, 2001 and March 5, 2002 decisions denying his request for further merit review pursuant to section 8128.<sup>4</sup> On May 2, 2005, October 21, 2009, July 19, 2011 and July 25, 2012, the Board affirmed OWCP decisions denying appellant's requests for reconsideration on the grounds that they were not timely and did not show clear evidence of error.<sup>5</sup> In an order dated December 16, 2013, the Board set aside a May 10, 2013 nonmerit decision denying appellant's request for reconsideration.<sup>6</sup> The Board determined that OWCP applied the standards applicable to timely request reconsideration even though the last merit decision was issued on March 10, 1999 and appellant requested reconsideration on March 14, 2013. The Board remanded the case for application of the proper standard for untimely requests for reconsideration in accordance with OWCP procedures. The facts and circumstances of the case as set forth in the prior decisions and orders are hereby incorporated by reference. The facts relevant to the instant appeal will be set forth.

On March 14, 2013 appellant requested reconsideration. He asserted that OWCP failed to provide him with a July 29, 1991 decision denying his case. Appellant related that he had reviewed his case record and found that it did not contain a copy of that decision. He maintained that on August 22, 1991 OWCP closed his rehabilitation file after finding a suitable position. Appellant related that OWCP failed to reference or provide him with appeal rights for that decision.

Appellant submitted an April 27, 1992 injured workers' rehabilitation status report. An OWCP rehabilitation specialist indicated that he had closed appellant's file on August 22, 1991

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<sup>2</sup> Docket No. 90-321 (issued April 5, 1990).

<sup>3</sup> Docket No. 97-670 (issued March 10, 1999). OWCP accepted the occupational disease claim of appellant, who was then a 28-year-old mail handler, for left carpal tunnel syndrome. Appellant returned to limited-duty employment on November 5, 1988 but resigned from work on March 16, 1989 because he did not want to work his assigned schedule. On June 19, 1989 the employing establishment terminated his employment due to his failure to report for work. The Board found that the employing establishment did not require appellant to work outside his restrictions and that the medical evidence did not establish that he was disabled from his modified employment.

<sup>4</sup> Docket No. 02-1032 (issued October 22, 2002).

<sup>5</sup> Docket No. 04-757 (issued May 2, 2005); Docket No. 09-151 (issued October 21, 2009); Docket No. 10-2320 (issued July 19, 2011); Docket No. 12-714 (issued July 25, 2012). On January 25, 2010 the Board denied appellant's petition for reconsideration of its July 19, 2011 decision. *Order Denying Petition for Reconsideration*, Docket No. 10-2320 (issued January 25, 2012). On March 1, 2013 the Board issued an order dismissing appeal, noting that appellant had tried to appeal an informational letter rather than a decision. *Order Dismissing Appeal*, Docket No. 12-1967 (issued March 1, 2013).

<sup>6</sup> *Order Remanding Case*, Docket No. 13-1383 (issued December 16, 2013).

after a claims examiner determined that appellant had received a suitable job offer and was not entitled to compensation. The rehabilitation specialist noted that there was a decision returned on July 29, 1991 regarding a suitability finding of a job offer.

By decision dated February 3, 2014, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and did not show clear evidence of error.

On appeal appellant maintains that a July 29, 1991 OWCP decision denying further vocational rehabilitation and closing his case is not contained in the case record. He asserts that he was not provided with appeal rights for that July 29, 1991 decision and that the August 10, 1996 decision did not incorporate the July 29, 1991 decision by reference.

### **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> One such limitation, 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 its part 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 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**

As found by the Board on prior appeal, appellant failed to file a timely application for review. OWCP's 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

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<sup>7</sup> *Supra* note 1.

<sup>8</sup> 20 C.F.R. § 10.607.

<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.

March 14, 2013 request for reconsideration was submitted more than one year after the last merit decision issued on March 10, 1999, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>13</sup>

On reconsideration, appellant argued that OWCP failed to provide him with a copy of a July 29, 1991 decision and did not include the decision in the case record. He further asserted that subsequent OWCP decisions did not incorporate the July 29, 1991 decision by reference. In support of his contention, appellant provided an April 27, 1992 status report. In the status report, an OWCP rehabilitation specialist related that he closed the file on August 22, 1991 on the instructions of a claims examiner. He indicated that there was a decision returned on July 29, 1991 concerning the suitability of a job offer. OWCP, however, did not issue a decision dated July 29, 1991. On July 6, 1992 it issued an initial denial of appellant's entitlement to compensation beginning March 17, 1989 based on its determination that the employing establishment had limited-duty work available for him within his restrictions at the time he resigned on March 17, 1989. It is unclear to what the rehabilitation specialist was referring when he cited a July 29, 1991 decision, though the record does contain a July 26, 1991 arbitration decision finding that the employing establishment did not violate the National Agreement in assigning appellant to a modified position. Regardless, appellant's assertion is not relevant to the pertinent issue of whether he met his burden of proof to establish a recurrence of disability due to either a change in his injury-related condition or withdrawal of limited-duty employment subsequent to his March 16, 1989 resignation. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>14</sup>

On appeal appellant alleges that a July 29, 1991 decision that denied further vocational rehabilitation is not in the case record. He also notes that he did not receive appeal rights for that decision. As discussed, however, there is no evidence that OWCP issued a decision on July 29, 1991. Additionally, vocational rehabilitation is provided and administered as a discretionary component of FECA and is not an entitlement. Section 8104(a) of FECA provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation.<sup>15</sup> Section 10.518(a) of OWCP's implementing regulations state that OWCP may, in its discretion, provide vocational rehabilitation services as authorized by section 8104.<sup>16</sup> Appellant had no entitlement to vocational rehabilitation services and thus his argument that OWCP erred in ceasing vocational rehabilitation is insufficient to show clear evidence of error.

The evidence submitted in support of appellant's untimely reconsideration request is not relevant and thus insufficient to establish clear evidence of error. In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to raise a

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<sup>13</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>14</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>15</sup> 5 U.S.C. § 8104(a).

<sup>16</sup> 20 C.F.R. § 10.518(a); *see Roniva Brown*, 38 ECAB 338 (1987).

substantial question as to the correctness of OWCP's decision.<sup>17</sup> The evidence appellant submitted on reconsideration fails to meet this standard.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 3, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> See *Veletta C. Coleman*, 48 ECAB 367 (1997).