



## ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim as his request was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

On October 12, 1994 appellant, then a 40-year-old special agent, filed an occupational disease claim alleging that he sustained a right wrist injury due to performing his repetitive work duties over time. OWCP accepted that he sustained right carpal tunnel syndrome and right median nerve lesions.<sup>3</sup> On July 10, 1995 appellant underwent OWCP-authorized repeat right carpal tunnel release surgery with internal microdissection and neurolysis of the right median nerve. He stopped work on July 10, 1995 and returned to his regular full-time work for the employing establishment on December 4, 1995. Appellant retired after he completed his last day of work on December 23, 2005.

On April 11, 2007 appellant filed a claim for a schedule award due to his accepted employment injuries.

In an August 28, 2007 decision, OWCP granted appellant a schedule award for 28 percent permanent impairment of his right arm. The award ran for 87.36 weeks from February 13, 2007 to October 16, 2008. The date of the pay rate used for the calculation of schedule award compensation was July 10, 1995, the date that appellant stopped work and underwent OWCP-authorized surgery on his right wrist.

In a March 22, 2013 letter, appellant's counsel at the time requested reconsideration on appellant's behalf and argued that he had more than 28 percent permanent impairment of his right arm, for which he received a schedule award on August 28, 2007. He submitted a March 9, 2013 impairment rating report of Dr. John Sorenson, an attending chiropractor.

In an April 19, 2013 decision, OWCP found that appellant failed to establish more than 28 percent permanent impairment of his right arm, for which he had previously received a schedule award.

In a December 9, 2013 letter, received on December 13, 2013, counsel, on behalf of appellant, requested reconsideration and challenged the pay rate used for compensation purposes in OWCP's August 28, 2007 schedule award decision. He stated that OWCP based appellant's schedule award compensation on the pay he received on July 10, 1995, but argued that his compensation should have been based on his pay on December 23, 2005, the date he last worked and had injurious exposure to employment factors. Counsel cited the Board cases of *Charles W.*

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<sup>3</sup> On March 1, 1994 appellant underwent right carpal tunnel release surgery with removal of right palm subcutaneous mass. He stopped work at the time of his March 1, 1994 surgery and later returned to his regular work for the employing establishment on a full-time basis.

*Hancock*<sup>4</sup> and *Elizabeth F. Keough*<sup>5</sup> indicating that they supported the principle that, when computing compensation, OWCP should use the “last day of exposure” and not “the date of the injury.” He also cited *Andrew W. Eickholt*<sup>6</sup> for the principle that the date of disability for purposes of section 8101(4) of FECA is the date that an employee became incapacitated for work because of an injury.

In a December 30, 2013 decision, OWCP denied appellant’s request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. It found that his December 2013 request for reconsideration of OWCP’s pay rate determination was untimely and that he had failed to show clear evidence of error in that prior determination.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>7</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>8</sup>

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”<sup>9</sup> OWCP regulations and procedures provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of OWCP.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise, and explicit and must

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<sup>4</sup> 18 ECAB 662 (1967).

<sup>5</sup> 35 ECAB 347 (1983).

<sup>6</sup> 30 ECAB 360 (1979).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>10</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedures further provide, “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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error.”

<sup>11</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

manifest on its face that OWCP committed an error.<sup>12</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> 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.<sup>15</sup>

Section 8107 of FECA provides that schedule award compensation for permanent impairment of a scheduled member shall be based on the employee's "monthly pay."<sup>16</sup> Such compensation is to be based on the pay rate as determined under section 8101(4) which defines "monthly pay" as "[t]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."<sup>17</sup>

The Board has held that where an injury is sustained over a period of time, as in the present case, the date of injury is the date of last exposure to those work factors causing injury.<sup>18</sup> Applying this principle to schedule award claims, the Board has held that the date of injury is the date of the last exposure which adversely affects the impairment because every exposure which has an adverse effect (an aggravation) constitutes an injury.<sup>19</sup> OWCP must determine both the date of last exposure to employment factors and the date of the supporting medical evaluation upon which the degree of permanent impairment is determined.<sup>20</sup> In a case where a claimant continues to be exposed to injurious work factors and the medical evidence documents continued worsening of the claimed condition, OWCP selects the date of last exposure to injurious work factors as the date of injury.<sup>21</sup>

### ANALYSIS

In its December 30, 2013 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on

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<sup>12</sup> 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>14</sup> See *Leona N. Travis*, *supra* note 12.

<sup>15</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>16</sup> 5 U.S.C. § 8107(a).

<sup>17</sup> *Id.* at § 8101(4).

<sup>18</sup> *Sherron A. Roberts*, 47 ECAB 617 (1996).

<sup>19</sup> *Aubrey W. Edwards*, Docket No. 03-930 (issued July 8, 2003); *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

<sup>20</sup> *Id.*

<sup>21</sup> *G.L.*, Docket No. 12-1795 (issued September 24, 2013).

December 13, 2013, more than one year after OWCP's August 28, 2007 pay rate determination, and, therefore, he must demonstrate clear evidence of error on the part of OWCP in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its August 28, 2007 decision. He did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error.

In his December 9, 2013 letter received on December 13, 2013, counsel, on behalf of appellant, requested reconsideration of OWCP's August 28, 2007 decision and challenged the pay rate used for compensation purposes in that decision. He stated that OWCP based appellant's schedule award compensation on the pay he received on July 10, 1995, but argued that his compensation should have been based on his pay on December 23, 2005, the date he last worked and had injurious exposure to employment factors.

Counsel's argument in this regard would not tend to show clear evidence of error in OWCP's pay rate determination made in its August 28, 2007 decision. He merely cited general principles of law regarding pay rate determinations without explaining how they would apply to the particular facts of appellant's schedule award case. Counsel cited *Elizabeth F. Keough*,<sup>22</sup> a case involving the pay rate for survivor compensation benefits in which the Board stated that, in occupational disease cases, the date of injury for compensation calculation purposes is the date of the last exposure to the implicated employment factors. He cited *Andrew W. Eickholt*,<sup>23</sup> a case involving the pay rate for disability compensation, for the principle that the date of disability for purposes of section 8101(4) of FECA is the date that an employee became incapacitated for work because of an injury. However, counsel did not explain how the principles of these cases would be applied in schedule award cases such as the present case.<sup>24</sup>

Counsel did not discuss how the specific evidence of record showed that the date of injury for pay rate purposes should have been fixed by appellant's last day of work, December 23, 2005. As noted above, the date of injury in a schedule award case is the date of the last employment exposure which adversely affects the impairment as documented by the medical evidence of record.<sup>25</sup> Counsel did not provide any discussion of the medical evidence or explain how it showed that, from a medical standpoint, appellant established the existence of employment exposure which adversely affected his right arm impairment up through the claimed date of December 23, 2005.

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<sup>22</sup> *Supra* note 5.

<sup>23</sup> *Supra* note 6.

<sup>24</sup> Counsel also cited *Charles W. Hancock*, *supra* note 4, a case in which the Board noted that the employee's compensation computation was properly based on his monthly pay at the time of his separation from federal employment "which was determined to be the date of the injury." However, in this case, the Board did not describe in any detail the legal principles which governed this determination.

<sup>25</sup> *See supra* notes 18 through 21.

For these reasons, the argument presented by counsel on behalf of appellant does not raise a substantial question concerning the correctness of OWCP's August 28, 2007 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.<sup>26</sup>

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>26</sup> The Board notes that counsel provided the same arguments on appeal as he did in the reconsideration letter submitted in December 2013.