

FACTUAL HISTORY

This case has previously been before the Board. On April 5, 1990 the Board affirmed an August 19, 1989 schedule award decision.² 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).³ On 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(a).⁴ In decisions dated May 2, 2005, October 21, 2009, July 19, 2011, and July 25, 2012 the Board affirmed OWCP decisions denying appellant's requests for reconsideration as they were not timely and did not establish clear evidence of error.⁵ In a December 16, 2013 order, the Board set aside a May 10, 2013 nonmerit decision denying appellant's request for reconsideration and remanded the case for OWCP to apply the proper standard of review for untimely requests for reconsiderations.⁶ By decision dated July 1, 2014, the Board affirmed a February 3, 2014 decision finding that his request for reconsideration was untimely and failed to demonstrate clear evidence of error.⁷ The facts and circumstances of the case as set forth in the prior decisions are hereby incorporated by reference.

By letter dated July 7, 2014, appellant asked OWCP whether it was required to follow the provisions of 5 U.S.C. § 8106(c) before terminating compensation for an employee on limited duty who stopped work for a good reason. In a July 30, 2014 response, OWCP advised him of the provisions of section 8106(c). It further stated, "If you were offered suitable employment within your restrictions and later abandoned your post without providing updated medical evidence as to why the position was not suitable for you, entitlement to compensation can be terminated."

² Docket No. 90-321 (issued April 5, 1990).

³ Docket No. 97-670 (issued March 10, 1999). OWCP accepted that on September 10, 1987 appellant, then a 28-year-old mail handler, sustained left carpal tunnel syndrome causally related to factors of his federal employment. 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 had not required appellant to work outside his restrictions and that the medical evidence had not established that he was disabled from his modified employment.

⁴ Docket No. 02-1032 (issued October 22, 2002).

⁵ 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 dismissed appellant's appeal of an information letter. *Order Dismissing Appeal*, Docket No. 12-1967 (issued March 1, 2013).

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

⁷ Docket No. 14-759 (issued July 1, 2014).

On September 26, 2014 appellant requested reconsideration of OWCP's August 10, 1996 decision. He related that he was submitting OWCP's July 30, 2014 letter as new evidence. Appellant asserted that it failed to apply the provisions of section 8106 prior to terminating his compensation on July 6, 1992, citing *Maggie L. Moore*.⁸ He also alleged that the employing establishment failed to allow him to resume his limited-duty position.

In a letter dated September 30, 2014, appellant explained that he began working limited duty in November 1988. He indicated that he stopped work for cause in February 1989. Appellant asked whether OWCP had to follow section 8106 in February 1989 before terminating his compensation of an employee "who has abandoned their position for cause."

In a November 14, 2014 response, OWCP instructed appellant to follow his appeal rights for a September 26, 2014 decision.

By decision dated December 2, 2014, OWCP denied appellant's request for reconsideration as it was not timely and did not establish clear evidence of error. It noted that it had not terminated his compensation under section 8106(c).

On appeal, appellant argues that OWCP did not respond to his request for further information on September 30, 2014 but instead told him to follow his appeal rights for a decision dated September 26, 2014 that did not exist. He also asserts that its August 10, 1996 decision constituted a suitable work termination as it found that he was not entitled to compensation because he abandoned a limited-duty job.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁹ 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.¹⁰

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.¹¹ To establish clear evidence of error, a

⁸ 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ 20 C.F.R. § 10.607.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

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.¹²

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.¹³ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁴ As appellant's September 26, 2014 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁵

Appellant argued that OWCP failed to apply the provisions of section 8106 prior to terminating his compensation on July 6, 1992 as required under *Maggie L. Moore*.¹⁶ In support of his allegation, he submitted a July 30, 2014 letter from OWCP advising him that if he abandoned suitable employment his compensation could be terminated under section 8106(c).¹⁷ As discussed by the Board in its July 19, 2011 decision, OWCP did not terminate appellant's compensation for refusing suitable work. Instead, OWCP denied his claim for compensation beginning March 16, 1989 based on its finding that he did not show that the employing establishment withdrew his limited-duty work and as the medical evidence was insufficient to establish that he was disabled from his light-duty assignment. Consequently, appellant's arguments are not pertinent to the underlying issue in this case.¹⁸

Appellant also alleged that the employing establishment failed to let him resume his limited-duty position. The Board's jurisdiction, however, is limited to reviewing final decisions of OWCP.¹⁹

¹² *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Robert F. Stone*, *supra* note 12.

¹⁵ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *Supra* note 8 (holding that when OWCP makes a preliminary determination of suitability and extends the employee 30 days to either accept or give reasons for not accepting, OWCP must consider any reasons given before it can make a final determination on the issue of suitability. Should OWCP find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of section 8106(c) without first affording the employee the opportunity to accept or refuse the offer of suitable work with notice of the penalty provision).

¹⁷ Section 8016(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation benefits. 5 U.S.C. § 8106(c)(2).

¹⁸ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁹ 20 C.F.R. § 501.2(c).

Appellant also questioned whether OWCP had to apply the provisions of section 8106(c) if a claimant stopped performing limited-duty work. He alleged that it did not follow section 8106(c) prior to the employing establishment's termination of his employment for being absent without leave. If OWCP terminates compensation for refusing or abandoning suitable work, it must apply the provisions of section 8106(c).²⁰ The employing establishment's termination of appellant for cause is not within the Board's jurisdiction, which extends only to review of final decisions of OWCP.²¹

On appeal, appellant argues that OWCP did not respond to his request for further information on September 30, 2014 but instead told him to follow his appeal rights for a decision dated September 26, 2014 that was not issued. However, any error by OWCP in referencing a decision on September 26, 2014 is harmless as it does not affect the outcome of the case.²²

Appellant additionally contends that OWCP, in its August 10, 1996 decision, terminated his compensation under section 8106(c) when it found that he was not entitled to compensation because he abandoned his limited-duty position. OWCP, however, determined that the medical evidence was insufficient to establish that he was totally disabled from his limited-duty position beginning August 10, 1996 and thus found that he was not entitled to compensation.²³ While OWCP used the term "abandonment" to describe appellant's work stoppage, it is clear from the context of the decision that it was informing him that a voluntary work stoppage does not constitute a recurrence of disability rather than terminating his compensation under section 8106(c).²⁴

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.²⁵ None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not provided

²⁰ 5 U.S.C. § 8106(c); *see also* U.A., 59 ECAB 701 (2008).

²¹ *Id.*

²² *See generally* D.G., Docket No. 13-612 (issued May 21, 2013).

²³ As discussed, on March 10, 1999 the Board affirmed OWCP's August 10, 1996 decision. Docket No. 97-670 (issued March 10, 1999). It found that appellant had not worked outside his restrictions and that he had not submitted medical evidence showing that he was unable to perform his modified employment beginning March 16, 1989; consequently, it found that he did not establish a recurrence of disability.

²⁴ A "recurrence of disability" means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations. 20 C.F.R. § 10.5(x); *see also* S.F., 59 ECAB 525 (2008); *Terry R. Hedman*, 38 ECAB 222 (1986).

²⁵ *See* D.G., 59 ECAB 455 (2008).

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 as it was untimely and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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