

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

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**E.P., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, ROBINS  
AIR FORCE BASE, Warner Robins, GA,  
Employer**

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**Docket No. 15-1609  
Issued: December 3, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On July 23, 2015 appellant filed a timely appeal of a June 22, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated March 15, 1991, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

**ISSUE**

The issue is whether OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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

On appeal appellant argues that OWCP erred in finding that he failed to file a timely request for reconsideration. He also argues that OWCP has not handled his recurrence claim or its development appropriately or in an impartial manner.

### **FACTUAL HISTORY**

Appellant's claim has previously been before the Board. The history of this case is set forth in the Board's prior decisions and is incorporated herein by reference.<sup>2</sup> The relevant facts are hereinafter set forth. On July 25, 1988 appellant, then a 38-year-old computer operator, filed a traumatic injury claim (Form CA-1) alleging that on July 14, 1988 he injured his back when he tripped and fell over a box. OWCP accepted the claim for a low back strain.

Appellant filed a claim alleging a recurrence of disability on July 3, 1989 as a result of his July 14, 1988 employment injury. OWCP denied this claim on January 16, 1990, finding that he had failed to submit sufficient evidence to establish that his back condition was causally related to his July 14, 1988 employment injury.

On November 19, 1990 appellant made a timely request for reconsideration. On March 15, 1991, OWCP granted his request, reviewed the merits of his claim, and denied modification of the prior decision. It found that the medical evidence failed to demonstrate that the claimed condition or disability for work was causally related to appellant's accepted employment injury.

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<sup>2</sup> Docket No. 94-544 (issued July 19, 1995) (the Board affirmed a November 9, 1993 nonmerit OWCP decision denying reconsideration of a March 15, 1991 OWCP decision); Docket No. 01-798 (issued October 9, 2001) (the Board affirmed a November 27, 2000 decision denying appellant's reconsideration request as it was untimely filed and failed to establish clear evidence of error); Docket No. 03-887 (issued June 5, 2003) (the Board affirmed a February 11, 2003 OWCP decision denying appellant's reconsideration request as it was untimely filed and failed to establish clear evidence of error); Docket No. 03-905 (issued January 21, 2004) (the Board issued an order remanding the case for reconstruction of the record); Docket No. 04-64 (issued August 9, 2005) (the Board affirmed OWCP's October 7, 2003 decision denying appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error); Docket No. 06-875 (issued September 8, 2006) (the Board affirmed OWCP's January 23, 2006 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely and failed to establish clear evidence of error); Docket No. 07-55 (issued March 27, 2007) (the Board affirmed OWCP's September 29, 2006 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely and failed to establish clear evidence of error); Docket No. 07-1907 (issued January 15, 2008) (the Board issued an order dismissing appellant's appeal as he had not appealed a final decision of OWCP); Docket No. 08-1121 (issued November 3, 2008) (the Board affirmed OWCP's February 28, 2008 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely and failed to establish clear evidence of error); Docket No. 10-334 (issued August 4, 2010) (the Board issued an order dismissing appellant's appeal as he had failed to file a timely appeal of OWCP's May 15, 2009 nonmerit decision); Docket No. 11-1626 (issued February 14, 2012) (the Board affirmed a June 21, 2011 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely filed and failed to establish clear evidence of error), *Erratum* Docket No. 11-1626 (issued April 26, 2012), *petition for recon. denied* Docket No. 11-1626 (issued July 26, 2012). By decision dated September 10, 2013, the Board affirmed an OWCP nonmerit decision dated February 1, 2013 denying his request for reconsideration as untimely filed and failed to establish clear evidence of error. Docket No. 13-734 (issued September 10, 2013), *petition for recon. denied*, Docket No. 13-734 (issued May 2, 2014). On August 14, 2014 the Board issued an order dismissing appellant's December 26, 2013 petition for reconsideration due to the Board's lack of jurisdiction as the request for reconsideration was not filed within 30 days of the Board's September 10, 2013 decision.

The March 15, 1991 decision was the last decision on the merits of appellant's claim of recurrence issued by OWCP. The statement of appeal rights accompanying OWCP's March 15, 1991 merit decision notified appellant that any further request for reconsideration must be made within one year of the date of the decision, *i.e.*, within one year of March 15, 1991.

In a letter dated June 5, 2015, appellant requested reconsideration and submitted a CA-1 form. He explained that the only reason he returned to work in January 1989 was because he was told by the employing establishment that he would be fired if he did not return to work. Prior to being allegedly forced to return to work appellant noted that he was paid compensation under FECA from July 14, 1988 until his return to work in January 1989. At the time of his return to work, he stated that he was still ill from his employment injury and under a doctor's care. Appellant contended that his back injury has never healed and OWCP has been negligent in failing to provide him compensation for his injury. He stated that OWCP was aware of his condition at the time of his return to work in January 1989 and was kept informed by his treating physician as to his condition. As a result of his back injury, appellant contended that he developed a consequential crippling arthritis from the cold air working in a computer room. He argues that both OWCP and the employing establishment were negligent in the handling of his claim, failing to pay medical bills incurred as a result of the injury, and not referring him to a doctor for a second opinion evaluation. Appellant requested OWCP to have his medical files reviewed by an expert Board-certified referral physician.

Appellant submitted an October 24, 1988 attending physician's report (Form CA-20) from Dr. Peter Holliday, appellant's attending neurosurgeon, which diagnosed low back strain/spasms and recurring headaches and reported leg weakness and severe low back pain. He noted an injury date of July 14, 1988 and period of total disability as October 10 to 23, 1988.

By decision dated June 22, 2015, OWCP found that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>3</sup> It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>4</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.<sup>5</sup> Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding

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<sup>3</sup> *Supra* note 1. 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. *See J.S.*, Docket No. 10-385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

<sup>4</sup> 20 C.F.R. § 10.607; *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>5</sup> *B.W.*, Docket No. 10-323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007) *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.<sup>6</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>13</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

### ANALYSIS

Appellant seeks reconsideration of a March 15, 1991 merit decision denying modification of his claim for recurrence of disability on July 3, 1989 as a result of his accepted July 14, 1988 employment injury. In his reconsideration request of June 5, 2015 he continues to disagree with the denial of his claim and filed his request for reconsideration in a letter dated June 5, 2015. Because appellant filed his request more than one year after OWCP's March 15, 1991 merit

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<sup>6</sup> See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

<sup>7</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>8</sup> See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> See *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> See *Leon J. Modrowski*, *supra* note 5; *Jesus D. Sanchez*, *supra* note 5.

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *supra* note 7.

<sup>13</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>14</sup> See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

decision, the Board finds that his request for reconsideration was untimely filed. Thus, he must demonstrate clear evidence of error on the part of OWCP in denying his claim.<sup>15</sup>

The Board further finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of compensation was erroneous. In support of his request, appellant submitted an October 24, 1988 report of Dr. Holliday. Dr. Holliday's report is irrelevant to the issue of whether appellant sustained a recurrence on July 3, 1989. It only discussed disability from October 10 to 23, 1998. The evidence submitted by appellant does not establish any error in OWCP's denial of his recurrence claim.

Appellant argues that he never healed from his original injury, that OWCP mishandled his claim, and that the medical evidence is sufficient to establish his claim. He also argues that OWCP mishandled his claim and that it was aware that the injury he sustained was a lifetime injury. Appellant's June 5, 2015 request for reconsideration fails to establish that OWCP's March 15, 1991 decision was erroneous. The arguments of error are unsubstantiated. The Board will, therefore, affirm the June 22, 2015 decision denying appellant's request.

### **CONCLUSION**

OWCP properly refused to reopen appellant's claim for reconsideration on the merits as his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>15</sup> 20 C.F.R. § 10.607(b). See *S.D.*, 58 ECAB 713 (2007); *Jack D. Johnson*, 57 ECAB 593 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 22, 2015 is affirmed.

Issued: December 3, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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