

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

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**R.O., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cincinnati, OH, Employer**

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**Docket No. 15-1681  
Issued: December 24, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 4, 2015 appellant filed a timely appeal from an April 16, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between November 25, 2013, the date of the most recent merit decision, 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 over the merits of appellant's claim.

**ISSUE**

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

**FACTUAL HISTORY**

On August 30, 1999 appellant, then a 42-year-old supervisor of operations, filed a traumatic injury claim (Form CA-1) alleging that he sustained a lower back injury at work on August 30, 1999 due to falling to the floor from a chair while reaching for objects on his desk.

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

OWCP accepted his claim for a lumbosacral strain. Appellant later stopped work and, after extensive development of the evidence, OWCP accepted appellant's claim for disability and he received disability compensation on the daily rolls beginning October 10, 2000.<sup>2</sup>

In late 2011, OWCP referred appellant for participation in a vocational rehabilitation program designed to return him to work. Appellant's vocational rehabilitation counselor reported that appellant failed to participate in essential preparatory vocational rehabilitation efforts as he claimed that his health prevented him from participating. The counselor asserted that appellant had not submitted probative medical evidence supporting such incapacity.

In a March 20, 2013 letter, OWCP advised appellant that, under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, if an individual without good cause fails or refuses to participate in essential preparatory vocational rehabilitation efforts, it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in return to work at the same or higher wages than for the position held when injured. OWCP provided appellant 30 days to participate in vocational rehabilitation efforts or submit evidence of good cause for his failure to participate in such efforts. No response was received.

By decision dated April 29, 2013, OWCP reduced appellant's compensation to zero effective May 5, 2013 based on its determination that he had failed to participate in essential preparatory vocational rehabilitation efforts.

Appellant filed a request for reconsideration and submitted medical evidence which he believed showed that he was physically incapable of participating in vocational rehabilitation efforts.

In a November 25, 2013 decision, OWCP affirmed its April 29, 2013 decision reducing appellant's compensation to zero for failure to participate in essential preparatory vocational rehabilitation efforts.

In a letter and form dated November 21, 2014 and received by OWCP on November 25, 2014, appellant requested reconsideration of OWCP's November 25, 2013 decision. He argued that the medical evidence of record showed that his compensation should be reinstated. In support of his reconsideration request, appellant submitted additional medical evidence, including an August 2, 2013 report in which Dr. Larry L. Houts, an attending osteopath and Board-certified family practitioner, detailed the findings of his July 24, 2013 physical examination. Dr. Houts indicated that appellant's lumbar region showed tenderness upon light pressure and pain upon bending which constituted findings consistent with the history of injury. He noted that he reviewed a functional capacity examination report which showed that appellant was "unemployable at this time."

By decision dated April 16, 2015, OWCP denied appellant's request for further review of the merits of his claim because his request was untimely filed and failed to demonstrate clear evidence of error. It found that appellant's reconsideration request, received on November 25, 2014, was not timely filed with respect to its November 25, 2013 decision. OWCP also found that the evidence appellant submitted in support of his reconsideration request did not show clear evidence of error in its November 25, 2013 decision.

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<sup>2</sup> Appellant received disability compensation on the periodic rolls beginning November 23, 2008.

## LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>3</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>4</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, OWCP must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."<sup>5</sup> OWCP regulations and procedure 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>6</sup>

## ANALYSIS

OWCP accepted appellant's claim for an August 30, 1999 lumbosacral strain and paid compensation for periods of disability. By decision dated April 29, 2013, OWCP reduced appellant's compensation to zero effective May 5, 2013 based on its determination that he failed to participate in essential preparatory vocational rehabilitation efforts. It affirmed this decision on November 25, 2013 and appellant requested reconsideration of the November 25, 2013 decision. By decision dated April 16, 2015, OWCP denied appellant's request for further review of the merits of his claim because his reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP improperly found that appellant filed an untimely request for further review of the merits of his claim. Appellant's request for reconsideration of OWCP's November 25, 2013 decision was filed on November 25, 2014 because it was received by OWCP on that date.<sup>7</sup> Therefore, the reconsideration request was filed precisely one year after the issuance of the November 25, 2013 decision and OWCP incorrectly found that the request was not filed within one year.

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>5</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>6</sup> *See* 20 C.F.R. § 10.607(b). OWCP procedures 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." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011).

<sup>7</sup> OWCP's regulations at 20 C.F.R. § 10.607(a) establish a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

Because OWCP incorrectly found that appellant filed an untimely reconsideration request, it improperly applied the clear evidence of error standard in refusing to reopen appellant's case for further review of the merits of his claim.<sup>8</sup> The case shall be remanded to OWCP for evaluation of appellant's reconsideration request under the standards for a timely filed reconsideration request. After carrying out this development, OWCP shall issue an appropriate decision.

**CONCLUSION**

The Board finds that OWCP improperly found that appellant filed an untimely request for further review of the merits of his claim. The case is not in posture for decision regarding whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim and the case is remanded to OWCP for further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 16, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 24, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> See *supra* notes 5 and 6.