

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

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**B.A., Appellant**

**and**

**DEPARTMENT OF THE NAVY, MARINE  
CORPS BASE, Kaneohe Bay, HI, Employer**

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**Docket No. 15-1818  
Issued: December 28, 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 28, 2015<sup>1</sup> appellant filed a timely appeal from a March 5, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated March 5, 2015, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from March 5, 2015, the date of OWCP's last decision, was September 1, 2015. Since using September 2, 2015, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 28, 2015, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1)

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

On appeal appellant argues that his request for reconsideration was timely filed.

## FACTUAL HISTORY

On May 18, 2012 appellant, then a 58-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his lower back as a result of lifting. OWCP accepted the claim for a lumbar strain. Appellant stopped work on the date of injury and returned to full-time light-duty work on July 23, 2012.

On November 4, 2012 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation for 80 hours of wage-loss compensation for the period October 22 to November 4, 2012.

By decision dated January 16, 2014, OWCP denied appellant's claim for wage-loss compensation for the period October 22 to November 2, 2012. It found the record contained no medical evidence supporting appellant's claim that he was disabled during this period as a result of his accepted employment injury.

On January 14, 2015 OWCP received appellant's request for reconsideration dated January 13, 2015, including medical evidence supporting his request. A duplicate copy was received on January 20, 2015. Appellant argued that the chain of causation had not been broken as he felt pain in his back when exiting an automobile.

By decision dated March 5, 2015, OWCP found that appellant's request for reconsideration was untimely received. It noted that the request for reconsideration was not received until January 20, 2015. OWCP denied the request as it did not establish clear evidence of error.

## LEGAL PRECEDENT

To be entitled to a merit review of OWCP's 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 time 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, it must nevertheless undertake a limited review to determine whether the application establishes clear

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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 (1989).

evidence of error.<sup>5</sup> OWCP regulations and procedures provide that it 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>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>8</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>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</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>11</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 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>12</sup>

OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP improperly found that appellant's application for reconsideration was untimely. The last merit decision was dated January 16, 2014. Appellant had one year to timely request reconsideration. The one-year time limitation began to run on the

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

<sup>6</sup> *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(c) (October 2011). OWCP procedures further provide that 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 that a schedule award was miscalculated). 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. *Id.* at Chapter 2.1602.5(a).

<sup>7</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>8</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>9</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> See *supra* note 8.

<sup>11</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>12</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>13</sup> 20 C.F.R. § 10.607.

day following the original OWCP decision.<sup>14</sup> Therefore, appellant had until January 16, 2015 to timely file an application for reconsideration.

On January 14, 2015 OWCP received appellant's request form dated January 13, 2015 for reconsideration of the January 16, 2014 decision. A duplicate copy of this form was received on January 20, 2015. OWCP found appellant's request for reconsideration was untimely filed based on the January 20, 2014 receipt date. It did not acknowledge that it had timely received the same form on January 14, 2015. As appellant's request for reconsideration was first received on January 14, 2015, it was filed within one year of OWCP's January 16, 2014 decision and therefore was timely.

The Board accordingly finds that appellant filed a timely application for reconsideration on January 14, 2015. OWCP reviewed the evidence under a clear evidence of error standard, which is appropriate only for untimely applications for reconsideration.<sup>15</sup> The case will accordingly be remanded to OWCP for proper review of the timely application for reconsideration and issuance of an appropriate decision.<sup>16</sup>

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for reconsideration of the January 16, 2014 decision, as untimely filed and failing to demonstrate clear evidence of error.

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<sup>14</sup> See *S.T.*, Docket No. 15-0382 (issued April 3, 2015); *C.K.*, Docket No. 10-1665 (issued May 25, 2011); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011),

<sup>15</sup> See *J.P.*, Docket No. 12-1596 (issued March 27, 2013); 20 C.F.R. § 10.607(b).

<sup>16</sup> See *E.B.*, Docket No. 12-84 (issued May 15, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 5, 2015 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: December 28, 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