

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

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**R.G., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
City of Industry, CA, Employer**

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**Docket No. 15-1927  
Issued: December 29, 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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 29, 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 April 22, 2011, 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 as his request 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.*

## **FACTUAL HISTORY**

OWCP accepted that on September 7, 2002 appellant, then a 43-year-old letter carrier, sustained thoracic and lumbosacral strains due to casing mail at work. Appellant received disability compensation on the daily rolls beginning November 13, 2002.<sup>2</sup>

In August 2009 appellant was referred for OWCP-sponsored vocational rehabilitation efforts designed to return him to work.

Appellant's vocational rehabilitation counselor provided reports in which he discussed appellant's nonparticipation in vocational rehabilitation efforts. He indicated that on September 21, 2009 he contacted appellant *via* e-mail, but that he never responded. On October 8, 2009 the rehabilitation counselor spoke to appellant on the telephone and scheduled an initial evaluation for October 12, 2009 at 10:00 a.m. Appellant failed to attend the appointment and later called to indicate that he had overslept. The rehabilitation counselor noted that the appointment was rescheduled for 2:00 p.m. the same day, but that appellant called back 30 minutes later and rescheduled it for October 15, 2009 at 1:00 p.m. Appellant did not keep the rescheduled appointment nor did he provide an explanation for his absence. The rehabilitation counselor indicated that further attempts at contacting appellant failed because his telephone had been disconnected. He concluded that appellant had failed to participate in essential preparatory vocational rehabilitation efforts.

In a November 4, 2009 letter, OWCP advised appellant that 5 U.S.C. § 8113(b) provides that if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed, and OWCP finds that in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, OWCP may reduce prospectively the compensation based on what probably would have been his wage-earning capacity had he not failed to apply for and undergo vocational rehabilitation. It also indicated that, under 20 C.F.R. § 10.519 of its regulations, if an individual without good cause fails or refuses to participate in the essential preparatory efforts, OWCP will assume, in the absence of evidence to the contrary, that the vocational rehabilitation efforts would have resulted in a return to work with no loss of wage-earning capacity, and compensation will be reduced accordingly. OWCP provided appellant 30 days to participate in vocational rehabilitation efforts or provide good cause for not doing so. Appellant did not contact OWCP for the purpose of participating in vocational rehabilitation efforts or respond to its November 4, 2009 letter.

By decision dated January 21, 2010, OWCP reduced appellant's compensation to zero effective January 17, 2010 due to his failure to participate in essential preparatory vocational rehabilitation efforts. It noted that it was assumed that appellant's participation in vocational rehabilitation efforts would have resulted in a return to work with no loss of wage-earning capacity.

Appellant requested reconsideration and submitted the results of diagnostic tests, and other medical reports. He maintained that he was unable to participate in vocational rehabilitation efforts.

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<sup>2</sup> Appellant received disability compensation on the periodic rolls beginning October 5, 2003.

By decision dated April 22, 2011, OWCP denied modification of its January 21, 2010 decision reducing appellant's compensation to zero for failure to participate in essential preparatory vocational rehabilitation efforts. It found that appellant had not submitted medical evidence supporting his argument that he was not physically capable of participating in vocational rehabilitation efforts.

On April 26, 2012 OWCP received a form that appellant completed on April 16, 2012 which contained a check mark indicating that he wished to appeal his case to the Board. On April 26, 2012 it also received an eight-page letter containing the salutation "To whom it may concern" and a notation after the signature of "For Reconsideration." Appellant contended that he did comply with OWCP's requests for vocational rehabilitation. He requested that his benefits be reinstated.

On November 3, 2014 OWCP received a form signed on September 12, 2014 in which appellant requested reconsideration of its April 22, 2011 decision denying modification of its reduction of his compensation to zero for failure to participate in essential preparatory vocational rehabilitation efforts.

In an undated letter received by OWCP on March 31, 2015, appellant again requested reconsideration of OWCP's April 22, 2011 decision. He argued that he did, in fact, follow all of the instructions of his vocational rehabilitation counselor and attend all required meetings. Appellant also claimed, in the alternative, that he had good cause not to participate in vocational rehabilitation efforts because his medical conditions physically prevented him from participating in such efforts. He argued that, even if it were shown that he failed to cooperate with vocational rehabilitation efforts, OWCP did not establish that, in the absence of his noncooperation, he would have had no wage loss.<sup>3</sup>

In support of his reconsideration request, appellant submitted numerous medical reports dated between August 2006 and March 2015. Only a small number of the reports related to the period contemporaneous with the time of the January 2010 reduction of his compensation benefits. Appellant submitted July 9, 2010 and January 30, 2011 reports of diagnostic testing. Most of the medical reports were dated in 2014 and early 2015 and discussed the degenerative disease of his neck and back.<sup>4</sup>

In an April 16, 2015 decision, 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 determined that appellant filed an untimely request for reconsideration because his request was received on November 3, 2014, a date more than one year after OWCP's April 22, 2011 decision. OWCP found that the evidence and argument submitted by appellant in support of his untimely reconsideration request did not raise a substantial question concerning the correctness of OWCP's April 22, 2011 decision and did not show clear evidence of error in that decision.

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<sup>3</sup> Appellant submitted other statements in which he discussed his general concerns about the administration of his claim.

<sup>4</sup> Appellant also submitted pharmacy prescription slips, change of address forms, and other administrative documents concerning his compensation claim.

## 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>5</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>6</sup>

OWCP, however, may not deny an application for review solely as the application was untimely filed. When an application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."<sup>7</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>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup>

## ANALYSIS

The Board finds that in its April 16, 2015 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was received and filed on November 3, 2014, a date more than one year after OWCP's April 22, 2011

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>8</sup> *Id.*; 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>9</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>12</sup> *See Leona N. Travis*, *supra* note 10.

<sup>13</sup> *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

decision. 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.<sup>14</sup>

On appeal, appellant argues he filed his reconsideration request in a timely manner because he sent OWCP a reconsideration request which was received by OWCP on April 26, 2012. The Board notes that on April 26, 2012 OWCP received a form completed by appellant on April 16, 2012, but that the form contained a check mark indicating that he wished to appeal his case to the Board.

On April 26, 2012 OWCP also received an eight-page letter containing the salutation "To whom it may concern" and a notation after the signature of "For Reconsideration." However, this request was not filed in a timely manner as it too was received beyond one year from the issuance of the April 22, 2011 decision. As appellant filed an untimely request for reconsideration of OWCP's April 22, 2011 decision, appellant must demonstrate clear evidence of error on the part of OWCP in issuing that decision.<sup>15</sup>

Appellant has failed to establish clear evidence of error in the April 22, 2011 decision. He did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error.

On appeal appellant argued that he did, in fact, follow all of the instructions of his vocational rehabilitation counselor and attend all required meetings. However, he did not provide sufficient details of such alleged cooperation or submit evidence supporting his assertions. Appellant's unsupported assertions in this regard do not show that the employing establishment erred in its April 22, 2011 decision.

On appeal appellant argued, in the alternative, that he had good cause not to participate in vocational rehabilitation efforts because his medical conditions physically prevented him from participating in such efforts. He submitted medical reports dated between 2006 and 2015 but only a small number of the reports related to the period at issue. None of the reports contain a rationalized medical opinion that appellant's medical condition had incapacitated him to the extent that he could not participate in vocational rehabilitation efforts and therefore these reports would not tend to support his claim that he had good cause to not participate in vocational rehabilitation efforts due to his medical condition.<sup>16</sup> The medical evidence does not raise a substantial question concerning the correctness of OWCP's April 22, 2011 decision which found that appellant did not show good cause for failing to participate in vocational rehabilitation efforts.

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<sup>14</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

<sup>15</sup> See *supra* note 7.

<sup>16</sup> Appellant also submitted pharmacy prescription slips, change of address forms, and other administrative documents concerning his compensation claim, but these documents would not support his assertion that he was physically unable to participate in vocational rehabilitation.

On appeal appellant also argued that, even if it were shown that he failed to cooperate with vocational rehabilitation efforts, OWCP did not establish that, in the absence of his noncooperation, he would have had no wage loss. He did not explain the basis for this belief and his mere assertions in this regard would not be sufficient to establish clear error.

For these reasons, the Board finds that the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of OWCP's April 22, 2011 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.

**CONCLUSION**

The Board finds that 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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 29, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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