

FACTUAL HISTORY

This case has previously been before the Board. On January 14, 1992 appellant, then a 49-year-old construction representative, sustained injuries to his neck and back when he slipped on a wet dock at work. He stopped work on January 16, 1992 and did not return. Effective August 9, 1992, he elected a disability retirement annuity from the Office of Personnel Management (OPM). OWCP accepted the claim for cervical and lumbosacral sprains and paid compensation benefits until the election of OPM benefits. On February 27, 2006 he had filed a Form CA-7 claim for disability benefits retroactive to August 9, 2002. On January 5, 2007 appellant elected to receive wage-loss compensation from OWCP retroactive to August 9, 1992, in lieu of OPM benefits. He asserted that his disability was due to his accepted condition. On June 1, 2007 OWCP denied his claim for disability compensation due to insufficient medical evidence. After a reconsideration request, OWCP conducted a merit review but denied the claim on September 27, 2007. An appeal was filed to the Board. On May 13, 2008 the Board issued an order remanding the case to OWCP for proper assemblage of the record and a *de novo* decision as the case record was missing materials from August 4, 1995 through December 14, 2004.³ After determining no records were missing, OWCP reissued its decision on December 1, 2008 denying wage-loss compensation beginning August 9, 1992.

By decision dated October 22, 2009, the Board affirmed the December 1, 2008 decision, finding that appellant had not met his burden of proof to establish wage-loss compensation beginning August 9, 1992.⁴ Appellant requested reconsideration. In decisions dated January 14, 2011 and April 4, 2012, OWCP reviewed the case on its merits and denied modification of the wage-loss compensation determination. On October 26, 2012 appellant appealed the April 4, 2012 decision to the Board. On December 20, 2012 the Board issued an order dismissing appeal as it was untimely filed and the Board lacked jurisdiction to review the appeal.⁵

On March 29, 2013 appellant requested reconsideration of the April 4, 2012 decision. The request was postmarked on March 29, 2013 and received by OWCP on April 5, 2013. By decision dated May 8, 2013, OWCP denied appellant's request as untimely filed and failing to establish clear evidence of error. Appellant disagreed and again requested reconsideration. He continued to request that OWCP reconsider his claim. On August 14, 2013 OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error. Appellant appealed to the Board. By decision dated June 11, 2014, the Board affirmed the May 8 and August 14, 2013 OWCP decisions.⁶ The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.

By letter dated June 18, 2014 received by OWCP on June 26, 2014, appellant requested reconsideration. Evidence received in support of this reconsideration request included a May 22, 2013 letter from the U.S. Postal Service apologizing for delayed delivery of his reconsideration

³ Docket No. 08-278 (issued May 13, 2008).

⁴ Docket No. 09-519 (issued October 22, 2009).

⁵ Docket No. 13-169 (issued December 20, 2012).

⁶ Docket No. 14-132 (issued June 11, 2014).

request mailed on March 29, 2013, and confirming delivery of that letter to an OWCP mailroom in London, Kentucky, on April 4, 2013. Also submitted were a printout showing that appellant's certified mail item was delivered on April 4, 2013 in London, Kentucky, and a copy of correspondence between appellant and the office of Senator Elizabeth Warren.

By decision dated September 29, 2014, OWCP denied appellant's request for reconsideration. It found that, while he had established that the March 29, 2013 request for reconsideration was delivered to OWCP mailroom on April 4, 2013, it was not received by OWCP's district office until April 5, 2013, and was therefore untimely filed. OWCP further found that appellant did not submit any relevant and pertinent new evidence with his most recent reconsideration request that shows that OWCP erroneously applied or interpreted a specific point of law, or advances a relevant legal argument not previously considered.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁷

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include precoupment hearing decisions.⁹ Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (October 2011).

Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.¹⁰

OWCP will consider an untimely application 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.¹¹

The term clear evidence of error is intended to represent a difficult standard.¹² If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹³

ANALYSIS

The most recent decision reviewing the merits of appellant's case was OWCP's April 4, 2012 decision. As the appeal rights attached to that decision explained, appellant had one calendar year from the date of that decision or until April 4, 2013, to ensure receipt by OWCP of any reconsideration request.

OWCP received appellant's June 18, 2014 reconsideration request on June 26, 2014. As the received date was more than one year beyond April 4, 2012, appellant's request must be considered untimely. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.

In denying appellant's reconsideration request, OWCP found the request untimely but did not review the request under the clear evidence of error standard. Rather it applied the standard of review for timely requests for reconsideration.¹⁴ As OWCP applied the wrong standard of review to the untimely request for reconsideration, the Board will set aside OWCP's September 29, 2014 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.¹⁵

CONCLUSION

The Board finds that this case is not in posture for decision as OWCP applied the improper standard of review.

¹⁰ *Id.* at Chapter 2.1602.4.b (October 2011).

¹¹ 20 C.F.R. § 10.607.

¹² *Supra* note 10 at Chapter 2.1602.5.a (October 2011).

¹³ *Id.* at Chapter 2.1602.5.b.

¹⁴ *Cf. H.L.*, Docket No. 13-2077 (issued March 20, 2014) (the Board set aside and remanded the case on the grounds appellant's request was untimely and its generic decision failed to discuss or evaluate the particular evidence and argument appellant presented to support her request).

¹⁵ *See* 20 C.F.R. § 10.607(b).

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further review under the clear evidence of error standard.

Issued: October 6, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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