

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a decision dated February 9, 2004, the Board found that the case was not in posture for decision with regard to whether the employee was entitled to disability compensation after July 31, 1996. The Board determined that OWCP had properly found that, if the employee was receiving retroactive pay for the period August 1, 1996, under an Equal Employment Opportunity (EEO) decision, he would be prohibited from receiving wage-loss compensation for the same period. However, there was no evidence of record that the employing establishment had fulfilled its obligations under the EEO decision, nor was there evidence that the employee was paid any of the back wages he was owed. On remand, the Board directed that OWCP should determine whether the employee was paid back wages pursuant to the EEO order and, after examining all of the relevant evidence, to issue a *de novo* decision on the employee's entitlement to wage-loss compensation benefits for the period beginning August 1, 1996.² The facts of the case, as set forth in the prior decisions, are incorporated herein by reference.

On May 12, 2004 OWCP requested that the employing establishment provide documentation regarding retroactive payments for salary or wages beginning August 1, 1996 and the employee's return to work. The employing establishment provided sufficient evidence to establish that appellant was on the payroll for that period and included the employee's back pay application and the back pay decision/settlement worksheet with supporting documents.

In an October 7, 2004 decision, OWCP determined that the employee had received back pay for the period August 1, 1996 until his return to work on February 23, 2004. It determined that, as a result, the employee was not eligible for any further FECA compensation benefits during that period.

The record indicates that the employee passed away in 2013.

On May 18, 2015 appellant's representative requested reconsideration of the October 7, 2004 decision. He argued that the employee should receive compensation for wage-loss compensation benefits for the period beginning August 1, 1996 through February 23, 2004. Appellant's representative argued that the employee did not receive the correct payment for his back wages under the EEO order and the wages were calculated incorrectly. He argued that the employee was not compensated for the above noted period of time, but rather, the employing establishment credited the employee with the amount of money he would have received from his Office of Personnel Management (OPM) retirement account as if he had been working and receiving wages outside the employing establishment.

Appellant's representative argued that instead of paying the employee for the time period in question, the employing establishment deducted/credited the compensation it owed him because he used his own (money in his retirement) to support him and his family. He argued that since the employee used his own money, he was entitled to make an election of benefits and have his OPM retirement account credited for the amount of money withdrawn from his retirement

² Docket No. 04-0091 (issued February 9, 2004).

account. Under 5 U.S.C. § 8116, the representative argued that when an election was required in a disability case, OWCP must provide a Form CA-1102 to the employee, which provides information about the rate of compensation payable and the employee's right to elect the more advantageous benefit. He argued that when the employee's benefits were reinstated on February 23, 2004, it was clear evidence of error because OWCP failed to provide him with an election of benefits letter. The representative argued that he had met the requirements to establish clear evidence of error and requested that the employee be given an election of benefits letter to elect the more advantageous benefit. No documentation accompanied his argument.

In a September 30, 2015 decision, OWCP denied appellant's request for reconsideration for the reason that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely as it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.⁷ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. The Board makes an independent

³ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

⁷ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.⁸

ANALYSIS

In its September 30, 2015 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision regarding whether the employee was entitled to receive compensation for wage loss beginning August 1, 1996 on October 7, 2004. The reconsideration request of appellant's representative was received on May 18, 2015, more than 10 years after the October 7, 2004 merit decision and was, therefore, untimely.

The Board also finds that the untimely request does not demonstrate clear evidence of error. In its October 7, 2004 decision, OWCP determined that the employing establishment had provided sufficient documentation to establish that the employee had been on the employing establishment rolls for the period August 1, 1996 through his return to work on February 23, 2004. It determined that the employee was thus not entitled to any further compensation benefits during that period.

The employee's representative argued that the employee should receive compensation for wage-loss compensation benefits for the period beginning August 1, 1996 through February 23, 2004 because the employing establishment had not properly paid the employee for his back wages under the EEO order and the wages had been calculated incorrectly. However, the Board lacks jurisdiction over the structure and accuracy of the back wages the employee was to receive, as a result of this EEO order. Any concerns regarding that payment would be addressed to either the EEOC or the employing establishment. Appellant's representative argues that the employing establishment calculated some of the back pay on the employee's retirement salary and as such believes an election of benefits form, under 5 U.S.C. § 8116, would have been appropriate. However, this allegation has not been supported by any evidence to establish any error in OWCP's September 30, 2015 decision. While appellant is correct that if an employee were receiving retirement pay and was also entitled to wage-loss compensation under FECA, an election under 5 U.S.C. § 8116 would be required. In this case, however, the employee was not entitled to compensation benefits under FECA because he was receiving compensation from the employing establishment for back wages.⁹ As such this argument fails to raise a substantial question as to the correctness of OWCP's decision and is therefore insufficient to demonstrate clear evidence of error.

OWCP reviewed the arguments submitted by appellant's representative and properly found it to be insufficient to demonstrate clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review. The Board finds that OWCP did not abuse its discretion in denying further merit review.

⁸ *Id.*

⁹ *See* 5 U.S.C. § 8116; 20 C.F.R. § 10.421.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board