

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated April 5, 1990, the Board affirmed an August 19, 1989 schedule award decision.² On March 10, 1999 the Board affirmed an August 10, 1996 decision finding that appellant did not establish a recurrence of disability on March 16, 1989 and a November 13, 1996 decision denying his request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).³ By decision dated October 22, 2002, the Board affirmed March 14 and November 29, 2001 and March 5, 2002 decisions denying his request for further merit review pursuant to section 8128(a).⁴ In decisions dated May 2, 2005, October 21, 2009, July 19, 2011, and July 25, 2012, the Board affirmed OWCP decisions denying appellant's requests for reconsideration as they were untimely and did not demonstrate clear evidence of error.⁵ By order dated December 16, 2013, the Board set aside a May 10, 2013 nonmerit decision denying his request for reconsideration under section 8128(a) and remanded the case for OWCP to apply the standards for untimely requests for reconsideration.⁶ On July 1, 2014 the Board affirmed a February 3, 2014 decision finding that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.⁷ In a decision dated April 20, 2015, the Board affirmed a December 2, 2014 nonmerit decision denying his request for reconsideration as it was untimely and did not demonstrate clear evidence of error.⁸ The facts and circumstances of the case as set forth in the prior decisions are incorporated herein by reference.

By letter dated January 27, 2015, OWCP advised appellant that the employing establishment had jurisdiction over matters related to his employment. It informed him that it did not terminate his compensation for refusing suitable work, but instead stopped his compensation when he resumed limited-duty employment on November 5, 1988. After appellant stopped work on March 16, 1989 and filed a claim for compensation, OWCP found that he had

² Docket No. 90-321 (issued April 5, 1990).

³ Docket No. 97-670 (issued March 10, 1999). OWCP accepted that appellant, then a 28-year-old mail handler, sustained left carpal tunnel syndrome causally related to factors of his federal employment. He returned to limited-duty employment on November 5, 1988 but resigned from work on March 16, 1989 because he did not want to work his assigned schedule. On June 19, 1989 the employing establishment terminated appellant's employment due to his failure to report for work. The Board found that the employing establishment did not require him to work outside his restrictions and that the medical evidence did not establish that he was disabled from his modified employment.

⁴ Docket No. 02-1032 (issued October 22, 2002).

⁵ Docket No. 04-757 (issued May 2, 2005); Docket No. 09-151 (issued October 21, 2009); Docket No. 10-2320 (issued July 19, 2011); Docket No. 12-714 (issued July 25, 2012). On January 25, 2010 the Board denied appellant's petition for reconsideration of its July 19, 2011 decision. *Order Denying Petition for Reconsideration*, Docket No. 10-2320 (issued January 25, 2012). On March 1, 2013 the Board dismissed appellant's appeal of an informational letter. *Order Dismissing Appeal*, Docket No. 12-1967 (issued March 1, 2013).

⁶ *Order Remanding Case*, Docket No. 13-1383 (issued December 16, 2013).

⁷ Docket No. 14-759 (issued July 1, 2014).

⁸ Docket No. 15-426 (issued April 20, 2015). The Board denied appellant's petition for reconsideration on October 27, 2015. *Order Denying Petition for Reconsideration*, Docket No. 15-0426 (issued October 27, 2015).

not established a recurrence of disability beginning that date, a finding that was affirmed by the Board.

On August 19, 2015 appellant requested reconsideration. He maintained that the January 27, 2015 letter from OWCP provided that the employing establishment had jurisdiction over employment laws and status, which he asserted constituted a new argument regarding whether it impermissibly withdrew his job. Appellant alleged that the employing establishment offered him a limited-duty position on July 6, 1998 but then withdrew “the procedural and medical guaranteed legal challenges” of the offer by telling him that he had to “take it or leave it.” He asserted that OWCP erred in its merit decisions when it failed to indicate that objections raised to the job had to be adjudicated prior to the employing establishment withdrawing the position. Appellant related that a July 26, 1999 arbitration case established that the employing establishment erroneously told him he had no right to protest the job offer and had to accept the offered position.

Appellant resubmitted two pages of a July 26, 1991 labor arbitration panel decision. The decision noted that a compensation specialist with the employing establishment advised him that he must either take or leave the job of modified custodial offered in November 1988 as she believed that he had no other rights under employment laws or the National Agreement.

In an addendum dated November 3, 2015, appellant related that his allegations were relevant to the issue of whether he had established that the employing establishment withdrew the limited-duty job offer after he abandoned his position on March 16, 1989. He asserted that after he returned to work in November 1988 and then abandoned his position on March 16, 1989, the employing establishment withdrew his appeal rights. Appellant contended that OWCP should remand his case for proper findings of fact with rationale.

By decision dated November 16, 2015, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that he had not submitted evidence supporting his allegations.

On appeal appellant contends that he submitted evidence to OWCP showing that the employing establishment told him that he could take or leave the job offer and thus withdrew applicable medical and procedural safeguards.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁹ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.¹⁰ OWCP will consider an untimely application

⁹ *Supra* note 1.

¹⁰ 20 C.F.R. § 10.607(a). 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 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).

only if the application demonstrates clear evidence of error on the part of OWCP 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. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.¹² To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP’s procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ The most recent merit decision was the Board’s decision issued March 10, 1999. As OWCP received appellant’s request for reconsideration on August 19, 2015 more than one year after the most recent merit decision dated March 10, 1999, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁶

OWCP, in its last merit decision dated August 10, 1996, found that appellant did not establish a recurrence of disability beginning March 16, 1989 as he did not show that he was working outside his restrictions or that he was disabled from his limited-duty employment due to his accepted work injury. In a decision dated March 10, 1999, the Board affirmed the August 10, 1996 decision. In his reconsideration request, appellant contended that OWCP failed to consider that the employing establishment withdrew his limited-duty position and informed him that he had to take the offered position without explaining his legal rights. As noted by the Board in its July 25, 2012 decision, it previously addressed this argument in its March 10, 1999 merit

¹¹ 20 C.F.R. § 10.607(b).

¹² Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.5(a) (October 2011).

¹³ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Robert F. Stone*, *supra* note 13.

¹⁶ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

decision affirming OWCP's finding that he did not establish a recurrence of disability. Consequently, this issue, absent further merit review of this issue by OWCP, is *res judicata*.¹⁷

Appellant also maintained that OWCP erred in its August 19, 1996 decision by failing to indicate that objections to the job had to be adjudicated before the employing establishment withdrew the position. He noted that the employing establishment had jurisdiction over his employment status, as provided by OWCP in its January 27, 2015 letter. The underlying issue in the case, however, is whether appellant has established that he sustained a recurrence of disability beginning March 16, 1989, the date that he stopped work. In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁸ Appellant's contention is not relevant to this issue and thus is insufficient to demonstrate clear evidence of error.

Appellant resubmitted two pages from a July 26, 1991 arbitration decision indicating that the employing establishment told him that he had to take the job of modified custodian offered November 1988. He argued that this established that the employing establishment withdrew his procedural rights after he resumed work in November 1988 and abandoned his position on March 16, 1989. The Board previously discussed the arbitration decision in its July 1, 2014 decision, noting that it found that the employing establishment did not violate the National Agreement in assigning appellant to the modified position. The resubmission of this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision.¹⁹ Further, appellant's allegation that the employing establishment failed to properly provide him with legal protection is not relevant to the issue of whether he established a recurrence of disability subsequent to his March 16, 1989 resignation and, consequently, does not demonstrate clear evidence of error.

As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of OWCP's last merit decision, he has not demonstrated clear evidence of error.²⁰

On appeal appellant asserts that he submitted evidence to OWCP showing that the employing establishment informed him that he had to take the job and withdrew medical and procedural safeguards. As discussed, this evidence does not address the underlying issue of whether he met his burden of proof to show that he was disabled from his limited-duty employment beginning March 16, 1989 and thus it is insufficient to demonstrate clear evidence of error.

¹⁷ See *Robert G. Burns*, 57 ECAB 657 (2006); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

¹⁸ See *E.M.*, Docket No. 14-0667 (issued May 7, 2014); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁹ See *T.M.*, Docket No. 15-1571 (issued November 5, 2015).

²⁰ See *Veletta C. Coleman*, 48 ECAB 367 (1997).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

ORDER

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

Issued: April 26, 2016
Washington, DC

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

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

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