



## **FACTUAL HISTORY**

This case has previously been before the Board. On April 28, 1978 appellant, a 39-year-old store worker, filed a traumatic injury claim (Form CA-1), alleging that on April 26, 1978 he injured his head and shoulder as a result of being struck by a metal door while bailing cardboard. He stopped work on the date of injury and returned to full duty the next day on April 27, 1978. OWCP accepted appellant's claim for contusion of the left shoulder and scalp hematoma.<sup>2</sup> Thereafter, appellant filed claims for a recurrence of disability (Form CA-2a) on October 16, 1984 and March 13, 2004. On July 19, 2004 OWCP denied the March 13, 2004 recurrence claim as the medical evidence was insufficient to establish that it was causally related to the April 26, 1978 work injury. Appellant requested a hearing and by decision dated August 10, 2005, an OWCP hearing representative affirmed the July 19, 2004 decision. On December 23, 2005 appellant requested a review of the written record and submitted additional evidence.<sup>3</sup> By decision dated January 24, 2006, an OWCP hearing representative denied appellant's request for a review of the written record, on the grounds that he was not entitled to a second review as a matter of right. The request was further denied because the issue in the case could be equally well addressed through a request for reconsideration. Appellant appealed to the Board. By decision dated December 11, 2006, the Board affirmed the August 10, 2005 and January 24, 2006 OWCP decisions which denied appellant's claim for a recurrence and request for a review of the written record.<sup>4</sup> Appellant requested reconsideration multiple times. OWCP denied his requests in decisions dated July 15, 2008, August 13, 2009, January 22 and August 16, 2010.

On December 18, 2009 appellant filed a timely appeal from a June 26, 2009 merit decision in OWCP File No. xxxxxx397 and the August 13, 2009 nonmerit decision in the present claim, OWCP File No. xxxxxx587. In its February 16, 2011 decision, the Board affirmed OWCP's June 26, 2009 decision in File No. xxxxxx397, finding that he failed to establish that he sustained a recurrence of disability commencing March 3, 1980 due to his accepted September 23, 1975 employment injury, and that OWCP properly refused to reopen his claim for reconsideration of the merits under 5 U.S.C. § 8128(a). The Board also affirmed OWCP's August 13, 2009 decision in OWCP File No. xxxxxx587, finding that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error.<sup>5</sup>

On January 18, 2012 appellant again requested reconsideration. In a decision dated April 27, 2012, OWCP denied his request as it was untimely filed and failed to establish clear evidence of error. On July 23, 2012 appellant filed a timely appeal from OWCP's April 27, 2012 nonmerit decision. By decision dated November 2, 2012, the Board affirmed the April 27, 2012

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<sup>2</sup> Appellant has a separate claim for a September 23, 1975 injury that OWCP accepted for a right lumbar muscle strain. (OWCP File No. xxxxxx397).

<sup>3</sup> Evidence included a September 26, 1975 report from Dr. Robert L. Shore, a physician, an April 14, 1980 report from Dr. Steven Rowlan, a Board-certified orthopedic surgeon, an August 2, 1985 report from Dr. Jerry Martin, a chiropractor, and a June 23, 1987 report from Dr. Hans von Brauchitsch, a Board-certified psychiatrist.

<sup>4</sup> Docket No. 06-1337 (issued December 11, 2006), *Order Denying Petition for Reconsideration* (issued June 15, 2007).

<sup>5</sup> Docket No. 10-634 (issued February 16, 2011).

OWCP decision, as the request was untimely and failed to establish clear evidence of error.<sup>6</sup> Appellant again requested reconsideration. In a merit decision dated June 17, 2013, OWCP denied modification of its prior decision. The facts of the case, as set forth in the prior Board decisions, are incorporated herein by reference.

By letter dated July 18, 2015 and received on July 30, 2015, appellant again requested reconsideration.<sup>7</sup> He submitted narrative statements and previously filed traumatic injury and recurrence claim forms. Appellant also resubmitted a September 26, 1975 report from Dr. Shore, a request for examination and/or treatment (Form CA-16) dated April 26, 1978, an April 14, 1980 report from Dr. Rowlan, reports dated January 23 and August 2, 1985 from Dr. Martin, and a June 23, 1987 report from Dr. von Brauchitsch.

In an August 1, 2005 report, Dr. Mark W. Cotton, a Board-certified family practitioner, asserted that appellant suffered from organic brain syndrome and opined that he was mentally impaired as a result of a head injury that occurred in 1978. He opined that appellant was unable to make decisions regarding his own affairs because of his mental impairment since the initial injury of 1978 and it was not expected that this condition would improve. On June 11, 2015 Dr. Cotton reported that appellant had been under his care since July 2003 for chronic low back pain and a closed head injury with resulting organic brain syndrome. He opined that both injuries were work related and occurred approximately 36 years ago. Dr. Cotton found that appellant was totally disabled from work and had not held a job since the time of the injury.

By decision dated October 28, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>8</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>9</sup> One such limitation provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>10</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>11</sup>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit

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<sup>6</sup> Docket No. 12-1515 (issued November 2, 2012).

<sup>7</sup> Appellant submitted other such forms that that were received on July 30 and August 5, 2015. Not all of the writing on these forms is legible.

<sup>8</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>10</sup> 20 C.F.R. § 10.607(a).

<sup>11</sup> See *F.R.*, Docket No. 09-575 (issued January 4, 2010).

decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<sup>12</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>13</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>14</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</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>17</sup>

To establish 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>18</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>19</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations<sup>20</sup> and procedures<sup>21</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was OWCP's June 17, 2013 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since OWCP did not receive his request until July 30, 2015, it was filed outside of the one-year time period. As appellant's request for reconsideration was submitted more than one year after the June 17, 2013

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<sup>12</sup> 20 C.F.R. § 10.607(b).

<sup>13</sup> See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>14</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010).

<sup>15</sup> See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>16</sup> See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>17</sup> See *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>18</sup> See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>19</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>20</sup> 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011); see *supra* note 18.

merit decision, it was untimely filed. Consequently, he must establish clear evidence of error by OWCP in the denial of his claim.<sup>22</sup>

The Board finds that the evidence submitted by appellant in support of his request for reconsideration does not raise a substantial question as to the correctness of OWCP's June 17, 2013 decision or shift the weight of the evidence of record in his favor.

In his reports, Dr. Cotton reported that appellant had been under his care since July 2003 for chronic low back pain and a closed head injury with resulting organic brain syndrome and opined that he was mentally impaired as a result of a head injury that occurred in 1978. He found that appellant was totally disabled and did not expect his condition to improve. Dr. Cotton opined that both injuries were work related and occurred approximately 36 years ago. The term clear evidence of error is intended to represent a difficult standard. A detailed, well-rationalized medical report which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.<sup>23</sup> It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.<sup>24</sup> While the reports of Dr. Cotton are generally supportive of appellant's continuing residuals and disability, it does not establish clear error on the part of OWCP in rendering its June 17, 2013 decision. Thus, the Board finds that the reports of Dr. Cotton are insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's decision denying his request for reconsideration.

The remaining medical reports submitted were duplicative of reports previously of record and do not show error with respect to the June 17, 2013 decision.<sup>25</sup> Appellant has not explained how resubmission of these reports raises a substantial question concerning the correctness of OWCP's decision.

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in its June 17, 2013 decision.

On appeal, appellant requests reconsideration of the merits of his claim. As noted above, the Board only has jurisdiction over OWCP's October 28, 2015 nonmerit decision which denied his request for reconsideration and therefore is precluded from conducting a merit review. As explained, the medical evidence provided by appellant is insufficient to shift the weight of the evidence in his favor and does not establish clear evidence of error.

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<sup>22</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>23</sup> See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

<sup>24</sup> See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

<sup>25</sup> See *L.M.*, Docket No. 14-1738 (issued March 3, 2015) (where the claimant resubmitted medical reports previously of record, the Board found that the evidence was duplicative and failed to establish clear evidence of error).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 28, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2016  
Washington, DC

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

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

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