

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

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E.P., Appellant )

and )

DEPARTMENT OF THE AIR FORCE, ROBINS )  
AIR FORCE BASE, Warner Robins, GA, )  
Employer )

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**Docket No. 16-1402**  
**Issued: December 15, 2016**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 20, 2016 appellant filed a timely appeal of a June 14, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days elapsed since the last merit decision dated March 15, 1991 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>1</sup> Appellant initially filed a timely request for oral argument before the Board. On July 6, 2016 the Board received appellant's letter which withdrew his request for oral argument. The Board will therefore proceed with a review of the record.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

On appeal appellant argues that OWCP erred in finding that he failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

Appellant's claim has previously been before the Board on multiple appeals. The facts and circumstances of the prior appeals are set forth in the Board's prior decisions and are incorporated herein by reference.<sup>3</sup> The relevant facts are as follows.

On July 25, 1988 appellant, then a 38-year-old computer operator, filed a traumatic injury claim (Form CA-1) alleging that on July 14, 1988 he injured his back when he tripped and fell over a box. OWCP accepted the claim for a low back strain.

Appellant filed a recurrence of disability (Form CA-2a) alleging disability as of July 3, 1989 causally related to his July 14, 1988 employment injury. OWCP denied this claim on January 16, 1990 finding that he failed to submit evidence sufficient to establish that his current back condition was causally related to his July 14, 1988 employment injury. On November 19, 1990 appellant timely requested reconsideration. On March 15, 1991 OWCP reviewed the merits of the claim and denied modification of the prior decision. It found that the medical

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<sup>3</sup> Docket No. 94-544 (issued July 19, 1995) (the Board affirmed a November 9, 1993 nonmerit OWCP decision denying reconsideration of a March 15, 1991 OWCP decision); Docket No. 01-798 (issued October 9, 2001) (the Board affirmed a November 27, 2000 decision denying appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error); Docket No. 03-887 (issued June 5, 2003) (the Board affirmed a February 11, 2003 OWCP decision denying appellant's reconsideration request as untimely filed and failed to demonstrate clear evidence of error); Docket No. 03-905 (issued January 21, 2004) (the Board issued an order remanding the case for reconstruction of the record); Docket No. 04-64 (issued August 9, 2005) (the Board affirmed OWCP's October 7, 2003 decision denying appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error); Docket No. 06-875 (issued September 8, 2006) (the Board affirmed OWCP's January 23, 2006 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely filed and failed to demonstrate clear evidence of error); Docket No. 07-55 (issued March 27, 2007) (the Board affirmed OWCP's September 29, 2006 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely filed and failed to demonstrate clear evidence of error); Docket No. 07-1907 (issued January 15, 2008) (the Board issued an order dismissing appellant's appeal as he had not appealed from a final decision of OWCP); Docket No. 08-1121 (issued November 3, 2008) (the Board affirmed OWCP's February 28, 2008 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely filed and failed to demonstrate clear evidence of error); Docket No. 10-334 (issued August 4, 2010) (the Board issued an order dismissing appellant's appeal as he had failed to file a timely appeal of OWCP's May 15, 2009 nonmerit decision); Docket No. 11-1626 (issued February 14, 2012) (the Board affirmed OWCP's July 5, 2011. On February 14, 2012 the Board affirmed a June 21, 2011 nonmerit decision denying appellant's request for reconsideration of the March 15, 1991 decision as it was untimely filed and failed to demonstrate clear evidence of error), *Erratum* Docket No. 11-1626 (issued April 26, 2012), *petition for recon. denied*, Docket No. 11-1626 (issued July 26, 2012). By decision dated September 10, 2013, the Board affirmed an OWCP nonmerit decision dated February 1, 2013 denying his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. Docket No. 13-734 (issued September 10, 2013), *petition for recon. denied*, Docket No. 13-734 (issued May 2, 2014). On August 14, 2014 the Board issued an order dismissing appellant's December 26, 2013 petition for reconsideration due to the Board's lack of jurisdiction as the request for reconsideration was not filed within 30 days of the Board's September 10, 2013 decision. By decision dated December 3, 2015, the Board affirmed a June 22, 2015 decision denying appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. Docket No. 15-1609 (issued December 3, 2015). On December 23, 2015 the Board issued an order dismissing appellant's appeal as it was duplicative of an earlier appeal. Docket No. 15-1883 (issued December 23, 2015).

evidence failed to demonstrate that the claimed condition or disability for work was causally related to appellant's accepted employment injury.

The March 15, 1991 decision is the last merit decision regarding appellant's July 3, 1989 recurrence claim. The statement of appeal rights accompanying OWCP's March 15, 1991 merit decision notified appellant that any further request for reconsideration must be made within one year of the date of the decision, *i.e.*, within one year of March 15, 1991.

In letters dated April 1 and 13, 2016, appellant requested reconsideration and asked OWCP to review all prior decisions and the current medical evidence. He argued that OWCP failed to consider his mental status when finding that he failed to establish good reason for filing an untimely request for reconsideration. In his April 13, 2016 letter, appellant argued that the medical evidence established that he was entitled to receive compensation benefits and was totally disabled due to his accepted work injury. He further argued that OWCP failed to consider his mental illness when finding that he had filed an untimely request for reconsideration.

In support of his request, appellant submitted a June 30, 2014 report from Dr. Harvey A. Jones, an attending general surgeon and an undated claim for a recurrence of disability (Form CA-2a) beginning July 14, 1988. He also resubmitted evidence previously considered by the Board and OWCP including a July 10, 1989 report by Dr. Jones, a March 14, 2012 report by Dr. Benjamin M. Johnston, a treating Board-certified internist, and an October 11, 1990 notice of separation by the employing establishment.

Dr. Johnston, in his March 14, 2012 report, noted that appellant attributed his recurrent lumbosacral pain to a 1988 employment injury. He opined that appellant's current spinal problems were the result of the July 14, 1988 employment injury.

In his June 30, 2014 report, Dr. Jones provided a history of appellant's treatment and opined that appellant had sustained a permanent injury due to the accepted 1988 work injury. He also reported that appellant became depressed and became narcotic dependent following the 1989 surgery. According to Dr. Jones this resulted in appellant's incoherence and failure to make proper decisions such as applying for permanent and total disability.

By decision dated June 14, 2016, OWCP determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

OWCP, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>4</sup> OWCP will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.* 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. *See J.S.*, Docket No. 10-385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

that decision.<sup>5</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.<sup>6</sup> OWCP procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review demonstrates "clear evidence of error" on the part of OWCP.<sup>7</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

To demonstrate 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 demonstrate 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> To demonstrate 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>14</sup>

The Board makes an independent determination of whether a claimant has demonstrated 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>15</sup>

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<sup>5</sup> 20 C.F.R. § 10.607; *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>6</sup> *B.W.*, Docket No. 10-323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007) *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>7</sup> *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration 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." 20 C.F.R. § 10.607(b).

<sup>8</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>9</sup> *See Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *See Leon J. Modrowski*, *supra* note 6; *Jesus D. Sanchez*, *supra* note 6.

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

<sup>13</sup> *See supra* note 8.

<sup>14</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>15</sup> *See George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

## ANALYSIS

Appellant seeks reconsideration of a March 15, 1991 merit decision denying modification of his claim that he sustained a recurrence of disability on July 3, 1989 as a result of his accepted July 14, 1988 employment injury. He continues to disagree with the denial of his claim and filed his request for reconsideration in letters dated April 1 and 13, 2016. While appellant has requested that the time limitation be waived due to his mental condition, he has not submitted any rationalized medical evidence based on objective findings to substantiate that he was mentally incompetent and incapable of filing a request for reconsideration during the year following March 15, 1991.<sup>16</sup> While Dr. Jones noted in his June 30, 2014 report that appellant became depressed and narcotic dependent following his 1989 surgery, he did not specifically address whether appellant was mentally incompetent during the relevant time period. Therefore his report fails to prove mental incompetence as alleged.

Because appellant filed his request more than one year after OWCP's March 15, 1991 merit decision, the Board finds that appellant filed an untimely request for reconsideration. Thus, appellant must demonstrate clear evidence of error on the part of OWCP in denying his claim.<sup>17</sup>

The Board further finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* 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> A detailed, well-rationalized medical report which would have required further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.<sup>19</sup> To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.<sup>20</sup>

In support of his request, appellant submitted to OWCP a new report by Dr. Jones dated June 30, 2014. Dr. Jones, in his June 30, 2014 report, opined that appellant sustained permanent injury due to the accepted 1988 work injury. Dr. Jones did not specifically address the accepted low back strain or how it caused a recurrence of total disability on July 3, 1989.

Appellant also resubmitted a July 10, 1989 report by Dr. Jones, a March 14, 2012 report by Dr. Johnston, and an October 11, 1990 notice of separation by the employing establishment. In resubmitting these documents, he did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for a

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<sup>16</sup> *I.F.*, Docket No. 15-625 (issued June 2, 2015).

<sup>17</sup> 20 C.F.R. § 10.607(b). *See S.D.*, 58 ECAB 713 (2007); *Jack D. Johnson*, 57 ECAB 593 (2006).

<sup>18</sup> *See Robert G. Burns*, 57 ECAB 657 (2006); *supra* note 14.

<sup>19</sup> *See G.B.*, Docket No. 16-319 (issued April 16, 2016); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016); *see Dean D. Beets*, 43 ECAB 1153 (1992).

recurrence of disability. It is not apparent how resubmission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision.<sup>21</sup>

None of the evidence appellant has submitted manifests on its face that OWCP committed an error in denying appellant's recurrence claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's merit decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

Appellant again argued that he never healed from his original injury, that OWCP mishandled his claim, and that the medical evidence was sufficient to establish his claim. Appellant's April 1 and 13, 2015 requests for reconsideration did not establish that OWCP's March 15, 1991 decision was erroneous in finding that a recurrence of disability had not been established. The Board will, therefore, affirm the July 14, 2016 decision denying appellant's request.

On appeal appellant contends that the evidence submitted demonstrates clear evidence of error. As discussed above and in prior Board decisions, appellant has failed to establish any error on the part of OWCP in denying his recurrence claim and in finding that he failed to demonstrate clear evidence of error.

### **CONCLUSION**

OWCP properly refused to reopen appellant's claim for reconsideration on the merits as his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>21</sup> *J.J.*, Docket No. 13-1363 (issued November 6, 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 14, 2016 is affirmed.

Issued: December 15, 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