



## ISSUE

The issue is whether OWCP properly denied appellant's July 28, 2014 request for reconsideration finding that it was untimely filed and failed to establish clear evidence of error.

## FACTUAL HISTORY

On May 20, 2010 appellant, then a 31-year-old airway transportation systems specialist, filed a claim for traumatic injury (Form CA-1) alleging that he was injured on May 18, 2010 in the performance of duty when he fell to the ground and braced himself with his right arm due to a blast of jet exhaust. He did not stop work. OWCP accepted (under File No. xxxxxx308) a sprain of the right wrist, not otherwise specified. It later accepted post-traumatic stress disorder and aggravation of osteoarthritis, localized, primarily involving the hand/wrist.

Appellant later experienced a similar incident on February 15, 2011, when a plane was coming down the taxiway while he was repairing something at the 1,000 foot bar, which is 30 to 40 feet from the end of the runway. The plane was heading his way and would have ended up at the end of the runway ready to take off, but appellant left before it reached him. Appellant stated that he had previously asked that the runway be shut down to air traffic until he could get the item fixed. He advised that he could not concentrate after the February 15, 2011 incident. Appellant claimed that he had been able to recover from the May 18, 2010 employment injury and was able to perform his job, but the February 15, 2011 incident pushed him over the edge, and he could not perform his job anymore.

On June 24, 2011 appellant filed a series of claims for wage-loss compensation beginning March 18, 2011 due to his accepted May 18, 2010 injury.

In a decision dated November 10, 2011, OWCP denied appellant's claim for wage-loss compensation. It noted that appellant had undergone training in Oklahoma City, Oklahoma, from August to September, 2010, and in Macon, Georgia, in November 2010. Appellant stated that he felt his condition had improved since he had been away from the airfield in training. OWCP denied the compensation claims from March 18, 2011 to the present because the disability was due to the intervening February 15, 2011 incident and not due to the May 18, 2010 accepted incident. OWCP encouraged appellant to file a new claim for injury for the work events that occurred on February 15, 2011.

On July 28, 2014 appellant filed a request for reconsideration of the November 10, 2011 denial of his claims for disability. He pointed to medical evidence supporting that he fit the criteria for post-traumatic stress disorder, that he was temporarily totally disabled beginning March 18, 2011, and that he sustained this post-traumatic stress disorder as a direct result of the May 18, 2010 work incident. Appellant argued that OWCP made a medical conclusion on a psychiatric issue when it observed that a new injury had occurred on February 15, 2011. He further argued that OWCP's statement that he did not stop working entirely until after the February 15, 2011 incident was completely false. Appellant claimed that he worked several days after February 15, 2011, and that his last day of work was not until March 18, 2011. He noted his doctor's observation that the initial traumatic experience on May 18, 2010 was "worsened" by further exposure to dangerous work conditions on February 15, 2011. Appellant claimed this

signified that the condition already existed and stated, “It was and remains my contention that there was no reason for the District Office to request that I turn in a new Form CA-2 regarding my PTSD since it was already an accepted condition under this case file (xxxxxx308).”

Appellant stated that he had filed a new occupational disease claim (Form CA-2) under File No xxxxxx981), but on April 13, 2012 OWCP had denied the claim because he had not provided sufficient evidence to establish an emotional condition as a result of factors of his employment. He argued that OWCP should never have asked him to claim that his post-traumatic stress disorder began on February 15, 2011.

Appellant added that he was able to return to work with restrictions after July 13, 2011, but the employing establishment had no suitable work. He submitted copies of letters dated July 2 and August 30, 2012 from his manager, who requested current medical information as to his work status, warned about excessive absences, and informed appellant of his options, as he had not supplied the information requested.

In a decision dated January 26, 2015, OWCP denied appellant’s reconsideration request, finding that it was untimely and failed to present clear evidence of error.

On appeal counsel presents arguments not made in the July 28, 2014 reconsideration request to support that OWCP issued its November 10, 2011 decision in error and without following proper procedure. In particular, she argues that OWCP erred in denying payments for future periods. This was a clear procedural error, counsel explains, citing OWCP’s FECA procedure manual. Counsel argues that appellant was eligible for compensation benefits after March 4, 2011. She contends that appellant should have been placed on the periodic rolls because the sole reason he did not return to work after July 13, 2011 was that the employing establishment could not accommodate his restrictions. Counsel argues that OWCP should have further developed the medical evidence on the issue of appellant’s work capacity.

### **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.”<sup>2</sup>

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 provides that an application for reconsideration must be received by OWCP within one year of the date of

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<sup>2</sup> 5 U.S.C. § 8128(a).

OWCP's decision for which review is sought. OWCP will consider an untimely application 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.<sup>3</sup>

The term "clear evidence of error" is intended to represent a difficult standard.<sup>4</sup> 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.<sup>5</sup>

### ANALYSIS

OWCP received appellant's reconsideration request on July 28, 2014. This was more than one calendar year after the date of the most recent merit decision in his case, namely, OWCP's November 10, 2011 decision denying his claim for wage-loss compensation beginning March 18, 2011. Appellant's reconsideration request is therefore untimely. The question for determination is whether that request presented clear evidence of error in OWCP's November 10, 2011 decision.

Appellant's reconsideration request does not establish, on its face, that OWCP's November 10, 2011 decision was erroneous. OWCP denied his claim for wage-loss compensation beginning March 18, 2011 because it appeared from both the medical evidence and his account of events that the disability for which he claimed compensation was attributed to his exposure to a new work incident on February 15, 2011, and not solely because of what had happened on May 18, 2010.

As OWCP regulations state, a notice of recurrence should not be filed when a new event contributing to an already existing occupational disease has occurred. In these instances, the employee should file a Form CA-1 or Form CA-2.<sup>6</sup> FECA procedures provide that a recurrence of disability does not include a work stoppage caused by a condition which results from a new injury or by renewed exposure to the causative agent of a previously suffered occupational disease. If a new work-related injury or exposure occurs, a Form CA-1 or Form CA-2 should be completed accordingly.<sup>7</sup> Careful attention should be given as to whether the claim is for a recurrence of the original injury, or if a new injury has occurred.<sup>8</sup>

Appellant was not claiming an inability to work caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening

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<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

<sup>5</sup> *Id.* at Chapter 2.1602.5.b.

<sup>6</sup> 20 C.F.R. § 10.104(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.c(5) (June 2013).

<sup>8</sup> *Id.* at Chapter 2.1500.6.b.

injury or exposure to the work environment that caused the illness.<sup>9</sup> As appellant had explained, he was able to manage his May 18, 2010 employment conditions and was able to perform his job until the February 15, 2011 incident pushed him over the edge.

In OWCP's November 10, 2011 decision denying his claim for wage-loss compensation it did not dispute that he sustained a post-traumatic stress disorder as a direct result of the May 18, 2010 work incident. It formally notified him earlier that his original injury claim was updated to include post-traumatic stress disorder. The question raised by his multiple claims for wage-loss compensation in 2011, however, related to his ability to work due to the accepted May 28, 2010 employment injury. Appellant attributed his disability, however, to the new incident of February 15, 2011 which allegedly acted as a trigger exacerbating his existing, work-related post-traumatic stress disorder and causing an inability to work beginning March 18, 2011. The February 15, 2011 incident, however, has not been accepted.

OWCP did not conclude that appellant suffered a new injury on February 15, 2011. It simply acknowledged that a new work incident occurred on February 15, 2011, which raised a question whether appellant sustained a new injury, namely, an aggravation of his post-traumatic stress disorder.

OWCP correctly noted that appellant did not stop working entirely until after the February 15, 2011 work incident. Appellant did not stop working until March 18, 2011. The accepted May 18, 2010 work injury did not cause appellant to stop work. Appellant was able to manage his May 18, 2010 employment injuries and was able to perform his job for approximately one month after the February 15, 2011 incident.

As appellant's reconsideration request did not, on its face, establish that OWCP's November 10, 2011 decision was erroneous, the Board finds that he failed to present clear evidence of error. Accordingly, the Board finds that OWCP properly denied his untimely reconsideration request and will affirm OWCP's January 26, 2015 decision.

Counsel offers arguments on appeal that did not appear in appellant's reconsideration request. The Board, however, must review the reconsideration request as it appeared before OWCP at the time of its January 26, 2015 decision. The Board may not consider new arguments presented to rehabilitate or perfect appellant's July 24, 2014 request.<sup>10</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's July 28, 2014 reconsideration request as it was untimely filed and failed to establish clear evidence of error.

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<sup>9</sup> 20 C.F.R. § 10.5(x) (definition of recurrence).

<sup>10</sup> 20 C.F.R. § 501.2(c)(1) (the Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 26, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 2016  
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