



occupational disease claim (Form CA-2) for post-traumatic stress disorder (PTSD), which he attributed to his constructive termination in August 1978.<sup>3</sup> Appellant served on active duty with the U.S. Army for approximately eight and one-half years, ending in February 1976. Based on Department of Veterans Affairs (DVA) medical records, he was diagnosed with delayed onset PTSD in July 1997. Appellant received benefits from DVA for his service-connected PTSD.<sup>4</sup> With respect to his November 20, 2008 claim for FECA benefits, he indicated that he first became aware of the employment-related nature of his PTSD on February 15, 2004. Appellant claimed to have promptly notified the employing establishment of his condition.

In a July 10, 2009 decision, OWCP denied appellant's claim as untimely filed. The record established that, on or about July 7, 2004, appellant was either aware or should have been aware that his claimed condition was employment related. However, he waited more than four years (November 20, 2008) before filing his occupational disease claim. As such, appellant failed to meet the three-year filing requirement under 5 U.S.C. § 8122.

Appellant requested a hearing before an OWCP hearing representative. By decision dated December 14, 2009, the hearing representative affirmed OWCP's July 10, 2009 decision. Appellant appealed to the Board. On November 22, 2010 the Board affirmed the hearing representative's decision.<sup>5</sup>

Appellant subsequently filed multiple requests for reconsideration. OWCP denied reconsideration on January 5, 2011, July 12, 2013, and most recently on February 24, 2016.<sup>6</sup> Its latest nonmerit decision followed appellant's December 21, 2015 request for reconsideration, which OWCP received on January 5, 2016.

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<sup>3</sup> Between July 1976 and August 1978, appellant worked approximately 18 months at the Robert F. Kennedy Youth Center, Federal Correctional Institution (FCI), Morgantown, WV. He resigned effective August 18, 1978. However, appellant claimed the employing establishment forced him to quit.

<sup>4</sup> As of August 12, 1997, DVA rated appellant 50 percent disabled due to his service-connected PTSD. Appellant also received disability benefits from the Social Security Administration for anxiety disorders.

<sup>5</sup> Docket No. 10-0673 (issued November 22, 2010). The Board also issued a June 10, 2011 order denying appellant's petition for reconsideration. Docket No. 10-0673, *Order Denying Petition for Reconsideration* (issued June 10, 2011). The November 22, 2010 decision and June 10, 2011 order are incorporated herein by reference.

<sup>6</sup> With respect to OWCP's January 5, 2011 nonmerit decision, appellant filed an untimely appeal, which the Board dismissed by order dated January 25, 2012. Docket No. 12-0004, *Order Dismissing Appeal* (issued January 25, 2012). Appellant also appealed OWCP's July 12, 2013 nonmerit decision, which the Board affirmed by decision dated May 14, 2014. Docket No. 14-0141 (issued May 14, 2014). His subsequent petition for reconsideration was untimely, and accordingly, the Board issued an order dismissing the petition. Docket No. 14-0141, *Order Dismissing Petition for Reconsideration* (issued March 12, 2015). Appellant also wrote to the Board on January 26, 2015. The Board considered his January 26, 2015 correspondence as a new appeal, which it assigned Docket No. 15-0766. By order dated May 11, 2015, the Board dismissed the appeal for lack of jurisdiction. Docket No. 15-0766, *Order Dismissing Appeal* (issued May 11, 2015). The then-current record revealed that OWCP had not issued a final adverse decision following the Board's May 14, 2014 decision. Appellant filed a petition for reconsideration of the Board's May 11, 2015 order, which the Board dismissed by order dated October 5, 2015. Docket No. 15-0766, *Order Dismissing Petition for Reconsideration* (issued October 5, 2015). The Board reiterated that OWCP had not issued a final decision following the Board's May 14, 2014 decision, and therefore, the Board lacked jurisdiction over the case. The above-mentioned Board decision and orders are incorporated herein by reference.

In his request for reconsideration, appellant argued that he informed the employing establishment about his injury in February 2004 and again in July 2004, but that it failed to report the information to OWCP. He also alleged that the employing establishment told him to file an Equal Employment Opportunity (EEO) complaint, but neglected to inform him that he needed to file a separate FECA claim for his PTSD. Appellant reportedly attached some EEO-related documents to his December 21, 2015 request for reconsideration, but the record does not reflect OWCP having received any additional information at that time.

OWCP subsequently received a January 10, 2016 letter from appellant directed to the U.S. Secretary of Labor. Appellant's January 10, 2016 correspondence reiterated that he reported the injury to the employing establishment in July 2004, but the employing establishment neglected to inform OWCP. He also wrote to OWCP on January 17, 2016 raising the same argument. Additionally, appellant provided OWCP an annotated copy of two FECA statutory provisions (5 U.S.C. §§ 8120 and 8122), which described the employing establishment's responsibility for reporting an injury to DOL and the timeframe for making a claim under FECA.

By decision dated February 24, 2016, OWCP denied appellant's request for reconsideration and declined to review the merits of his case. It found that the evidence of record did not support that it had erroneously applied or interpreted a point of law. OWCP also found that the evidence did not contain a new legal argument not previously considered. Lastly, it indicated that the evidence was cumulative, and thus, substantially similar to evidence or documentation already contained in the case record and previously considered. Consequently, OWCP denied reconsideration because the evidence presented was "[insufficient] to warrant review of the decision dated [May 11, 2015]."

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>7</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>8</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>9</sup> OWCP will consider an untimely request for reconsideration only if the request

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<sup>7</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607 (2014).

<sup>9</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b. For decisions issued on or after June 1, 1987 through August 28, 2011, the request for reconsideration must be "mailed" to OWCP within one year of OWCP's decision for which review is sought. *Id.* at Chapter 2.1602.4e.

demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit decision.”<sup>10</sup> The request must establish, on its face, that such decision was erroneous.<sup>11</sup> Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>12</sup>

When a request is timely filed, a different standard of review applies. A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>13</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>14</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision. The issue on reconsideration is whether appellant timely filed his November 20, 2008 occupational disease claim. OWCP erroneously noted that the decision under review was the Board’s May 11, 2015 order, which dismissed appellant’s January 26, 2015 appeal for lack of jurisdiction. First, OWCP is not authorized to review Board decisions.<sup>15</sup> Second, the Board’s May 11, 2015 order did not address the issue of whether appellant’s November 20, 2008 claim was timely under 5 U.S.C. § 8122. The last OWCP merit decision to address that particular issue was the OWCP hearing representative’s December 14, 2009 decision.

Appellant’s December 21, 2015 request for reconsideration is untimely because more than one year has elapsed since the last OWCP merit decision issued on December 14, 2009.<sup>16</sup> Because OWCP mistakenly believed the request was timely, it applied the wrong standard in determining whether further merit review was warranted under 20 C.F.R. § 10.608. Although the February 24, 2016 decision did not specifically reference 20 C.F.R. § 10.606(b)(3), it is

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<sup>10</sup> 20 C.F.R. § 10.607(b).

<sup>11</sup> *Id.* To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>12</sup> 20 C.F.R. § 10.608(b).

<sup>13</sup> *Id.* at § 10.606(b)(3).

<sup>14</sup> *Id.* at § 10.608(a), (b).

<sup>15</sup> *Id.* at § 501.6(d).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

evident from OWCP's analysis that it did not apply the appropriate "clear evidence of error" standard under 20 C.F.R. § 10.607(b).<sup>17</sup> Accordingly, the case must be remanded to OWCP for proper adjudication of appellant's untimely request for reconsideration.

**CONCLUSION**

The case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: June 1, 2016  
Washington, DC

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

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

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

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<sup>17</sup> As previously noted, OWCP found that the evidence did not support that it had erroneously applied or interpreted a point of law. It also found that the evidence did not contain a new legal argument not previously considered. Finally, OWCP indicated that the evidence was substantially similar to evidence or documentation already contained in the case record and previously considered. The Board notes that this analysis mirrors the provisions of 20 C.F.R. § 10.606(b)(3)(i), (ii), and (iii).