

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

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<b>C.W., Appellant</b>  <b>and</b>  <b>DEPARTMENT OF AGRICULTURE,      AGRICULTURAL MARKETING SERVICE,      Washington, DC, Employer</b>	) ) ) ) ) ) ) ) ) ) )	<b>Docket No. 17-0836          Issued: August 7, 2017</b>
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On March 6, 2017 appellant filed a timely appeal from a January 20, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last merit decision in this case was an August 21, 2015 Board decision.<sup>1</sup> As there was no merit decision issued by OWCP within 180 days 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 to review merits of the claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> The decision of the Board is final upon the expiration of 30 days from the date of issuance, and is final as to the subject matter appealed. 20 C.F.R. § 501.6(d).

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

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On March 5, 2014 appellant, then a 50-year-old physical science technician, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral carpal tunnel syndrome causally related to factors of his federal employment. By decision dated April 10, 2014, OWCP denied the claim finding that the medical evidence of record failed to establish that the diagnosed condition was causally related to factors of his federal employment. On May 8, 2014 appellant requested a hearing before an OWCP hearing representative.

By decision dated January 27, 2015, an OWCP hearing representative affirmed the April 10, 2014 decision finding that appellant had not established an injury causally related to factors of his federal employment.

On March 13, 2015 appellant appealed to the Board.

In a decision dated August 21, 2015, the Board affirmed the January 27, 2015 decision finding that appellant had not met his burden of proof to establish an injury causally related to factors of his federal employment.<sup>4</sup>

Upon return of the case record to OWCP, appellant resubmitted a July 25, 2014 report by Dr. David Rehak, a Board-certified orthopedic surgeon specializing in hand surgery, wherein he discussed proposed surgery with appellant, findings on examination, and the job duties as related by appellant. Dr. Rehak opined that, if the job duties described by appellant as lifting 50-pound bags, preparing samples, and manually squeezing a pneumatic device were accurate, then these duties could have caused or exacerbated his bilateral carpal tunnel syndrome. In an August 14, 2014 addendum, he advised that he had reviewed appellant's job description and pictures and opined that his job caused or exacerbated his current diagnosis.

On January 6, 2016 appellant requested reconsideration and indicated that his job description and pictures showed the type of work he performed on a daily basis for 40 hours per week.

By decision dated January 15, 2016, OWCP denied appellant's reconsideration request finding that he neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review. It explained that Dr. Rehak's July 25 and August 14, 2014 reports were repetitious because they duplicated information that was already in the case record and were previously considered by OWCP.

On April 4, 2016 appellant appealed the January 15, 2016 decision to the Board.

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<sup>3</sup> Docket No. 16-1137 (issued December 19, 2016); Docket No. 15-0881 (issued August 21, 2015).

<sup>4</sup> Docket No. 15-0881 at *supra* note 3.

By decision dated December 19, 2016, the Board affirmed the January 15, 2016 OWCP decision denying appellant's request for reconsideration.<sup>5</sup>

Following OWCP's January 15, 2016 decision, appellant submitted a March 16, 2016 medical report from Dr. Rehak in support of his claim. Dr. Rehak diagnosed carpal tunnel syndrome and opined that appellant's job could have caused or contributed to his right carpal tunnel syndrome.

On January 12, 2017 appellant requested reconsideration and argued that Dr. Rehak's March 16, 2016 note established that his job could have caused or contributed to his diagnosis of right carpal tunnel syndrome. He reported that, years before, he was approved for left carpal tunnel syndrome and could not understand why bilateral carpal tunnel syndrome was not approved.<sup>6</sup>

By decision dated January 20, 2017, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions nor included relevant and pertinent new evidence. This decision also noted that any further request for reconsideration should be made within one year of December 19, 2016.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.<sup>7</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> For OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System.<sup>9</sup> If the last day of the one-year time period is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.<sup>10</sup>

A claimant seeking a timely reconsideration of a final decision must present arguments or provide evidence that: (1) shows that OWCP erroneously applied or interpreted a specific point

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<sup>5</sup> Docket No. 16-1137 at *supra* note 3.

<sup>6</sup> The Board notes that the record contains no other information pertaining to this prior claim.

<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). *See also C.B.*, Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987 there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP's decision for which review is sought.

<sup>10</sup> *Id.*, at Chapter 2.1062.4. *See also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>11</sup> If OWCP determines that at least one of these requirements is met, it reopens, and reviews the case on its merits.<sup>12</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, it will deny the request for reconsideration without reopening the case for review on the merits.<sup>13</sup>

OWCP, however, may not deny an application for review solely because it was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.<sup>14</sup> In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.<sup>15</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>16</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>17</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>18</sup> The evidence submitted must not only be of sufficient probative value to create a conflicting 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>19</sup>

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>20</sup>

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<sup>11</sup> 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>12</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>13</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>14</sup> *See id.* at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>15</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>17</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

<sup>18</sup> *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>19</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>20</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

## ANALYSIS

The Board finds that this case is not in posture for decision and must be remanded to OWCP for application of the appropriate standard of review.<sup>21</sup>

An application for reconsideration must be received by OWCP within one year of the date of the last merit review of the claim, including any merit review by the Board.<sup>22</sup> The last merit decision of record was the Board's August 21, 2015 decision.<sup>23</sup> On January 6, 2016 appellant submitted a timely reconsideration request, within one year of the Board's August 21, 2015 decision. By decision dated January 15, 2016, OWCP denied his reconsideration request finding that he neither raised substantive legal questions nor included relevant and pertinent new evidence sufficient to warrant merit review. Appellant requested an appeal before the Board and by decision dated December 19, 2016, the Board affirmed the January 15, 2016 OWCP decision denying merit review.<sup>24</sup> On January 12, 2017 he again requested reconsideration. By decision dated January 20, 2017, OWCP denied appellant's request, finding that he neither raised substantive legal questions nor included relevant and pertinent new evidence sufficient to warrant merit review.

The Board finds that, in its January 20, 2017 decision, OWCP erroneously applied the standard of review for a timely request for reconsideration as set forth at 20 C.F.R. §§ 10.605 through 10.607. As more than one year elapsed since the last merit decision dated August 21, 2015 to the filing of appellant's request for reconsideration on January 12, 2017, OWCP should have applied the clear evidence of error legal standard.<sup>25</sup> This is the appropriate standard for cases in which a reconsideration request is untimely filed.<sup>26</sup> As such, the Board will remand the case to OWCP for application of the standard for reviewing an untimely request for reconsideration as set forth at 20 C.F.R. § 10.607(b) under the more stringent clear evidence of error standard.<sup>27</sup> Following any necessary further development, OWCP shall issue an appropriate decision.

## CONCLUSION

The Board finds that this case is not in posture for decision.

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<sup>21</sup> See *K.K.*, Docket No. 16-1187 (issued February 7, 2017); *E.B.*, Docket No. 16-0746 (issued June 1, 2016).

<sup>22</sup> See *Mary E. Schipske*, 43 ECAB 318 (1991); see also *C.V.*, Docket No. 14-1293 (issued February 23, 2015).

<sup>23</sup> Docket No.15-0881 at *supra* note 4.

<sup>24</sup> Docket No. 16-1137 at *supra* note 5.

<sup>25</sup> See *John W. O Connor*, 42 ECAB 797 (1991).

<sup>26</sup> See *Donna M. Campbell*, 55 ECAB 241 (2004).

<sup>27</sup> *Dewayne C. Davis*, Docket No. 94-2346 (issued August 14, 1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 20, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: August 7, 2017  
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