

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

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R.R., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,  
TRANSPORTATION SECURITY  
ADMINISTRATION, San Jose, CA, Employer**

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**Docket No. 17-1210  
Issued: April 12, 2018**

*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 May 11, 2017 appellant filed a timely appeal from a March 29, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated November 13, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The record provided to the Board includes evidence received after OWCP issued its March 29, 2017 decision. The Board's jurisdiction is limited to the evidence that was in the case record before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from this new evidence for the first time on appeal. *Id.*

## **ISSUE**

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

## **FACTUAL HISTORY**

On November 13, 2014 appellant, then a 66-year-old lead transportation security officer, filed an occupational disease claim (Form CA-2) alleging that he developed colon cancer as a result of performing his stressful work duties.<sup>3</sup> He indicated that he first became aware of his claimed condition on October 16, 2014, and first realized on that same date that it was caused or aggravated by his employment. Appellant stopped work on October 13, 2014.

In an accompanying statement, appellant further described the stress he experienced while performing his work duties. He noted that he was on his feet for 40 hours per week (during four 10-hour days) and reported that he was responsible for such tasks as opening passenger checkpoints, calibrating screening equipment, setting up rotating work schedules, and managing other employees. Appellant asserted that these tasks were made more difficult by changes in management, understaffing, baggage line malfunctions, and staffing investigations.

Appellant submitted a November 13, 2014 report in which Dr. Derrick Wong, an attending Board-certified oncologist, indicated that he was treating appellant for colon cancer. In a November 24, 2016 report, Dr. Khoi Tran, an attending Board-certified general surgeon, discussed appellant's bowel and urinary incontinence problems. Appellant also submitted a report describing an October 20, 2014 surgical procedure which included excision of an adenocarcinoma from his colon.

In a December 17, 2014 development letter, OWCP requested that appellant submit additional evidence in support of his claim, including a physician's opinion supported by a medical explanation as to how the reported work factors caused or aggravated a medical condition.

Appellant submitted a December 19, 2014 report from Dr. David M. Sack, an attending Board-certified occupational medicine physician. He conveyed to Dr. Sack that he believed that stress from his job contributed to his colon cancer. Dr. Sack responded that there is no scientific evidence supporting any link between work stress and colon cancer.

In a March 13, 2015 report, Dr. Tran advised that appellant underwent a minimally invasion right colon resection for colon cancer on October 20, 2014 and noted that appellant reported having common side effects of the surgery, including loose stool with increased frequency of bowel movements. He recommended that appellant not work for two months and that he receive follow-up treatment from his urologist and his gastroenterologist.<sup>4</sup>

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<sup>3</sup> Appellant indicated that he developed an adenocarcinoma and underwent colon surgery.

<sup>4</sup> In a March 18, 2015 report, Dr. Scott Angell, an attending Board-certified urologist, indicated that appellant reported having poor urinary control since his October 20, 2014 surgery. He noted that a bladder ultrasound showed that appellant did not completely empty his bladder.

In a report dated March 18, 2015, Dr. Michael Su, an attending Board-certified internist, opined that, based on medical examination and surgical diagnosis, appellant developed colon cancer 6 to 12 months prior to his October 20, 2014 surgery. He noted that appellant had worked for the employing establishment for over six years and that the colon cancer developed within the last two years. Dr. Su advised that “[d]uring a specific time” appellant developed symptoms such as significant worsening of fatigue and weakness, weight loss, and irregular bowel movements. He opined that the significant changes in appellant’s work in the last two years at the very least aggravated his condition and noted, “The direct exposure of continuous stress, personnel reporting management difficulties, and irregular working hours constituted an adverse working environment which likely contributed to the cause or worsened progression of his disease.” Dr. Su indicated that, due to this condition, appellant had urinary/fecal incontinence and weakness which was unlikely to resolve, and he opined that appellant was eligible for permanent disability.

In a January 25, 2015 letter, an employing establishment official acknowledged that appellant performed a number of the duties he delineated in the statement accompanying his claim, but the official asserted that appellant was not exposed to abnormal stress. The official indicated that any staffing shortages were temporary in nature.

In an April 16, 2015 decision, OWCP denied appellant’s claim for employment-related colon cancer. It accepted employment factors with respect to appellant’s performance of his work duties, including having to work when understaffed, but found that appellant failed to submit medical evidence sufficient to establish causal relationship between a diagnosed condition and the accepted work factors.<sup>5</sup>

Appellant requested a hearing with a representative of OWCP’s Branch of Hearings and Review. During the hearing held on September 24, 2015, he provided further discussion regarding the employment factors which he believed contributed to his colon cancer.

Prior to the hearing, appellant submitted a June 4, 2015 report of Dr. Robert G. Hayes, an attending clinical psychologist. Dr. Hayes posited that, due to a hostile work environment, appellant sustained several conditions, including major depressive disorder and post-traumatic stress disorder.

In a June 26, 2015 report, Dr. Su provided a description of appellant’s medical condition similar to that provided in his March 18, 2015 report. He noted that it was well established that high levels of stress, and related diagnosed conditions such as post-traumatic stress disorder, constituted a primary risk factor for heart disease. Dr. Su asserted that there was growing evidence that this risk extended to other chronic diseases such as metabolic syndrome, autoimmune disease, and malignancy. He noted that, during the past two years, appellant was exposed to continuous stress, personnel reporting management difficulties, and irregular working hours. Dr. Su indicated,

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<sup>5</sup> OWCP had vacated a prior decision, dated January 29, 2015, which denied appellant’s claim for employment-related colon cancer, because appellant had not received its December 17, 2014 development letter. It sent appellant another development letter and provided him an opportunity to submit additional evidence before issuing its April 16, 2015 decision.

“I feel strongly that the accumulation of these factors over time caused, as well as exacerbated, his colon cancer and other chronic conditions.”

In a November 13, 2015 decision, OWCP’s hearing representative affirmed OWCP’s April 16, 2015 decision. He determined that appellant failed to submit medical evidence sufficient to establish causal relationship between the claimed condition of colon cancer and the accepted employment factors.

In a November 1, 2016 letter, received by OWCP on November 15, 2016, appellant requested reconsideration of the November 13, 2015 decision.

Appellant submitted several articles from periodicals which generally discussed the relationship between cancer and environmental and behavioral factors. An October 29, 2016 letter, signed by appellant and his union representative, discusses their disagreement with management’s characterization of appellant’s work duties. Appellant also resubmitted the March 18, 2015 report of Dr. Su.

In a March 29, 2017 decision, OWCP denied appellant’s request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error

### **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 or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.<sup>6</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, section 10.607(a) of the implementing regulation provide that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.<sup>7</sup> Timeliness is determined by the document receipt date (*i.e.*, the received date in OWCP’s Integrated Federal Employees’ Compensation System).<sup>8</sup> When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, a Sunday or a legal holiday.<sup>9</sup> 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.<sup>10</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.(b)(February 2016).

<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>11</sup>

To demonstrate clear evidence of error, 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>12</sup> The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>13</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>14</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>16</sup> The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>17</sup>

## **ANALYSIS**

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>18</sup> As appellant's request for reconsideration was not received by OWCP until November 15, 2016, more than one year after issuance of its November 13, 2015 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its November 13, 2015 decision.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its November 13, 2015 decision.

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<sup>11</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>12</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>13</sup> *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

<sup>14</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>18</sup> See *supra* note 7.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its November 13, 2015 decision.<sup>19</sup> His contentions made reference to evidence previously of record and already considered. The evidence and argument he submitted did not raise a substantial question concerning the correctness of OWCP's November 13, 2015 decision.

In support of his untimely reconsideration request, appellant submitted several articles from periodicals which generally discussed the relationship between cancer and environmental and behavioral factors. However, the Board notes that this evidence would not tend to show that OWCP erred in issuing its November 13, 2015 decision because it is of no evidentiary value in establishing causal relationship between his diagnosed colon cancer and his work environment. The Board has held that newspaper clippings, medical texts, and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee.<sup>20</sup> Appellant did not explain how the submitted evidence of general application raised a substantial question as to the correctness of OWCP's November 13, 2015 decision.

Appellant also resubmitted Dr. Su's March 18, 2015 report which had previously been considered by OWCP and deemed insufficient to establish his claim for employment-related colon cancer. He did not explain how the resubmission of this report would show that OWCP erred in issuing its November 13, 2015 decision. An October 29, 2016 letter, signed by appellant and his union representative, discusses their disagreement with management's characterization of appellant's work duties. However, this letter concerns a factual matter which does not have any bearing on the underlying issue of this case, *i.e.*, whether he submitted medical evidence sufficient to establish causal relationship between a diagnosed condition and the accepted work factors.<sup>21</sup>

The Board finds that appellant's application for review does not show on its face that OWCP committed error when it found in its November 13, 2015 decision that appellant has not met his burden of proof to establish employment-related colon cancer.<sup>22</sup> As noted, clear evidence of error is intended to represent a difficult standard.<sup>23</sup> The evidence submitted by appellant would not show on its face that OWCP committed error when it found in its November 13, 2015 decision that he has not met his burden of proof to establish employment-related colon cancer.<sup>24</sup>

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<sup>19</sup> See *supra* note 8.

<sup>20</sup> *William C. Bush*, 40 ECAB 1064, 1075 (1989).

<sup>21</sup> OWCP had accepted employment factors with respect to appellant's performance of his work duties, including having to work when understaffed.

<sup>22</sup> See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

<sup>23</sup> See *supra* note 10.

<sup>24</sup> See *supra* note 8.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's November 13, 2015 decision and OWCP properly determined that he did not demonstrate clear evidence of error in that decision.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2018  
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