

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

S.M., Appellant	)	
	)	
and	)	Docket No. 18-0075
	)	Issued: April 11, 2018
U.S. POSTAL SERVICE, BULK MAIL	)	
CENTER, Forest Park, IL, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 12, 2017 appellant filed a timely appeal from a September 29, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last merit decision in this case was the Board's March 10, 1999 decision, which became final after 30 days of issuance and is not subject to further review.<sup>1</sup> As there is no merit decision issued by OWCP within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

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

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<sup>1</sup> 20 C.F.R. § 501.6(d); *C.D.*, Docket No. 17-1915 (issued February 21, 2018).

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

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 30, 1987 appellant, then a 28-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained pain and numbness in his left hand causally related to factors of his federal employment. OWCP accepted the claim for left carpal tunnel syndrome. Appellant stopped work on October 9, 1987 and returned to modified employment as a custodian on November 5, 1988.<sup>3</sup> He stopped work again on March 16, 1989, advising the employing establishment that he was not returning until he was placed back on his original tour schedule and preferable with a position in his own craft. On September 14, 1989 the employing establishment removed him from employment effective June 9, 1989 for unauthorized absence since March 1989.<sup>4</sup>

On March 10, 1999 the Board affirmed an August 10, 1996 OWCP decision, finding that appellant had not established disability from his light-duty employment beginning March 16, 1989 and a November 13, 1996 OWCP decision denying his request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).<sup>5</sup> The Board determined that he had not established that he worked outside of his restrictions and that the medical evidence of record did not show that he was disabled from his limited-duty position beginning March 16, 1989.

By decision dated October 22, 2002, the Board affirmed March 14 and November 29, 2001, and March 5, 2002, OWCP decisions denying appellant's requests to reopen his case for further merit review pursuant to 5 U.S.C. § 8128(a).<sup>6</sup> In decisions dated May 2, 2005, October 21, 2009, July 19, 2011, and July 25, 2012, it affirmed OWCP decisions denying his requests for reconsideration on the grounds they were untimely filed and failed to demonstrate clear evidence of error.<sup>7</sup> The Board, by order dated December 16, 2013, set aside a May 10, 2013 nonmerit decision denying appellant's request for reconsideration under section 8128(a) and remanded the case for OWCP to apply the standards for untimely requests for reconsideration.<sup>8</sup> On July 1, 2014 and April 20, 2015 the Board affirmed OWCP nonmerit decisions finding that his requests for

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<sup>3</sup> By decision dated April 5, 1990, the Board affirmed an August 19, 1989 schedule award decision. Docket No. 90-0321 (issued April 5, 1990).

<sup>4</sup> In an order dated July 11, 1995, the Board dismissed an appeal from an August 15, 1994 decision at appellant's request. *Order Dismissing Appeal*, Docket No. 95-0082 (issued July 11, 1995).

<sup>5</sup> Docket No. 97-0670 (issued March 10, 1999).

<sup>6</sup> Docket No. 02-1032 (issued October 22, 2002).

<sup>7</sup> Docket No. 12-0714 (issued July 25, 2012); Docket No. 10-2320 (issued July 19, 2011); Docket No. 09-0151 (issued October 21, 2009); Docket No. 04-0757 (issued May 2, 2005). On January 25, 2010 the Board denied appellant's petition for reconsideration of its July 19, 2011 decision. *Order Denying Petition for Reconsideration*, Docket No. 10-2320 (issued January 25, 2012). On March 1, 2013 the Board dismissed appellant's appeal of an information letter. *Order Dismissing Appeal*, Docket No. 12-1967 (issued March 1, 2013).

<sup>8</sup> *Order Remanding Case*, Docket No. 13-1383 (issued December 16, 2013).

reconsideration were untimely and failed to demonstrate clear evidence of error.<sup>9</sup> In its April 20, 2015 decision, the Board reviewed appellant's contention that OWCP erred in failing to apply the provisions of 5 U.S.C. § 8106(c) before the employing establishment terminated him from employment. The Board found that the issue was not termination based on refusing of suitable work, but instead whether the medical evidence established that he was disabled from his limited-duty assignment.

By decision dated April 26, 2016, the Board, affirmed a November 16, 2015 OWCP nonmerit decision that again denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.<sup>10</sup> It discussed his contention that OWCP erred in failing to consider that the employing establishment withdrew his limited duty, noting that it had previously addressed this argument and that it was thus *res judicata*.<sup>11</sup>

On July 3, 2017 appellant again requested reconsideration of OWCP's August 19, 1996 decision. He advised that the Board, in its April 26, 2016 decision, found that the relevant issue was whether he sustained a recurrence of disability after his March 16, 1989 resignation, but that the July 6, 1992 OWCP decision indicated that the employing establishment removed him from employment because he was absent without leave (AWOL). Appellant maintained that OWCP erred in failing to address the issue of his resignation, asserting that it should have applied the provisions of section 8106(c) to determine whether his reasons for resigning were acceptable.

By decision dated September 29, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that he had not raised an argument showing error in its last merit decision or submitted any evidence supporting his allegation that OWCP should have addressed the issue of his resignation in its July 1992 decision.

On appeal appellant notes that the Board indicated that he had resigned in its April 26, 2016 decision, but OWCP did not address this issue in its July 1992 decision, instead finding that he both resigned and was removed from service as he was AWOL. He asserts that OWCP has not addressed the issue of his resignation, as the Board finding takes precedence. Appellant requests that the Board remand the case for OWCP to impose the sanctions of section 8106(c).

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's

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<sup>9</sup> Docket No. 15-0426 (issued April 20, 2015); Docket No. 14-0759 (issued July 1, 2014). The Board denied appellant's petition for reconsideration on October 27, 2015. *Order Denying Petition for Reconsideration*, Docket No. 15-0426 (issued October 27, 2015).

<sup>10</sup> Docket No. 16-0270 (issued April 26, 2016).

<sup>11</sup> On February 21, 2017 appellant sought an appeal before the Board from a purported December 19, 2016 decision. In an order dated June 20, 2017, the Board dismissed his appeal as there was no adverse decision over which it had jurisdiction. *Order Dismissing Appeal*, Docket No. 17-0761 (issued June 20, 2017).

decision for which review is sought.<sup>12</sup> When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.<sup>13</sup> Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s Integrated Federal Workers’ Compensation System).<sup>14</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>15</sup>

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>16</sup> OWCP regulations and procedures provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows clear evidence of error on the part of OWCP.<sup>17</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. 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>

OWCP procedures note that the term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>19</sup>

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<sup>12</sup> 20 C.F.R. § 10.607(a).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

<sup>14</sup> *Id.* at Chapter 2.1602.4(b) (February 2016).

<sup>15</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>16</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>17</sup> *Id.* at § 10.607(b); *supra* note 13 at Chapter 2.1602.5(a) (February 2016).

<sup>18</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>19</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 13 at Chapter 2.1602.5(a) (February 2016).

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>20</sup>

### ANALYSIS

OWCP's procedures provide that the one-year time limitation for requesting reconsideration begins on the date of the original decision.<sup>21</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>22</sup> The last decision on the merits of the case was the Board's March 10, 1999 decision affirming an August 10, 1996 OWCP decision, finding that appellant had not established disability from work beginning March 16, 1989. Appellant's July 3, 2017 request for reconsideration was received by OWCP almost 18 years after the March 10, 1999 decision, well in excess of the one year time limitation, and thus is untimely. Therefore, he must demonstrate clear evidence of error by OWCP.<sup>23</sup>

On reconsideration, appellant contended that the Board found that the issue was whether he had established a recurrence of disability after he resigned on March 16, 1989, but that OWCP found that the employing establishment removed him from employment because he was AWOL. He argued that OWCP erred in failing to apply the provisions of section 8106(c) in adjudicating whether he provided acceptable reasons for his resignation. The relevant issue, however, is whether appellant met his burden of proof to establish that he was disabled from his limited-duty position beginning March 16, 1989. The Board has previously addressed his contention that OWCP erred in failing to apply the provisions of section 8106(c), relevant to termination of compensation for refusing suitable work, and found that it was insufficient to demonstrate clear evidence of error by OWCP. Its prior finding on this contention is *res judicata* absent further merit review by OWCP.<sup>24</sup>

On appeal appellant argues that the Board, in its April 26, 2016 decision, indicated that he had resigned from the employing establishment, but OWCP did not consider his resignation, finding that he had both resigned and been removed from the employing establishment as AWOL. The issue, however, is not whether he resigned from work, but instead whether he has established disability from his modified employment beginning March 16, 1989. Further, the Board's jurisdiction extends only to review of final decisions by OWCP. Matters regarding the employing establishment's termination of appellant for cause are not within the Board's jurisdiction.<sup>25</sup>

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<sup>20</sup> See *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>21</sup> 20 C.F.R. § 10.607(a).

<sup>22</sup> See *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>23</sup> 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

<sup>24</sup> See *B.W.*, Docket No. 17-0366 (issued June 7, 2017).

<sup>25</sup> See 20 C.F.R. § 501.2(c).

Appellant also contends that the Board should remand the case for OWCP to apply the provisions of section 8106(c). As noted, the Board has previously addressed this issue and thus, absent further merit review of this issue by OWCP, it is *res judicata*.<sup>26</sup>

Appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying appellant's claim. He has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.<sup>27</sup>

### **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 September 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy 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

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<sup>26</sup> See *supra* note 24.

<sup>27</sup> See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).