

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

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<b>E.P., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-0423</b>
	)	<b>Issued: September 11, 2018</b>
<b>DEPARTMENT OF THE AIR FORCE, ROBINS</b>	)	
<b>AIR FORCE BASE, Warner Robins, GA,</b>	)	
<b>Employer</b>	)	
_____	)	

*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 December 24, 2017 appellant filed a timely appeal from a December 18, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated March 15, 1991, 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 this case.<sup>2</sup>

**ISSUE**

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

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

<sup>2</sup> The Board notes that, following the December 18, 2017 nonmerit decision, OWCP received additional evidence. Appellant also submitted new evidence with his appeal to the Board. However, the Board's jurisdiction is limited to the evidence that was of record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

## **FACTUAL HISTORY**

Appellant has previously appealed to the Board on multiple occasions. The facts and circumstances of the case as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On July 25, 1988 appellant, then a 38-year-old computer operator, filed a traumatic injury claim (Form CA-1) alleging that on July 14, 1988 he injured his back when he tripped and fell over a box while at work. OWCP accepted the claim for a low back strain.

Appellant filed a recurrence of disability claim (Form CA-2a) on July 3, 1989 alleging a recurrence of his July 14, 1988 employment injury. OWCP denied this claim on January 16, 1990, finding that he failed to submit evidence sufficient to establish that his current back condition was causally related to his July 14, 1988 employment injury. Appellant filed a timely request for reconsideration on November 19, 1990. On March 15, 1991 OWCP granted his reconsideration request, reviewed the merits of his claim, but denied modification of the prior decision. It found that the medical evidence then of record failed to demonstrate that the claimed condition or disability for work was causally related to appellant's accepted employment injury.

The March 15, 1991 decision was OWCP's most recent final decision on the merits of appellant's recurrence claim. The statement of appeal rights accompanying OWCP's March 15, 1991 merit decision notified appellant that any further request for reconsideration must be made within one year of the date of that decision, *i.e.*, within one year of March 15, 1991.

In a letter received by OWCP on December 5, 2017, appellant requested reconsideration of the denial of his recurrence claim. He argued that medical evidence from the Veterans Administration established his mental incapacity and established good reason for his failure to file a timely request for reconsideration. Appellant contended that OWCP committed error in the handling of his claim and discrediting medical evidence he had submitted. He further argued that he never completely healed from his accepted employment injury, that he developed additional conditions, and that he is entitled to wage-loss compensation.

By decision dated December 18, 2017, OWCP determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error in its denial of his recurrence claim. It noted that the record was devoid of any evidence showing that he was mentally incompetent and incapable of filing a timely request for reconsideration of the March 15, 1991 merit decision.

## **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>3</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's

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<sup>3</sup> See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

decision for which review is sought.<sup>4</sup> Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s Integrated Federal Workers’ Compensation System).<sup>5</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>6</sup>

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP’s final merit decision was in error.<sup>7</sup> OWCP 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, if the claimant’s application for review demonstrates “clear evidence of error” on the part of OWCP.<sup>8</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>10</sup> The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup> To demonstrate clear evidence of error, 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial

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<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsideration, Chapter 2.1602.4(b) (February 2016).

<sup>6</sup> *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>8</sup> See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: “OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

<sup>9</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> See *Pasquale C. D’Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> See *Leon J. Modrowski*, *supra* note 7; *Jesus D. Sanchez* *supra* note 7.

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> See *supra* note 9.

question as to the correctness of OWCP's decision.<sup>15</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>16</sup>

### ANALYSIS

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

Appellant seeks reconsideration of a March 15, 1991 merit decision denying modification of his claim that he sustained a recurrence of disability on July 3, 1989 as a result of his accepted July 14, 1988 employment injury. He continues to disagree with the denial of his claim and filed his current request for reconsideration on December 5, 2017. Because OWCP received his request more than one year after OWCP's March 15, 1991 merit decision, the Board finds that appellant's request was untimely filed. Thus, appellant must demonstrate clear evidence of error on the part of OWCP in denying his claim.<sup>17</sup>

The Board finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. Appellant again argued that he had never healed from his original injury, that OWCP mishandled his claim, and that he was mentally incapacitated during the time period when his request for reconsideration should have been filed. He submitted no evidence with his December 5, 2017 letter requesting reconsideration which demonstrates on its face that OWCP's March 15, 1991 decision was erroneous in finding that a recurrence of disability had not been established. Appellant also submitted no medical evidence which establishes that he was mentally incapacitated at any point during the appeal process. The Board will, therefore, affirm the December 18, 2017 decision denying appellant's request.

Appellant has not raised an argument or submitted any evidence that is manifest 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>18</sup>

On appeal appellant contends that the medical evidence of record is sufficient to establish his recurrence claim and entitlement to wage-loss compensation. He also notes that he sustained three employment injuries involving his back and had undergone surgeries due to his back. Appellant also contends error by OWCP in the handling of his recurrence claim. As explained above, appellant has failed to demonstrate clear error on the part of OWCP in denying his

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<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 6.

<sup>16</sup> See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>17</sup> 20 C.F.R. § 10.607(b). See *S.D.*, 58 ECAB 713 (2007); *Jack D. Johnson*, 57 ECAB 593 (2006).

<sup>18</sup> See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

recurrence claim in its last merit decision on that issue. Therefore he failed to demonstrate clear evidence of error.

**CONCLUSION**

OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 18, 2017 is affirmed.

Issued: September 11, 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