

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

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A.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
St. Petersburg, FL, Employer

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**Docket No. 12-1579  
Issued: December 13, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 17, 2012 appellant filed a timely appeal from a March 30, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than one year has elapsed between the last merit decision, dated April 17, 2006, to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. The last merit decision was the Board's April 17, 2006 decision affirming an OWCP decision dated August 31, 2005 terminating appellant's wage-loss benefits and entitlement to a schedule award pursuant to 5 U.S.C. § 8106(c)(2). *See* Docket No. 06-73 (issued April 17, 2006). For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to appeal to the Board. *See* 20 C.F.R. § 501.3(e) (2008). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the May 11, 2011 nonmerit decision.

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

## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

## FACTUAL HISTORY

This case has previously been before the Board. The Board issued a decision on April 1, 1998 in which it reversed decisions of OWCP<sup>2</sup> dated June 11 and September 11, 1997 on the grounds that OWCP improperly terminated appellant's compensation.<sup>3</sup> In a decision dated July 15, 2003, the Board, in a second appeal, reversed a February 3, 2003 hearing representative's decision affirming a September 6, 2002 decision terminating his compensation benefits. In its September 6, 2002 decision, OWCP terminated appellant's compensation on the grounds that he no longer had any continuing disability due to his accepted September 7, 1989 employment injury.<sup>4</sup> In reversing the termination of benefits, the Board found the record contained an unresolved conflict in the medical evidence. In the third appeal, the Board, on April 17, 2006, affirmed an August 31, 2005 decision in which OWCP terminated appellant's compensation effective September 4, 2005 on the grounds that he refused an offer of suitable work.<sup>5</sup> On May 23, 2008 the Board, in a fourth appeal, affirmed a May 3, 2007 OWCP hearing representative's decision finding an overpayment of compensation and denying waiver of the overpayment.<sup>6</sup> In a fifth appeal, the Board issued an order dismissing appellant's appeal on March 24, 2010 as no person adversely affected by OWCP's final decision or authorized representative had filed an appeal with the Board.<sup>7</sup> On June 30, 2010 the Board issued an order denying his petition for reconsideration. In the sixth appeal, the Board issued a decision on January 5, 2012 affirming a May 11, 2011 decision denying appellant's request for reconsideration.<sup>8</sup> The Board found that OWCP properly found his request was untimely filed

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<sup>2</sup> On September 7, 1989 appellant, then a 43-year-old mail processor clerk, filed a traumatic injury claim alleging that he injured his back that date while breaking down mail. OWCP accepted the claim for a low back strain. This was assigned claim number xxxxxx808. On February 23, 1990 appellant filed an occupational disease claim alleging that on September 7, 1989 he first realized his lower back, left lumbar and left hip conditions were employment related. This was assigned claim number xxxxxx173, which was deleted on May 31, 1990 as OWCP determined appellant's February 23, 1990 claim was actually a claim for a recurrence of disability. The Office of Personnel Management (OPM) approved appellant's application for disability retirement on October 2, 1990. Appellant retired from the employing establishment effective October 1, 1990. On July 22, 1991 OWCP accepted appellant's recurrence claim and expanded his claim to include the condition of herniated nucleus pulposus. On October 2, 1991 appellant filed an election form opting to receive benefits under FECA effective September 11, 1990. By letter dated September 27, 1991, appellant was placed on the periodic rolls for temporary total disability.

<sup>3</sup> Docket No. 98-75 (issued April 1, 1998).

<sup>4</sup> Docket No. 03-1009 (issued July 15, 2003).

<sup>5</sup> Docket No, 06-73 (issued April 17, 2006).

<sup>6</sup> Docket No. 07-2010 (issued May 23, 2008).

<sup>7</sup> Docket No. 09-1939 (issued March 24, 2010).

<sup>8</sup> Docket No. 11-1388 (issued January 5, 2012).

and that he failed to establish clear evidence of error. The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.<sup>9</sup>

On February 13, 2012 appellant requested reconsideration. He argued that OWCP erred in finding that he refused an offer of suitable work as both the Department of Veterans Affairs (VA) and the Social Security Administration (SSA) issued findings that he was totally disabled. Appellant further contended that his psychiatric condition was not properly considered by OWCP especially due to the fact that he had to get clearance to work for the employing establishment because of his psychiatric condition. He further argued that OWCP erred in relying upon the opinion of Dr. Howard L. Schuele, an impartial medical examiner and Board-certified orthopedic surgeon, when it terminated his wage-loss compensation. Appellant contended that Dr. Schuele did not perform a thorough review of his situation or medical records.

In a progress note dated February 6, 2012 and signed by Bernadette Ackerman, a nurse, and Dr. Phillip M. Sinaikin, a treating Board-certified psychiatrist, on February 7, 2012, reported that appellant was totally disabled from all work since 1990 due to his post-traumatic stress disorder and chronic peptic ulcer disease based on a review of the medical evidence. The report stated that appellant had been treated and considered unemployable by Dr. Sinaikin since August 2008.

By decision dated March 30, 2012, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>10</sup> It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>11</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.<sup>12</sup> Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,<sup>13</sup> if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>14</sup> In this

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<sup>9</sup> On July 3, 1998 and October 17, 2003 appellant filed election forms opting to receive compensation benefits under FECA.

<sup>10</sup> See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

<sup>11</sup> 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>12</sup> *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>13</sup> 20 C.F.R. § 10.607.

<sup>14</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>15</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>16</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish 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 show 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>17</sup>

OWCP's 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>18</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>19</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>20</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>21</sup> As appellant's February 13, 2012 request for reconsideration was submitted more than one year after the last merit decision,

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<sup>15</sup> *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>16</sup> *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>17</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 14.

<sup>18</sup> *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(c) (October 2011).

<sup>19</sup> *See M.L.*, *supra* note 14; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

<sup>20</sup> 20 C.F.R. § 10.607(a).

<sup>21</sup> *Robert F. Stone*, 57 ECAB 393 (2005).

dated April 17, 2006, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>22</sup>

In his request for reconsideration, appellant argued that OWCP erroneously determined that the offered position was suitable without taking into consideration his psychological condition, disability findings by the VA and the SSA and the employing establishment's finding that rehabilitation was not suitable for him. He had raised the argument that he was totally disabled due his psychological condition previously and the Board noted in its April 17, 2006 decision that there was no rationalized medical evidence explaining how the position violated his work restrictions. Moreover, appellant has not presented any additional evidence to establish that the position was outside a specific work restriction. As to his contentions regarding disability determinations by the SSA and the VA, the Board notes that findings of other administrative agencies are not determinative of his level of disability under FECA. It is well established that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes which have varying standards for establishing eligibility for benefits.<sup>23</sup>

Appellant also submitted a report dated February 6, 2012 and signed on February 7, 2012 by Dr. Sinaikin and Ms. Ackerman who advised that appellant was unemployable and totally disabled due to his post-traumatic stress disorder. However, he does not explain how appellant was unable to perform the duties of the offered position or discusses why the position was unsuitable. The Board has held 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 (*i.e.*, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report, which if submitted prior to OWCP's denial, would have created a conflict in the medical opinion evidence requiring further development, is not clear evidence of error.<sup>24</sup>

The arguments raised in support of appellant's untimely reconsideration request were previously considered or irrelevant and, thus, insufficient to establish clear evidence of error. The medical evidence was also insufficient as it was not positive, precise and explicit and manifest on its fact that OWCP committed an error.<sup>25</sup> Appellant, has not, through the February 2007 report of Dr. Sinaikin and as required by 20 C.F.R. § 10.607(b), demonstrated clear evidence of error on the part of OWCP in finding that he had refused an offer of suitable work. His request for reconsideration does not establish on its face that OWCP's August 31, 2005 merit decision was erroneous. Therefore, the Board finds that appellant has not established clear evidence of error in OWCP's finding that he refused to accept suitable work.

The Board notes that appellant repeated his reconsideration arguments on appeal. As noted above, these arguments without more are insufficient to establish clear evidence of error.

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<sup>22</sup> 20 C.F.R. § 10.607(a); *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

<sup>23</sup> *Andrew Fullman*, 57 ECAB 574 (2006).

<sup>24</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>25</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 11, 2011 is affirmed.

Issued: December 13, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board