

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

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**R.M., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL AIR  
SYSTEMS COMMAND, Cherry Point, NC,  
Employer**

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**Docket No. 12-1910  
Issued: March 18, 2013**

*Appearances:*  
Daniel F. Read, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On September 18, 2012 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) March 22, 2012 nonmerit decision denying his request for reconsideration. Because more than 180 days elapsed from the last OWCP merit decision of January 13, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.<sup>2</sup>

**ISSUE**

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

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<sup>1</sup> 5 U.S.C. §§8101-8193.

<sup>2</sup> 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 file an appeal with the Board. See 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

On July 24, 2007 appellant, then a 52-year-old sheet metal mechanic, filed an occupational disease claim alleging that 20 years of employment caused or aggravated his back, neck and knee conditions. OWCP accepted the claim for aggravation of degeneration of lumbar or lumbosacral intervertebral disc and paid appropriate benefits. It rejected claims for cervical and knee conditions. Appellant stopped working in February 2008 and subsequently retired from the employing establishment.

On January 20, 2010 OWCP issued a notice of proposed termination of appellant's wage-loss and medical benefits based on the November 4, 2009 report from Dr. Donald D. Getz, a Board-certified orthopedic surgeon and impartial medical examiner, selected to resolve the conflict in medical opinion between appellant's attending physician, Dr. Ashraf Guirgues, a Board-certified orthopedic surgeon and the second opinion physician, Dr. James A. Maulsby, a Board-certified orthopedic surgeon, regarding whether or not the aggravation of lumbosacral intervertebral disc disease was temporary or permanent. Dr. Getz opined that the work-related transient aggravation of the underlying preexisting degenerative disc disease resolved and appellant's present symptoms related to the gradual and natural progression of his underlying chronic degenerative disc disease. Following the submission of additional reports from Dr. Guirgues, by decision dated March 26, 2010, OWCP finalized its termination of compensation benefits effective March 27, 2010. By decision dated January 13, 2011, OWCP denied modification of its March 26, 2010 termination decision.

In a letter dated January 19, 2012, appellant, through counsel, requested reconsideration and an extension of time. He contended that Dr. Guirgues' opinion was sufficient to show that appellant's back condition was related to his work and provided a well rationalized explanation of how his federal employment accelerated the usual rate of degeneration, which was advanced in appellant's case. In support of the reconsideration request, appellant submitted a January 13, 2012 report from Dr. Guirgues, who stated that appellant's diagnoses, as based on clinical examination and verified by diagnostic studies, were degenerative disc disease at L3-4 and L4-5, grade 1 spondylodesis at L4-5 with central stenosis and bilateral neuroforaminal narrowing and facet arthritis at L3-4. Dr. Guirgues opined that appellant's work caused and aggravated and accelerated his degenerative disc disease. He noted appellant's preemployment physical in 1966 showed no back complaints or back problems and his medical records from 2004 to 2007 showed no history of trauma to his back or back problems even though appellant had 20 years of sheet metal work, which involved heavy lifting in manual labor that progressed through 2007. Dr. Guirgues stated that appellant's discs were placed in an increased load situation, which increased and accelerated the degenerative disc disease process. He indicated that the magnetic resonance imaging (MRI) scans from 2007 show a decrease in the disc space height at L4-5 when compared with the most recent MRI scan, as well as evidence of further progression and loss of disc space height at L4-5 and drying out or desiccation of the L3-4 disc space. Dr. Guirgues stated that appellant's MRI scans were outside of the norm of what is typical for his age. Although some of these changes occur with normal aging, he opined that the changes seen in the MRI scans in 2007 and 2010 usually progress over time greater than three years. Thus, Dr. Guirgues opined that appellant's work has lead to progression and acceleration of his degenerative disc disease. He indicated that appellant was a smoker, which can also lead to acceleration and degenerative disc disease progress. While Dr. Guirgues opined it was likely

that smoking also contributed to appellant's degenerative disc disease, he stated it did not change his opinion that appellant's work was a significant contributing factor in his progression of degenerative disc disease.

By decision dated March 22, 2012, OWCP denied appellant's request for reconsideration finding it was not timely filed and failed to present clear evidence of error. It further denied his request for an extension of time as it was filed after the time limit for requesting reconsideration had lapsed.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or his application for review within one year of the date of that decision.<sup>3</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>4</sup>

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>5</sup> OWCP regulations and procedure 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>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>8</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup> This entails a limited review by OWCP of how the

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>5</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>6</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedure further provides, 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).

<sup>7</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>8</sup> 20 C.F.R., *supra* note 5; *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>9</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> *See Leona N. Travis*, *supra* note 8.

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>11</sup>

### ANALYSIS

In its March 22, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on January 13, 2011. Appellant's request for reconsideration was dated January 19, 2012, more than one year after January 13, 2011. Accordingly, his request for reconsideration was not timely filed. Appellant must therefore demonstrate clear evidence of error on the part of OWCP in terminating his compensation.<sup>12</sup>

Appellant's request for reconsideration does not establish clear evidence of error. OWCP terminated his wage-loss and medical benefits on the grounds that the weight of the medical evidence, as determined by Dr. Getz's impartial medical examination and opinion, established that appellant's accepted work-related condition had resolved. In his request for reconsideration, appellant argued that Dr. Guirgues' January 13, 2012 report was sufficient to show that appellant's back condition was causally related to his federal employment. However, this assertion is insufficient to raise a substantial question concerning the correctness of OWCP's decision.

With his request for reconsideration, appellant submitted a January 13, 2012 report from Dr. Guirgues, who opined that appellant's work caused and aggravated and accelerated his degenerative disc disease as evidenced by the level and progression of degenerative disc disease. Dr. Guirgues also opined that while appellant's smoking also contributed to his degenerative disc disease, it did not change his opinion that appellant's work has had a significant contributing factor in the progression of degenerative disc disease. His report is supportive of appellant's claim and contains rationale. The term clear evidence of error, however, is intended to represent a difficult standard. The submission of 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>13</sup> Dr. Guirgues' report does not manifest on its face that OWCP committed an error in terminating appellant's compensation benefits and thus is insufficient to show clear evidence of error.

On appeal, counsel argues that OWCP refused to extend the time to request reconsideration and affirmed the decision to terminate benefits based on the opinion of Dr. Getz. However, OWCP regulations contain no provision for waiving the filing period while a claimant attempts to obtain evidence.<sup>14</sup> Appellant argued that Dr. Getz' impartial report is without

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<sup>11</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>12</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>13</sup> See *D.D.*, 58 ECAB 206 (2006); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>14</sup> OWCP's regulations do provide that the time to file a request for reconsideration shall not include any periods subsequent to the decision for which the claimant can establish through probative medical evidence that he was unable to communicate in anyway and her testimony is necessary to obtain modification. 20 C.F.R. § 10.607(c); *Donald Booker-Jones*, 47 ECAB 685 (1996). Appellant has not submitted such evidence.

validity as Dr. Getz dismissed any idea that repetitive heavy work overtime could accelerate degenerative disc disease, calling it merely an “assumption.” The Board has no jurisdiction to review the merits of this case. While counsel may disagree with Dr. Getz’s medical rationale, Dr. Getz’s report does not show on its face that OWCP committed an error in its termination decision or in its refusal to allow an extension of time in light of the fact the reconsideration request was not dated within the one-year limit.

**CONCLUSION**

The Board finds that OWCP properly denied appellant’s request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers’ Compensation Programs’ decision dated March 22, 2012 is affirmed.

Issued: March 18, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees’ Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees’ Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees’ Compensation Appeals Board