

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

E.E., Appellant

and

**DEPARTMENT OF THE AIR FORCE, KELLY
AIR FORCE BASE, San Antonio, TX, Employer**

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**Docket No. 13-1280
Issued: September 26, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 29, 2013 appellant timely appealed the February 5, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this claim.²

ISSUE

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

¹ 5 U.S.C. §§ 8101-8193 (2006).

² Appellant submitted additional medical evidence that was not part of the record at the time OWCP issued its February 5, 2013 decision. The Board is precluded from considering evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1) (2012).

FACTUAL HISTORY

This case was previously before the Board.³ Appellant, a 73-year-old former packer, sustained an employment-related lower back injury on October 8, 1970. He has undergone multiple surgical procedures beginning with a July 1971 lumbar fusion. On October 7, 1986 OWCP issued a loss of wage-earning capacity (LWEC) determination based on appellant's part-time weekly wages as a supply clerk effective November 25, 1985.⁴ Appellant worked four hours per day and OWCP compensated him for four hours of lost wages per day. The October 1986 LWEC determination remained in effect through March 8, 2005.

Since March 9, 2005, OWCP has paid wage-loss compensation for total disability.⁵ However, appellant claimed that he should have been receiving compensation for total disability dating back to July 5, 1989.⁶ On numerous occasions he has reiterated his claim for an additional four hours of compensation per day from July 5, 1989 through May 8, 2005.

When the case was last on appeal, the Board affirmed OWCP's October 29, 2009 decision denying reconsideration. Appellant had filed a request for reconsideration on April 7, 2009. Because the request was filed more than a year after OWCP's award of total disability compensation effective March 9, 2005, his reconsideration request was deemed untimely. The Board further found that appellant had not established clear evidence of error on the part of OWCP in finding him totally disabled as of March 9, 2005.⁷ The Board's December 3, 2010 decision is incorporated herein by reference.

By letter dated December 15, 2012, appellant requested four hours of additional compensation per day for the period July 5, 1989 to March 8, 2005. He explained that he was requesting "reconsideration or modification of [his] former [wage-earning] capacity of September 1986." Appellant also indicated that he had enclosed some letters from his orthopedic physician that may be pertinent.

³ Docket No. 10-1063 (issued December 3, 2010).

⁴ Appellant had been working 20 hours per week.

⁵ March 9, 2005 was the date appellant underwent another OWCP-approved lumbar surgery. By letter dated June 16, 2005, OWCP formally advised that he would be compensated for total disability beginning March 9, 2005 and that he had been placed on the periodic rolls effective May 15, 2005.

⁶ Appellant previously filed a notice of recurrence of disability (Form CA-2a) beginning June 30, 1989, with associated wage-loss effective July 5, 1989. By decision dated April 24, 1991, OWCP denied appellant's recurrence claim on the basis that the evidence did not establish that he was disabled from performing his part-time limited-duty position on or after July 5, 1989. It subsequently denied modification in a May 23, 1991 decision. This latter decision found that an intervening incident occurred on or about July 5, 1989 when appellant reportedly reinjured his back lifting trash at work. Thus, appellant's claimed disability beginning July 5, 1989 was unrelated to the initial October 8, 1970 lumbar injury. OWCP subsequently denied reconsideration on October 15 and December 3, 1992. In a decision dated August 3, 1994, the Board affirmed OWCP's October 15 and December 3, 1992 decisions. (Docket No. 93-697).

⁷ Under the circumstances, the Board did not interpret appellant's April 7, 2009 filing as a request for modification of the October 7, 1986 LWEC determination, which was effectively set aside once OWCP commenced payment of compensation for total disability as of March 9, 2005.

OWCP received three reports from Dr. James W. Simmons, Jr., a Board-certified orthopedic surgeon, whose January 4, 2000 report noted, *inter alia*, that appellant had reinjured his back on June 30, 1989 and thus, was unable to work four hours per day. Appellant also resubmitted Dr. Simmons December 19, 2000 report, which similarly noted that appellant had reinjured his back on June 30, 1989 while lifting trash at work. In a report dated December 3, 2012, Dr. Simmons explained that in 1984 appellant had been placed on restricted duty, working four-hour days. The restricted duty persisted through June 30, 1989 at which time appellant experienced an exacerbation of his pain while at work that day. Based on the June 30, 1989 exacerbation, Dr. Simmons recommended that appellant remain off work entirely. He further stated that appellant's off-work status carried through 2005 at which time he was medically retired.

By decision dated February 5, 2013, OWCP denied appellant's December 15, 2012 request for reconsideration. The request was considered untimely and appellant failed to demonstrate clear evidence of error. OWCP noted that Dr. Simmons' January 4 and December 19, 2000 reports were previously of record and his December 3, 2012 report reiterated information contained in earlier reports regarding appellant's claimed disability beginning July 5, 1989.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁹ One such limitation is that the application for reconsideration must be sent within one year of the date of the merit decision for which review is sought.¹⁰

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹¹ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹² If the request for reconsideration is untimely,

⁸ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607.

¹⁰ *Id.* at § 10.607(a).

¹¹ *Id.* at § 10.606(b)(2).

¹² *Id.* at § 10.608(b).

OWCP will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of OWCP in its “most recent merit decision.”¹³

ANALYSIS

OWCP paid appellant four hours of wage-loss compensation per day through March 8, 2005 based on its October 7, 1986 LWEC determination. That decision was effectively set aside when OWCP awarded compensation for total disability beginning March 9, 2005, but appellant had earlier claimed entitlement to compensation for total disability beginning July 5, 1989. In October 1989, he filed a claim for recurrence of disability on or after June 30, 1989, which OWCP originally denied by decision dated April 24, 1991. OWCP later determined that appellant’s July 5, 1989 work stoppage was the result of an intervening injury and not because of his original October 8, 1970 lumbar injury. As noted, it ultimately paid him compensation for total disability beginning March 9, 2005 when he underwent additional lumbar surgery. Appellant has repeatedly requested that OWCP pay him an additional four hours of compensation per day for the period of July 5, 1989 to March 8, 2005.

The last time the case was on appeal, the Board affirmed OWCP’s October 29, 2009 nonmerit decision denying reconsideration. Since then OWCP has not issued another merit decision regarding entitlement to additional compensation for the claimed period of July 5, 1989 to March 8, 2005. In fact, the Board’s December 3, 2010 nonmerit decision was the most recent decision issued prior to the current OWCP decision on appeal. Because there has been no merit decision issued in the year prior to appellant’s December 15, 2012 request, the Board finds his request untimely. As such, appellant must demonstrate “clear evidence of error” on the part of OWCP in determining his entitlement to wage-loss compensation for total disability.¹⁴

The three reports from Dr. Simmons dated January 4 and December 19, 2000 and December 3, 2012 do not support appellant’s claimed entitlement to additional compensation beginning July 5, 1989. As OWCP correctly noted, either the specific report or the relevant information contained therein was already part of the record. The January 4, 2000 report contained essentially the same information as Dr. Simmons’ January 11, 2000 report, which OWCP received on January 13, 2000. Dr. Simmons’ December 19, 2000 report had been submitted on at least six prior occasions. In fact, the Board specifically referenced his December 19, 2000 report in its December 3, 2010 decision at page two. Lastly, Dr. Simmons’

¹³*Id.* at § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 question as to the correctness of OWCP’s decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ 20 C.F.R. § 10.607(b).

latest report dated December 3, 2012 essentially reiterated information included in both his January 4 and December 19, 2000 reports.

Apart from the repetitive nature of the above-noted evidence, these reports are insufficient to establish that appellant's July 5, 1989 work stoppage was causally related to his October 8, 1970 employment-related lumbar injury. Dr. Simmons has repeatedly attributed appellant's disability on or after July 5, 1989 to an intervening injury that occurred on June 30, 1989 while lifting trash. OWCP advised appellant as early as May 1991 that this intervening injury justified denial of his claimed recurrence of disability beginning July 5, 1989.

The Board finds that appellant has not demonstrated clear evidence of error. As such, there is no justification for further merit review. Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that OWCP properly denied merit review with respect to appellant's December 15, 2012 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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