

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

J.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 14-1589
Issued: November 24, 2014**

Appearances:
Joyce Fuller, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 8, 2014 appellant filed a timely appeal of a June 4, 2014 decision of the Office of Workers' Compensation Programs (OWCP) finding that his request for reconsideration was untimely filed and failed to show clear evidence of error. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the June 4, 2014 decision. The Board does not have jurisdiction over a decision on the merits of the claim.²

ISSUE

The issue is whether OWCP properly found the application for reconsideration was untimely filed and failed to show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The last merit decision was an OWCP decision dated April 22, 2002. For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. *See* 20 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

The case has previously been before the Board. Appellant filed a traumatic injury claim alleging that he sustained shoulder injury, clavicle strain, and right rotator cuff injury on August 9, 2000 when a coworker tapped him on the shoulder, causing him to “go to his knees.”³ By merit decisions dated November 22, 2001 and April 22, 2002, OWCP denied the claim on the grounds that the medical evidence did not establish that the diagnosed conditions were causally related to the alleged incident.

In a decision dated December 21 2005, the Board affirmed an August 27, 2004 OWCP decision finding that appellant’s request for reconsideration was untimely filed and failed to show clear evidence of error.⁴ In a decision dated August 17, 2007, the Board dismissed the appeal as there was no final decision issued within one year of the filing of the appeal.⁵ By decision dated June 20, 2008, the Board affirmed an October 12, 2007 OWCP decision, holding that appellant’s application for reconsideration was untimely and did not show clear evidence of error.⁶ In a decision dated December 17, 2009, the Board affirmed its February 13, 2009 decision finding his application for reconsideration was untimely and failed to show clear evidence of error.⁷ In a decision dated August 16, 2011, the Board affirmed an August 3, 2010 OWCP decision, finding appellant’s application for reconsideration was untimely and failed to show clear evidence of error.⁸ By decision dated February 5, 2013, the Board affirmed a June 21, 2012 OWCP decision, again finding appellant’s reconsideration request was untimely and failed to show clear evidence of error.⁹ The history of the case as contained in the Board’s prior decisions and orders is incorporated herein by reference.

By letter dated August 21, 2013, appellant, through his representative, requested reconsideration. He asserted that the request was timely, and provided a history of the case. Appellant argued that the evidence was sufficient to establish the claim and show clear evidence of error. By letters dated December 31, 2013 and March 26, 2014 to OWCP, he noted that OWCP had not acted on her request for reconsideration.

³ The record indicates that appellant had a May 3, 2000 claim accepted for right shoulder strain and a September 18, 1991 claim accepted for left elbow lateral epicondylitis, left shoulder adhesive capsulitis, left brachial plexus lesions, left tenosynovitis of the hand/wrist and sprain/strains of the right shoulder, upper arm and acromioclavicular joint. The September 18, 1991 claim has been established as a master file with both the May 3, 2000 and the current August 9, 2000 claim on appeal as subsidiary files.

⁴ Docket No. 04-2283 (issued December 21, 2005).

⁵ Docket No. 07-978 (issued August 17, 2007).

⁶ Docket No. 08-271 (issued June 20, 2008).

⁷ Docket No. 09-1027 (issued December 17, 2009).

⁸ Docket No. 10-2378 (issued August 16, 2011).

⁹ Docket No. 12-1749 (issued February 5, 2013).

By decision dated June 4, 2014, OWCP found the application for reconsideration was untimely. It denied the request without merit review on the grounds appellant had not shown clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.¹⁰ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”¹¹

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.¹² This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹⁴ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.¹⁵ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.¹⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.605.

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ Under section 8128 of FECA, “[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.”

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ 20 C.F.R. § 10.607. OWCP procedures state that for its decisions issued between June 1, 1987 and August 28, 2011, the request must be mailed within one year of the decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(e) (October 2011).

¹⁶ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

establish clear evidence of error.¹⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁹ A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.²⁰

ANALYSIS

In the present case, appellant submitted an application for reconsideration dated August 21, 2013 and received by OWCP on August 27, 2013. Although he refers to the June 21, 2012 OWCP decision, the appeal rights to that decision were limited to an appeal to the Board. Appellant filed an appeal and the Board reviewed the June 21, 2012 decision in its February 5, 2013 decision. However the Board's February 5, 2013 decision was not a review of the merits of the claim. The right to request reconsideration within one year accompanies a decision on the merits of the claim.²¹ For the purposes of timeliness, the relevant decision is the last decision on the merits of the claim which is dated April 22, 2002, denying the claim for an August 9, 2000 injury. Appellant stated that the reconsideration request was timely without discussing any relevant evidence. Since the application for reconsideration was dated more than one year after the last merit decision, it is untimely.²²

As an untimely application for reconsideration was filed, appellant must establish clear evidence of error. The history of the case documents that the Board has considered his arguments with respect to the evidence of record in prior appeals. For example, the Board noted in its December 17, 2009 decision that appellant had submitted a detailed history of the case and argued that OWCP did not properly consider the evidence of record. As the Board has explained in its prior decisions, the evidence of record does not establish clear evidence of error in this case. Appellant may submit new evidence which would, as noted above, be subject to a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record. He did not submit new evidence in this case. Appellant reiterated his prior arguments that he believed the evidence showed clear evidence of error. The Board's prior decision is therefore *res judicata*.²³

On appeal, appellant repeatedly argues that the request for reconsideration was timely. For the reasons noted, the request dated August 21, 2013 was untimely with respect to the April 22, 2002 merit decision. Appellant also reiterates the argument that there was clear evidence of error by OWCP. The Board has addressed these arguments on prior appeals. The application for reconsideration was untimely and did not show clear evidence of error. OWCP therefore properly denied merit review of the case.

¹⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁹ *Id.*

²⁰ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

²² As noted above, for decisions prior to August 29, 2011, the date of mailing is used to determine timeliness.

²³ *See R.M.*, Docket No. 14-1213 (issued October 15, 2014).

CONCLUSION

The Board finds that the August 21, 2013 application for reconsideration was untimely and failed to show clear evidence by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 4, 2014 is affirmed.

Issued: November 24, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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