

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

C.S., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
OKLAHOMA CITY OK-OCAMA,)
RANDOLPH AIR FORCE BASE, TX, Employer)

**Docket No. 15-484
Issued: April 20, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2014 appellant filed a timely appeal from a December 22, 2014 nonmerit decision of the Office of Workers' Compensation Programs' (OWCP) denying his request for reconsideration on the grounds that it was untimely filed and failed to establish 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 to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's December 13, 2013 decision denying appellant's occupational disease claim. Because more than 180 days elapsed between the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On March 16, 2012 appellant, then a 63-year-old sheet metal mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed right arm carpal tunnel syndrome (CTS) as a result of the repetitive drilling required by his federal employment duties. He first became aware of his condition on June 16, 2011 and of its relationship to his employment on July 7, 2011.

In support of his claim, appellant submitted a Notification of Personnel Action (Form SF-50) for a sheet metal mechanic and an official position description.

By letter dated September 20, 2013, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days. In another letter of that same date, OWCP requested the employing establishment respond to questions pertaining to appellant's occupational disease claim.

In support of his claim, appellant submitted medical reports dated June 3, 2011 to August 21, 2012 from Dr. L. Todd Olsen, a Doctor of Osteopathic Medicine, which documented his treatment for right shoulder pain and right hand numbness and tingling. Dr. Olsen diagnosed right shoulder full thickness rotator cuff tear, right shoulder labral tear, mild right upper extremity CTS, and right shoulder acromioclavicular joint osteoarthritis. He stated that the physical examination and complaints were consistent with the June 24, 2011 workplace injury described when appellant was lifting a side cowling at work which caused a stress across the right shoulder and a tearing sensation, resulting in immediate pain and weakness. Appellant also submitted a June 27, 2011 magnetic resonance imaging (MRI) scan of the right shoulder and a June 20, 2011 electromyography examination.

In an undated statement, appellant provided a history of his employment with the U.S. Army beginning in 1967. He was employed as an aircraft sheet metal mechanic beginning in March 1999. Appellant reported that in June 2011 he experienced severe numbness in his right hand and wrist causing him to seek medical treatment. His physician diagnosed right arm and right hand CTS. Appellant further stated that on June 16, 2011 he was diagnosed with osteoarthritis in the right shoulder.

By decision dated December 13, 2013, OWCP denied appellant's claim finding that the evidence of record failed to establish that the diagnosed condition was causally related to factors of his federal employment. It noted that the medical reports provided were inconsistent with his claim that his repetitive federal employment duties caused his right arm CTS.

In an appeal request form dated December 11, 2014, appellant requested reconsideration of OWCP's decision. The form was received by OWCP on December 16, 2014.

In a narrative statement dated December 11, 2014, received on December 16, 2014, appellant reported that he had previously injured his shoulder at work in 2011. OWCP accepted his traumatic injury claim in 2012 and approved surgery in 2013.³ Appellant further stated that he followed the same procedures for his occupational CTS claim and was enclosing the only correspondence he had received from OWCP pertaining to this claim. He noted the various weights of the double barrels, pistols, and rivet guns he used at work.

With his reconsideration request, appellant submitted an injury compensation letter from his employing establishment dated September 24, 2013, an OWCP letter dated September 12, 2013 assigning his claim number, a copy of the December 13, 2013 OWCP decision with appeal rights, a copy of the March 16, 2012 Form CA-2, a medical authorization and billing sheet, and an employee's rights and responsibilities when injured at work sheet.

On December 16, 2014 OWCP received an addendum to appellant's statement dated March 16, 2012, which he provided additional responses to the questions posed on the Form CA-2, explaining that the repetitive motion of bucking, shooting, and drilling caused his right arm CTS. He further stated that the delay in filing his OWCP claim was because he had to take time off work to care for his mother and father who were ill. Appellant stated that his father passed away on June 22, 2012 which also caused his delay to fill out the appropriate forms.

By decision dated December 22, 2014, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.⁴

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ 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.⁶

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must

³ The Board notes that the record contains no further information pertaining to this traumatic injury claim.

⁴ The Board notes that appellant submitted additional evidence after OWCP rendered its December 22, 2014 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and; therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit and it must manifest on its face that OWCP committed an error.⁷

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.⁸

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

In its December 22, 2014 decision, OWCP denied appellant's December 16, 2014 request for reconsideration of the December 13, 2013 decision, finding that it was not timely filed and failed to present clear evidence of error. The Board finds that OWCP properly determined that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

OWCP's procedures were changed effective August 29, 2011.¹³ Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹⁴ OWCP issued its most recent merit decision, denying appellant's occupational disease claim, on December 13, 2013. The one-year time limitation for reconsideration began to run on the date of the original decision, and the application for reconsideration must be received by OWCP within

⁷ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Time Limitations Chapter 2.1602.4 (October 2011).

¹⁴ 20 C.F.R. § 10.607 (2011).

one year of the date of OWCP's decision for which review is sought.¹⁵ Therefore, appellant had one year from December 13, 2013 to submit a timely request for reconsideration.

In computing the time for requesting reconsideration, the date of the event from which the designated time period begins to run shall not be included when computing the time period. However, the last day of the period shall be included unless it is a Saturday, a Sunday, or a legal holiday.¹⁶ The time for requesting reconsideration of OWCP's December 13, 2013 decision began to run on December 14, 2013, and ended on December 13, 2014. The Board notes, however, that December 13, 2014 fell on a Saturday. It is well established that when a time limitation expires on a nonbusiness day, the limitation is extended to include the next business day.¹⁷ Therefore, because the time limitation for filing a request for reconsideration fell on Saturday, the time period for filing a request for reconsideration did not expire until the next business day, which was Monday, December 15, 2014.¹⁸

In the instant case, OWCP stated in its December 22, 2014 decision that it would not review a decision unless the request was received within one year of that decision. Therefore, it utilized the new regulations and found that appellant's request was untimely filed as it was received on December 16, 2014. OWCP proceeded to deny appellant's request for reconsideration utilizing the clear evidence of error standard.

On appeal, appellant argued that OWCP did not mail the December 13, 2013 decision until December 18, 2013, which was evidenced by the envelope's postmark, and provided a copy of this envelope on appeal. He further argued that his reconsideration request was received by OWCP on December 15, 2014 in London, Kentucky as evidenced by the tracking receipt. Appellant argued that OWCP's December 22, 2014 decision erroneously stated that the reconsideration request was received on December 16, 2014. In support of this argument, he provided the tracking number submitted with his reconsideration request, a copy of the United States Postal Service (USPS) priority mail express receipt, and the USPS tracking history for his reconsideration request.

With respect to appellant's arguments that his claim was timely filed, the evidence he references was not in the record prior to OWCP's December 22, 2014 decision. As such, the Board cannot review this evidence for the first time on appeal.¹⁹ Appellant may submit this additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607. As the record before the Board does not establish that appellant's reconsideration request was received by December 15, 2014, one year after the date of the last merit decision of

¹⁵ *Supra* note 13.

¹⁶ *Debra McDavid*, 57 ECAB 149 (2005); *John B. Montoya*, 43 ECAB 1148 (1992).

¹⁷ *See M.H.*, Docket No. 13-1901 (issued January 8, 2014); *Debra McDavid*, 57 ECAB 149, 150 (2005); *Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000); *Gary J. Martinez*, 41 ECAB 427, 427-28 (1990).

¹⁸ *P.R.*, Docket No. 14-300 (issued May 12, 2014).

¹⁹ *Supra* note 4.

record on December 13, 2013, it was untimely.²⁰ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim.²¹

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In support of his reconsideration request, appellant resubmitted his Form CA-2 and correspondence received from OWCP. In resubmitting these documents, he did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. It is not apparent how resubmission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision.²²

Appellant also submitted an injury compensation letter from his employing establishment dated September 24, 2013, a medical authorization and billing sheet, an employee's rights and responsibilities when injured at work sheet, and additional narrative statements. He argued that his right arm CTS was caused by his repetitive employment duties and provided the weight of the tools he used at work. Appellant further explained why he delayed in filing his Form CA-2. This additional evidence is insufficient to establish that OWCP erred in its denial of appellant's claim.²³ The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.²⁴

While appellant addressed his disagreement with OWCP's denial of his claim and submitted additional factual details, his general allegations do not establish clear evidence of error because his arguments do not raise a substantial question as to the correctness of OWCP's decision. The Board notes that the underlying issue is medical in nature and the record contained no medical evidence to shift the weight of the evidence in appellant's favor and establish that OWCP erred in denying his claim. Appellant did not submit the type of positive, precise, and explicit evidence that manifests on its face that OWCP committed an error.²⁵ Thus, he did not establish clear evidence of error in the denial of his occupational disease claim.²⁶

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

²⁰ *S.W.*, Docket No. 13-1618 (issued December 12, 2013).

²¹ *See Debra McDavid*, 57 ECAB 149 (2005).

²² *J.J.*, Docket No. 13-1363 (issued November 6, 2013).

²³ *See W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

²⁵ *J.T.*, Docket No. 10-313 (issued February 24, 2010).

²⁶ *B.B.*, Docket No. 08-232 (issued August 7, 2008).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2015
Washington, DC

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

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

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