

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

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<b>R.M., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 17-0473</b>
	)	<b>Issued: June 6, 2017</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Melville, NY, Employer</b>	)	
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*Appearances:* *Case Submitted on the Record*  
*Aumiller Lomax, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 23, 2016 appellant, through counsel, filed a timely appeal from a June 28, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days elapsed between the last merit decision dated March 31, 2015 to the filing of this

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(f). One hundred eighty days from June 28, 2016, the date of OWCP's last decision, was December 25, 2016. Since using January 3, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 23, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

appeal, pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.

### **ISSUE**

The issue is whether OWCP properly denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

On May 7, 2014 appellant, then a 47-year-old body repairman, filed a traumatic injury claim (Form CA-1) alleging that on May 7, 2014 he sustained a right shoulder injury when he was lifting a long line vehicle windshield. He notified his supervisor and stopped work on the date of the injury.

By letter dated May 9, 2014, 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 afforded 30 days to submit the necessary evidence.

In support of his claim, appellant submitted May 7, 2014 discharge instructions from the emergency department documenting possible rotator cuff injury. In a May 7, 2015 diagnostic report, Dr. Samir Tilak, a treating radiologist, reported that an x-ray of the right shoulder revealed osteoarthritis with no definite fracture.

In a May 9, 2014 medical report, Dr. Luke Austin, a Board-certified orthopedic surgeon, provided a history of the May 7, 2014 employment incident, findings on physical examination, and review of diagnostic testing. He diagnosed right shoulder rotator cuff tear arthropathy and restricted appellant to modified duty. In an Attending Physician's Report (Form CA-20) of the same date, Dr. Austin reported that, on May 7, 2014, appellant was repairing a glass and started experiencing increasing pain as he was reaching, when he felt a pop in his right shoulder causing him to seek emergency medical treatment. He noted a history of prior right shoulder arthroscopy. Dr. Austin diagnosed right shoulder rotator cuff tear and checked the box marked "yes" when asked if the condition was caused or aggravated by the employment activity.

By decision dated June 16, 2014, OWCP denied appellant's claim finding that the evidence of record failed to establish that his diagnosed condition was causally related to the accepted May 7, 2014 employment incident.

By letter dated June 24, 2014 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In a June 30, 2014 medical report, Dr. Austin diagnosed right shoulder rotator cuff tear arthropathy, noting that it was a work injury. He reported that appellant previously had a right shoulder rotator cuff tear that was chronic and irreparable which was deemed to be a work-related injury from prior claims. Dr. Austin noted that the cuff tear arthritis was secondary to the chronic rotator cuff problems which appellant had for many years. He noted treating appellant

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

approximately three years ago for debridement surgery of the rotator cuff because it was irreparable at that time. Appellant had returned to full-duty work and had been able to participate over the last three years without difficulty. He reported that the pain in his shoulder continued, but that he would like to return to work. In a duty status report (Form CA-17), Dr. Austin released appellant to work with restrictions.

A hearing was held on January 15, 2015. Counsel reported that appellant had a significant history of accepted work-related claims to the same shoulder and that this current claim would be an aggravation of a preexisting condition. He further suggested the claims should be combined since they involved the same body part. The record was held open for 30 days.

By decision dated March 31, 2015, OWCP's hearing representative affirmed the June 16, 2014 decision finding that the evidence of record failed to establish that appellant's diagnosed condition was causally related to the accepted May 7, 2014 employment incident.<sup>4</sup>

On March 31, 2016 OWCP received a March 31, 2016 brief wherein counsel requested reconsideration of the March 31, 2015 decision of the Branch of Hearings and Review. Counsel referenced submission of new medical reports in support of appellant's claim and further argued that this claim should be combined with his previously accepted claims.

In support of his claim, appellant provided a February 24, 2010 operative report from Dr. Tod Lipschultz, a Board-certified orthopedic surgeon, a November 19, 2010 magnetic resonance imaging scan of the right shoulder with examination of the right shoulder arthrogram from Dr. Tilak, a March 2, 2011 operative report from Dr. Austin, and a June 4, 2012 unsigned permanent impairment evaluation.

By decision dated June 28, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>5</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>6</sup>

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<sup>4</sup> The Board notes that, under OWCP File No. xxxxxx952, OWCP accepted a right hand contusion on June 25, 2003. Under File No. xxxxxx946, OWCP accepted bilateral shoulder sprains, right lateral epicondylitis, and right elbow/forearm sprain on February 22, 2005. Under File No. xxxxxx855, OWCP accepted right shoulder strain on January 3, 2008; it also accepted recurrences in September 2009 and February 2010 and appellant underwent OWCP approved shoulder surgery in March 2008 and February 2010. Under File No. xxxxxx918, OWCP accepted a right shoulder sprain, rotator cuff tear, and right shoulder disorder of bursae and tendons for which appellant underwent OWCP approved right shoulder surgery in March 2011. OWCP granted a schedule award for 12 percent permanent impairment of the right upper extremity in February 2014.

<sup>5</sup> 20 C.F.R. § 10.607(a).

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

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must 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.<sup>7</sup>

### ANALYSIS

In its June 28, 2016 decision, OWCP denied appellant's request for reconsideration of the March 31, 2015 merit decision, finding that it was untimely filed and failed to demonstrate clear evidence of error. The Board finds, however, that OWCP improperly determined that his request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.<sup>8</sup>

On March 31, 2015 an OWCP hearing representative issued a decision finding that the evidence of record failed to establish that appellant's diagnosed condition was causally related to the accepted May 7, 2014 employment incident. Accordingly, appellant had until March 31, 2016 to make a timely request for reconsideration.<sup>9</sup> OWCP determined that his request for reconsideration should have been received on March 30, 2016. As appellant's request was not received until March 31, 2016, OWCP determined that the request for reconsideration was untimely filed. The Board finds, however, that he submitted a timely request for reconsideration on March 31, 2016 with evidence and argument in support of his claim, within the required one-year time period.<sup>10</sup>

20 C.F.R. § 10.607 provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought. In *C.B.*, the Board held that for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System.<sup>11</sup> In this case, the received date of the application was March 31, 2016, one year after the March 31, 2015 OWCP decision. The Board also noted in *C.B.*, that it is well established that when the date of the reconsideration request is exactly one year after the date of OWCP's decision, it is timely under 20 C.F.R. § 10.607(a).<sup>12</sup> Since appellant's application for reconsideration was received within one year of OWCP's decision for which review was sought, it was timely.

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

<sup>8</sup> *J.L.*, Docket No. 12-1181 (issued November 1, 2012).

<sup>9</sup> OWCP's procedures were changed effective August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations, Time Limitations* Chapter 2.1602.4 (February 2016). 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. 20 C.F.R. § 10.607 (2011).

<sup>10</sup> *Id.*

<sup>11</sup> Docket No. 13-1732 (issued January 28, 2014).

<sup>12</sup> *Id.*

The Board finds that OWCP improperly denied appellant's reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the legal standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).<sup>13</sup> Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.<sup>14</sup>

### **CONCLUSION**

The Board finds that OWCP improperly found that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.<sup>15</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 28, 2016 decision of the Office of Workers' Compensation Programs is set aside and remanded for action consistent with this decision.

Issued: June 6, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provide that an application for reconsideration must be in writing and 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.

<sup>14</sup> *Dewayne C. Davis*, Docket No. 94-2346 (issued August 14, 1997).

<sup>15</sup> *D.S.*, Docket No. 15-1841 (issued June 8, 2016).