

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

_____)	
J.W., Appellant)	
)	
and)	Docket No. 18-0703
)	Issued: November 14, 2018
U.S. POSTAL SERVICE, MID-ISLAND)	
POSTAL & DELIVERY CENTER, Melville, NY,)	
Employer)	
_____)	

Appearances:
*Robert Lisso, for the appellant*¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 12, 2018 appellant, through his representative, filed a timely appeal from an August 23, 2017 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 12, 2016, to the

¹ 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.

filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.³

ISSUE

The issue is whether OWCP properly determined that appellant's August 15, 2017 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 23, 2014 appellant, then a 43-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on that day, he felt pain in his right shoulder while unloading a trailer and pulling bulk mail containers/mail transport equipment (BMCs/MTE). He stopped work that day.

Following initial development, by decision dated September 17, 2014, OWCP denied the claim. It found that the medical evidence submitted was insufficient to establish causal relationship between the diagnosed shoulder conditions and the accepted July 23, 2014 work incident.

On May 18, 2015 appellant requested reconsideration. In support of his request, he submitted additional medical evidence. By decision dated August 11, 2015, OWCP denied modification of its September 17, 2014 decision. It found that the medical evidence appellant had submitted was insufficient to establish causal relationship between the diagnosed conditions and the accepted July 23, 2014 work incident.

On May 23 2016 appellant requested reconsideration.

In an April 12, 2016 report, Dr. Peter McCann, a Board-certified orthopedic surgeon, diagnosed primary osteoarthritis of the right shoulder and disorder of rotator cuff syndrome of right shoulder and allied disorder. He indicated that appellant was injured on July 23, 2014 while unloading trailer boxes of BMCs and pulling the BMCs with his right arm behind him as he walked forward. Dr. McCann noted that the BMCs weighed between 1,200 to 1,800 pounds. He opined that the strain to the shoulder while pulling a BMC in the estimated range of 1,200 to 1,800 pounds was a direct cause of appellant's injury to the rotator cuff and arthritis of the glenohumeral joint of the right shoulder. Dr. McCann explained that while appellant had preexisting injury to the rotator cuff and arthritis of the glenohumeral joint of the right shoulder, he was not symptomatic prior to the July 23, 2014 employment incident. He indicated that pulling heavy objects could cause further injury to a shoulder that had preexisting conditions. Dr. McCann explained that any activity that increased joint reaction force to the shoulder, such as pulling BMCs, could aggravate

² 5 U.S.C. § 8101 *et seq.*

³ The record provided the Board includes evidence received after OWCP issued its August 23, 2017 decision. However, section 501.2(c)(1) of the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

a preexisting shoulder condition and cause further injury and inflammation to an underlying joint that has had arthritic changes. He also noted that it was well known that physical activity could exacerbate an underlying preexisting injury to the rotator cuff and osteoarthritis, which were asymptomatic prior to such activity.

By decision dated August 12, 2016, OWCP denied modification of its prior decision. It found that Dr. McCann's opinion was equivocal in nature as to whether the accepted employment factors directly caused, aggravated, or exacerbated appellant's preexisting conditions.

Appellant requested reconsideration by a form dated August 10, 2017, postmarked August 11, 2017, and received by OWCP on August 15, 2017. In an August 10, 2017 narrative, he indicated that he reviewed the denial of his claim with his doctor and believed that the attached medical narratives should clear up any concerns.

Medical reports from Dr. McCann previously of record dated July 29, 2014 and April 12, 2016 were received along with new reports dated November 24, 2015 and August 9, 2017.⁴ In his November 24, 2015 report, Dr. McCann provided right shoulder assessments of disorder of rotator cuff syndrome, allied disorder, and primary osteoarthritis. He indicated that appellant injured his right shoulder on July 23, 2014 while pulling BMCs. Dr. McCann noted that appellant had a long history of rotator cuff injury with previous surgical procedures and osteoarthritis of the right glenohumeral joint. He noted that appellant's right shoulder function was satisfactory prior to the July 23, 2014 work injury. Dr. McCann opined that July 23, 2014 pulling of BMCs caused injury to appellant's rotator cuff and arthritis of the glenohumeral joint. He again explained that any activity that increases joint reaction force to the shoulder joint, such as pulling BMCs, can aggravate a preexisting arthritic shoulder and cause injury and inflammation to an underlying joint that had previous arthritic changes. Dr. McCann also noted that it was a well-known fact that physical activity may exacerbate the underlying condition of the shoulder which had a preexisting injury to the rotator cuff and osteoarthritis.

In his August 9, 2017 report, Dr. McCann opined that the activity in which appellant was engaged in on July 2, 2014⁵ directly caused injury to his right shoulder. He indicated that his opinion was based on appellant's history and physical examination. Dr. McCann noted that the act of unloading BMCs weighing 1,200 to 1,800 pounds caused injury to appellant's right shoulder and that the findings of injury to his rotator cuff and glenohumeral joint were consistent with his physical examination findings. He noted that, while appellant had preexisting injury to his right rotator cuff and glenohumeral joint, he had no symptoms in his right shoulder prior to his work injury. It was for that reason that Dr. McCann indicated that appellant's right shoulder condition was causally related to the employment incident.

By decision dated August 23, 2017, OWCP denied appellant's August 15, 2017 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁴ The record also contained a December 4, 2014 medical report pertaining to a different appellant.

⁵ The date of injury appears to be a typographical error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁶ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹⁰ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the 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. To demonstrate clear evidence of error, the evidence submitted 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.¹²

OWCP procedures note that 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). Evidence such as 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.¹³

⁶ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁹ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

¹² *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant's August 15, 2017 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations¹⁵ and procedures¹⁶ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷ The most recent merit decision was OWCP's August 12, 2016 decision. Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's iFECS).¹⁸ Appellant had one year from the date of OWCP's August 12, 2016 decision to timely request reconsideration. As one year from August 12, 2016 fell on Saturday, August 12, 2017, he had until Monday, August 14, 2017 to timely file a request for reconsideration.¹⁹ OWCP received appellant's reconsideration request on Tuesday, August 15, 2017. As OWCP did not receive appellant's reconsideration request until August 15, 2017, one day past the one year deadline from the August 12, 2016 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his claim.²⁰

Appellant submitted an August 10, 2017 narrative statement which indicated that he believed that the medical narratives he submitted established his claim. The issue in the case is a medical one of whether he has established causal relationship between his diagnosed right shoulder conditions and the accepted July 23, 2014 work incident through the submission of rationalized medical opinion evidence. Appellant's arguments regarding the weight of the medical evidence lack probative value. His honest belief that his work activities on July 23, 2014 caused his medical conditions is not in question, but that belief, however sincerely held, does not shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision.²¹

¹⁴ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁵ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ *Supra* note 8 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ *Supra* note 8 at Chapter 2.1602.4(b) (February 2016).

¹⁹ When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday. *Supra* note 8 at Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

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

²¹ *Robert G. Burns*, 57 ECAB 657 (2006).

Appellant also submitted duplicative reports, previously of record,²² and new reports dated November 24, 2015 and August 9, 2017 from Dr. McCann. In his November 24, 2015 report, Dr. McCann opined that July 23, 2014 pulling of BMCs caused injury to appellant's rotator cuff and arthritis of the glenohumeral joint. He explained that any activity that increased joint reaction force to the shoulder joint, such as pulling BMCs, could aggravate and may exacerbate a preexisting arthritic shoulder and cause injury and inflammation to an underlying joint that had previous arthritic changes. In his August 9, 2017 report, Dr. McCann opined that the act of unloading BMCs weighing 1,200 to 1,800 pounds caused injury to appellant's right shoulder. He advised that appellant's physical examination findings to his rotator cuff and glenohumeral joint were consistent with an injury and appellant had no symptoms in his right shoulder prior to his work injury. However, evidence such as 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.²³

As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of OWCP's last merit decision, appellant has failed to demonstrate clear evidence of error.²⁴

On appeal appellant's representative asserts that it was not his fault that OWCP received his reconsideration request after the one year period as he had mailed it on Thursday, August 10, 2017.²⁵ As previously noted, timeliness is determined by the document receipt date (*i.e.*, the "received date" in iFECS).²⁶ Appellant also maintained that Dr. McCann's April 12, 2016 and August 9, 2017 medical reports are sufficient to establish his claim. As previously noted, the Board does not have jurisdiction over the merits of the claim. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

CONCLUSION

The Board finds that OWCP properly determined that appellant's August 15, 2017 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

²² These reports had previously been submitted to and considered by OWCP and appellant did not explain how their mere resubmission demonstrated clear error in OWCP's August 12, 2016 decision. *See D.F.*, Docket No. 17-0745 (issued March 14, 2018); *see also A.M.*, Docket No. 10-0526 (issued November 8, 2010) (appellant did not sufficiently explain how largely duplicative evidence raised a substantial question as to the correctness of OWCP's decision.

²³ *See supra* note 13.

²⁴ *See W.A.*, Docket No. 18-0297 (issued July 18, 2018).

²⁵ The record indicates that the reconsideration request was postmarked August 11, 2017.

²⁶ *Supra* note 8 at Chapter 2.1602.4(b) (February 2016).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2018
Washington, DC

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

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

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