

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

D.G., Appellant)	
)	
and)	Docket No. 18-0063
)	Issued: September 6, 2018
DEPARTMENT OF THE ARMY,)	
INSTALLATION MANAGEMENT)	
COMMAND, Fort Drum, NY, Employer)	
)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 10, 2017 appellant filed a timely appeal from a May 31, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated May 9, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On August 29, 2001 appellant, a 48-year-old carpenter, filed an occupational disease claim (Form CA-2) alleging that he developed lateral epicondylitis due to factors of his federal employment, including the use of a hammer, lifting, and the use of a cordless drill in the performance of duty. OWCP initially accepted the claim for right lateral epicondylitis and authorized a debridement surgery, which appellant underwent on April 4, 2002. It later accepted that appellant sustained a recurrence of disability on May 10, 2003 and also granted him a schedule award for three percent permanent impairment of the right upper extremity. The award ran for 9.36 weeks for the period July 11 to September 14, 2004. By decisions dated July 8 2008 and April 6, 2009, OWCP denied the expansion of the acceptance of appellant's claim to include pancreatitis. Appellant returned to work on March 30, 2009 as a temporary office aid. By decision dated June 4, 2009, OWCP found that this full-time limited-duty position fairly and reasonably represented appellant's wage-earning capacity.

On April 9, 2009 appellant filed a claim for a schedule award (Form CA-7) for his left upper extremity. By decision dated June 22, 2010, OWCP granted him a schedule award for two percent permanent impairment of the left upper extremity. The award ran for 6.24 weeks for the period June 6 to July 19, 2010. OWCP noted that the schedule award period started on June 6, 2010 rather than the date he had reached maximum medical improvement because appellant had previously received compensation through June 5, 2010.

On February 13, 2014 appellant filed a notice of recurrence (Form CA-2a) claiming that he was totally disabled for work commencing March 31, 2010. By decision dated May 13, 2014, OWCP denied his claim for a recurrence of total disability. Appellant requested reconsideration. By decision dated April 24, 2015, OWCP denied modification of its prior decision because the evidence of record failed to establish that there was a material change in the nature and extent of the injury-related condition, causing renewed disability for work as of March 31, 2010. It noted that appellant was employed in a temporary position when he was injured and the temporary limited-duty position he started performing on March 30, 2009 expired on March 30, 2010.

On February 24, 2016 appellant requested reconsideration.

By decision dated May 9, 2016, OWCP denied modification of its prior decision as the evidence of record was insufficient to establish entitlement to disability benefits as his temporary limited-duty position had expired on March 30, 2010.

On October 17, 2016 appellant filed an appeal with the Board. By order dated November 23, 2016, the Board dismissed the appeal upon appellant's request.³

² Docket No. 17-0080 (issued November 23, 2016).

³ *Id.*

On May 12, 2017 appellant requested reconsideration of OWCP's May 9, 2016 decision.

Appellant submitted a narrative statement dated May 8, 2017 reiterating the factual history of his claim and provided an attending physician's report (Form CA-20) dated October 16, 2016 from Dr. Edward N. Powell, a Board-certified orthopedic surgeon, who diagnosed lateral epicondylitis and cubital tunnel syndrome.

Appellant also resubmitted an October 17, 2016 work capacity evaluation form (Form OWCP-5c) from Dr. Powell indicating that he could only lift nine pounds at his last functional capacity evaluation (FCE).

By decision dated May 31, 2017, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

Section 10.607(b) provides that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so

⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁶ 20 C.F.R. § 10.607(a).

⁷ See *Jesus D. Sanchez*, *supra* note 4; *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

⁸ 20 C.F.R. § 10.607(b).

⁹ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

¹⁰ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

¹¹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

as to produce a contrary conclusion.¹² 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.¹³

To demonstrate clear evidence of error, 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.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision.¹⁶ The Board has 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 Integrated Federal Employees' Compensation System (iFECS).¹⁷ The most recent merit decision was OWCP's May 9, 2016 decision denying appellant's recurrence claim. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since his request was not received by OWCP until May 12, 2017, it was filed outside the one-year time period.¹⁸ As appellant's May 12, 2017 request for reconsideration was received more than one year after the May 9, 2016 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his claim.¹⁹

¹² See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

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

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); see *supra* note 14.

¹⁸ OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provides 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. See 20 C.F.R. § 10.607 (2011); see also *C.B.*, Docket No. 13-1732 (issued January 28, 2014) (where 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 iFECS). Therefore, OWCP utilized the new regulations and found that as OWCP received appellant's request for reconsideration on May 12, 2017, or over one year after the May 9, 2016 decision, appellant's request was untimely filed.

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

In its May 9, 2016 decision, OWCP denied appellant's recurrence claim because the evidence of record failed to establish that there was a material change in the nature and extent of his injury-related condition, causing renewed disability for work as of March 31, 2010. It noted that appellant was employed in a temporary position when he was injured and the temporary limited-duty position he started performing on March 30, 2009 expired on March 30, 2010. In support of his untimely request for reconsideration, appellant submitted a May 8, 2017 narrative statement reiterating the factual history of his claim and an October 16, 2016 attending physician's report (Form CA-20) from Dr. Powell who diagnosed lateral epicondylitis and cubital tunnel syndrome. He also resubmitted an October 17, 2016 work capacity evaluation form (Form OWCP-5c) from Dr. Powell indicating that he could only lift nine pounds at his last FCE. The Board finds that this evidence fails to provide a rationalized medical opinion explaining how appellant's assigned duties exceeded his physical limitations or caused or aggravated his accepted right lateral epicondylitis condition. Thus, the Board finds that this evidence does not demonstrate clear evidence of error because it does not show that OWCP committed an error in denying appellant's recurrence claim, nor raise a substantial question as to the correctness of OWCP's decision.

To demonstrate clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.²⁰ None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim for a recurrence of total disability. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (February 2016); see *Dean D. Beets, supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 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