

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

C.M., Appellant)	
)	
and)	Docket No. 19-0585
)	Issued: August 15, 2019
DEPARTMENT OF THE ARMY, CORPS OF)	
ENGINEERS, East Alton, IL, Employer)	
)	

Appearances:
Fred Patrick Schuman, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 18, 2019 appellant, through counsel, filed a timely appeal from a July 25, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 28, 2017, to the 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 this case.

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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's April 25, 2018 request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On March 18, 2016 appellant, then a 41-year-old lock and dam equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury to his neck and right hand rolling on grease like painting on March 17, 2016 while in the performance of duty.

By decision dated May 18, 2016, OWCP denied the claim finding that appellant had not met his burden of proof to establish that the March 17, 2016 incident occurred as alleged.

Appellant subsequently requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received treatment notes dated April 29, June 10, July 15, and September 20, 2016 from Dr. Donald A. DeGrange, a Board-certified orthopedic surgeon, noting appellant's status and progress. In his report dated September 20, 2016, Dr. DeGrange opined that the scope of appellant's employment activities are the "most likely" cause of his injuries, which necessitated surgeries which had been performed on July 24, 2012 and April 19, 2016.³

A telephonic hearing was held before an OWCP hearing representative on February 14, 2017. Appellant testified that he was at work on March 17, 2016 when an elevator broke down and he was instructed to grease the stainless steel cables that ran to the ship to lift the container gates. He explained that he used a roller that was approximately six-feet long and he had to stand on his "tippy-toes" to reach the shiv, a pulley-type apparatus, because of the height. Appellant then had to exert a significant amount of energy and strength in order to push through the shiv to actually roll the grease onto the cables. He indicated that he felt a pinch in his neck and his hands went numb while he was working. Appellant also testified that he had a prior claim under OWCP File No. xxxxxx714 for an April 20, 2016 left shoulder injury.

By decision dated April 28, 2017, OWCP's hearing representative affirmed the prior decision, as modified, finding that the March 17, 2016 employment incident occurred as alleged and that the record established that appellant had a preexisting cervical disc condition, but the medical evidence of record was insufficient to establish that his current cervical condition was causally related to the accepted work incident.

On April 30, 2018 appellant requested reconsideration and submitted a deposition of Dr. DeGrange, dated November 14, 2017, from a matter pending before the Illinois Workers' Compensation Commission.

³ Dr. DeGrange referenced that appellant had been under his care since April 30, 2012 following an employment-incident on April 10, 2012 which occurred while using a very large wrench.

By decision dated July 25, 2018, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ 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.⁵ 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).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁸ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁹

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.¹⁰

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

⁴ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

¹⁰ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

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.¹¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that OWCP properly denied appellant's April 25, 2018 request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision.¹³ 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 iFECS.¹⁴ The most recent merit decision was OWCP's April 28, 2017 decision denying appellant's claim for a traumatic injury. 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 April 30, 2018, it was filed outside the one-year time period. As appellant's April 30, 2018 request for reconsideration was received more than one year after the April 28, 2017 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.¹⁵

The Board finds that the evidence submitted by appellant does not demonstrate clear evidence of error because it does not establish that OWCP committed an error in denying his traumatic injury claim, nor raise a substantial question as to the correctness of OWCP's April 28, 2017 decision.

In support of his untimely request for reconsideration, appellant submitted a deposition report of Dr. DeGrange dated November 14, 2017 from a separate matter that was before the Illinois Workers' Compensation Commission. In his deposition testimony, Dr. DeGrange detailed appellant's medical conditions and treatment and reiterated his opinion that factors of appellant's employment had aggravated or caused his conditions.

Although appellant submitted the deposition of Dr. DeGrange on reconsideration, this new evidence does not raise a substantial question as to the correctness of OWCP's decision.¹⁶ Rather, the deposition testimony merely provides his opinion as to causation and the need for additional

¹¹ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹² *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹³ *Supra* note 5; *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁴ *Supra* note 6 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

¹⁶ *See P.B.*, Docket No. 18-0265 (issued September 5, 2018); *D.E.*, 59 ECAB 438 (2008).

medical treatment.¹⁷ Thus, the Board finds that the deposition report of Dr. DeGrange is insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's decision denying his request for reconsideration.

To demonstrate clear evidence of error, it is insufficient 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.¹⁸ The evidence submitted does not manifest on its face that OWCP committed an error in its April 28, 2017 decision denying appellant's claim for a traumatic injury. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's last merit decision. Thus, the Board finds that the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's April 25, 2018 request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁷ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹⁸ *Supra* note 6 at Chapter 2.1602.5.a (February 2016); see *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).