

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

_____)	
R.S., Appellant)	
)	
and)	Docket No. 19-0180
)	Issued: December 5, 2019
U.S. CAPITOL POLICE, Washington, DC,)	
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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On November 5, 2018 appellant filed a timely appeal from a May 22, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from OWCP's last merit decision, dated March 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 to review the merits of this case.

ISSUE

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

¹ Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated September 4, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0180 (issued September 4, 2019).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 3, 2017 appellant, then a 46-year-old police officer, file a traumatic injury claim (Form CA-1) alleging that, while in the performance of duty on January 24, 2017, he closed the rear ramp of a civil disturbance unit trailer. The following day, he experienced increasing lumbar pain, left lower extremity pain, severe muscle cramping in both lower extremities, and right foot numbness. Appellant stopped work on January 25, 2017.

In a January 30, 2017 statement, appellant noted that he sought treatment on January 26, 2017 from Dr. Andrew Tucker, Board-certified in family practice and sports medicine, who opined that he had irritated a prior lumbar injury. As his symptoms did not abate, he sought treatment at a hospital emergency department where a magnetic resonance imaging scan of the lumbar spine demonstrated L4-5 nerve root impingement. Appellant was released from the hospital on January 28, 2017 pending surgery.

In a February 8, 2017 note, an employing establishment official noted that appellant underwent surgery on February 6, 2017 and remained hospitalized.

In a development letter dated February 22, 2017, OWCP informed appellant that the evidence of record was insufficient to establish his traumatic injury claim. It noted that he had not submitted evidence sufficient to establish the alleged January 24, 2017 employment incident as factual or a medical diagnosis related to that claimed incident. OWCP advised appellant of the type of medical and factual evidence needed and provided a questionnaire for his completion. It afforded him 30 days to submit the necessary evidence.

In response, appellant provided a March 3, 2017 note from Dr. P. Justin Tortolani, a Board-certified orthopedic surgeon, holding him off work through a March 24, 2017 follow-up appointment.

By decision dated March 28, 2017, OWCP accepted that the January 24, 2017 employment incident had occurred as alleged. However, it denied appellant's claim finding that the medical evidence of record was insufficient to establish a medical diagnosis causally related to the accepted employment incident.

On May 8, 2017 OWCP received March 24, 2017 reports wherein Dr. Tortolani returned appellant to restricted-duty work effective March 27, 2017, with lifting limited to 10 pounds, no twisting, and intermittent standing, walking, and climbing. As of May 9, 2017, Dr. Tortolani increased appellant's lifting tolerance to 40 pounds. On May 23, 2017 appellant accepted a temporary modified position within the restrictions given by Dr. Tortolani.

On May 7, 2018 appellant requested reconsideration of the March 28, 2017 decision. In support of his request, he submitted an August 16, 2017 statement signed by Dr. Tortolani indicating that appellant had previously undergone surgery on a herniated lumbar disc on February 7, 2014. It further noted that appellant subsequently sustained a lumbar spine injury on January 27, 2017 while closing a trailer ramp, and was referred to Dr. Tortolani. C.H. corrected the date of injury to January 24, 2017.

By decision dated May 22, 2018, OWCP denied appellant's reconsideration request 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.³ This discretionary authority, however, is subject to certain restrictions.⁴ For instance, OWCP's regulations⁵ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision for which review is sought. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁶ Timeliness is determined by the document receipt date, the received date in OWCP's integrated Federal Employees' Compensation System (iFECS).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely, OWCP must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.⁹ OWCP's procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.¹⁰ In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹² Evidence demonstrating clear evidence of error must be relevant to the issue

³ See *id.* at § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Id.*; see *Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹¹ *V.G.*, *supra* note 5; see *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *A.S.*, Docket No. 18-1556 (issued September 17, 2019); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a)(February 2016).

which was decided by OWCP.¹³ Additionally, the evidence must be positive, precise, explicit, and must manifest on its face that OWCP committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated 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.¹⁹

ANALYSIS

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

OWCP's regulations establish a one-year time limit for requesting reconsideration, which begins on the date of the original merit decision. The most recent merit decision was OWCP's March 28, 2017 decision, which denied appellant's traumatic injury claim finding fact of injury had not been established. As OWCP received appellant's request for reconsideration on May 7, 2018, more than one year after the March 28, 2017 merit decision, the Board finds that the request was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.²⁰

¹³ *S.T.*, *supra* note 8; *see C.V.*, *supra* note 9; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ *S.T.*, *supra* note 8; *see E.P.*, *supra* note 11; *Pasquale C. D Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *A.S.*, *supra* note 12; *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 5; *see C.V.*, *supra* note 9; *Leon J. Modrowski*, *supra* note 9; *Jesus D. Sanchez*, *supra* note 9.

¹⁶ *V.G.*, *supra* note 5; *see E.P.*, *supra* note 11; *Leona N. Travis*, *supra* note 14.

¹⁷ *A.S.*, *supra* note 12; *L.B.*, *supra* note 15; *supra* note 11.

¹⁸ *D.G.*, *supra* note 10; *Leon D. Faidley, Jr.*, *supra* note 8.

¹⁹ *See C.V.*, *supra* note 9; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

²⁰ 20 C.F.R. § 10.607(b).

In support of his reconsideration request, appellant submitted Dr. Tortolani's August 16, 2017 statement noting a February 7, 2014 lumbar spine procedure and January 24, 2017 lumbar injury. This evidence does not raise a substantial question regarding the correctness of OWCP's decision denying his claim for a traumatic injury as fact of injury had not been established.²¹ This evidence does not offer a rationalized medical opinion that OWCP's decision was incorrect and is of insufficient 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.²²

OWCP also received work restrictions from Dr. Tortolani dated March 27 and May 9, 2017, and a modified job offer accepted by appellant on May 23, 2017. This evidence, however, does not demonstrate that OWCP's March 28, 2017 decision was in error at the time that it was issued.²³

As the evidence submitted in support of appellant's untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of his claim or raise a substantial question that OWCP erred in its March 28, 2017 decision, the Board finds that OWCP properly denied his reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant contends that he had submitted all the necessary documents to establish a lumbar injury causally related to the accepted January 24, 2017 employment incident. However, as previously noted, the Board lacks jurisdiction to review the merits of this case.

CONCLUSION

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

²¹ *A.S.*, *supra* note 12; *L.B.*, *supra* note 15; *see P.B.*, Docket No. 18-0265 (issued September 5, 2018).

²² *T.S.*, Docket No. 19-0056 (issued July 1, 2019).

²³ *A.S.*, *supra* note 12; *L.B.*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 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