

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 25, 2017 appellant, then a 54-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he injured his right hand and bicep that day when he was struck by an over-the-road container (OTR) while in the performance of duty. He did not stop work.

In a supplemental statement dated March 25, 2017, appellant related that a coworker, G.N., was moving the OTR when it struck him. In a statement of even date, G.N. noted that he had not struck appellant with an OTR, as appellant alleged. In a separate witness statement of even date, A.B., indicated that G.N. was "nowhere near" appellant at the time his elbow was struck by the OTR.

In a series of reports dated March 25, 2017, Dr. Brent Harris, an osteopathic physician specializing in family practice, noted that appellant was treated on that day after he was struck by an OTR on the right hand, elbow, and back. He diagnosed right elbow contusion.

In a letter dated March 28, 2017, the employing establishment challenged appellant's claim. It referenced the witness statements of record and contended that appellant had not established fact of injury based on the discrepancy of witness accounts, and therefore his claim should be denied.

OWCP received a March 30, 2017 magnetic resonance imaging (MRI) scan of appellant's right elbow, which was interpreted by Dr. Vikram Hatti, Board-certified in diagnostic radiology, as demonstrating an osteochondral injury of the radial head, subcutaneous soft tissue edema superficial to the left cranial process, and distal attachment of the triceps tendon suggestive of contusion or inflammation.

In a development letter dated April 12, 2017, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence necessary to support his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In his responses to the questionnaire, dated April 21, 2017, appellant noted that he was working in the dispatch area and while hooking up a "web all-purpose container" he was struck in the arm by an OTR. He indicated that he recognized G.N. and called out to him, but G.N. ignored him and walked away. Appellant further related that A.B. witnessed the event and asked what happened.

By decision dated May 22, 2017, OWCP denied appellant's claim finding that there were inconsistencies in the evidence which cast doubt as to whether the incident occurred as alleged.

On July 6, 2017 appellant requested reconsideration of OWCP's May 22, 2017 decision. He submitted additional evidence along with his request.

In a statement dated July 6, 2017, appellant indicated that another coworker, A.J. witnessed the event. In a witness statement dated June 22, 2017, A.J. indicated that she witnessed appellant step down off his mule to hook up a piece of equipment. She related that appellant then injured his arm, but she did not specify how he injured it.

By decision dated July 19, 2017, OWCP denied modification of the May 22, 2017 decision.

Following its July 19, 2017 decision, OWCP received duplicative medical reports previously of record.

On July 23, 2018 OWCP received appellant's request for reconsideration dated July 17, 2018. With his request for reconsideration appellant submitted a substantially similar witness statement from A.B., wherein she reiterated the accounts as noted in her June 22, 2017 statement, with no additional information.

By decision dated October 9, 2018, OWCP denied appellant's request for reconsideration without reviewing the merits of his claim.

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. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ 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).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶ 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.⁷ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁸

³ 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).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ *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).

⁷ *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).

⁸ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁹

ANALYSIS

The Board finds that this case is not in posture for decision.

The most recent merit decision of OWCP was the July 19, 2017 decision. One year from July 19, 2017 elapsed on July 19, 2018. As OWCP received appellant's reconsideration request on July 23, 2018, more than one year after the July 19, 2017 decision, the request was untimely filed.

The proper standard of review for an untimely reconsideration request is the clear evidence of error standard. In denying appellant's reconsideration request, OWCP applied the standard of review for timely requests for reconsideration.¹⁰ As OWCP applied the incorrect standard of review to the untimely request for reconsideration, the Board will set aside OWCP's October 9, 2018 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.¹¹

CONCLUSION

The Board finds that this case is not in posture for decision.

⁹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *See L.W.*, Docket No. 16-1202 (issued January 25, 2018); *H.L.*, Docket No. 13-2077 (issued March 20, 2014).

¹¹ *See* 20 C.F.R. § 10.607(b); *see also J.D.*, Docket No. 18-0066 (issued May 13, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further action consistent with this decision of the Board.

Issued: December 10, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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