

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

R.C., Appellant)	
)	
and)	Docket No. 18-1441
)	Issued: October 21, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Baton Rouge, LA, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 17, 2018 appellant filed a timely appeal from February 12 and June 29, 2018 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP).¹ The most recent merit decision was a June 4, 2009 decision of the Board, which became final 30 days after issuance and is not subject to further review.² As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.⁴

¹ Appellant timely requested oral argument pursuant to 20 C.F.R. § 501.5(b) of the Board's *Rules of Procedure*. The Board denied the request as his arguments could be adequately addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1441 (issued August 14, 2019).

² *Id.* at § 501.6(d); *see P.S.*, Docket No. 18-0718 (issued October 26, 2018); *T.B.*, Docket No. 15-0001 (issued July 1, 2015); *C.M.*, Docket No. 15-0471 (issued April 27, 2015); *D.A.*, Docket No. 08-1217 (issued October 6, 2008).

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. However, 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 additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts of the case, as set forth in the prior decisions, are incorporated herein by reference. The relevant facts are as follows.

On January 17, 1988 appellant, then a 38-year-old city letter carrier, was injured in a motor vehicle accident while in the performance of duty. OWCP accepted the claim for cervical and lumbar strains and aggravation of preexisting degenerative disc disease. It paid appellant wage-loss compensation for intermittent periods of disability due to the accepted conditions.

On June 18, 1991 OWCP terminated appellant's compensation effective February 5, 1991, finding that the medical evidence of record established that he no longer had residuals or disability due to his accepted employment conditions. It found the report from the impartial medical specialist, Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon, who found that appellant's employment-related conditions had resolved, was entitled to the weight of the medical evidence.

In an April 27, 1992 decision, an OWCP hearing representative modified the June 18, 1991 decision to reflect that appellant sustained a temporary aggravation of underlying degenerative disc disease due to the accepted employment injury of January 17, 1988 and affirmed the decision that he no longer had residuals or disability due to his accepted employment conditions.

In a July 2, 2008 decision, OWCP found that appellant had not met his burden of proof to establish continuing residuals or disability on or after February 5, 1991, due to his accepted January 17, 1988 employment injury.

On July 15, 2008 appellant filed a timely appeal to the Board. By decision dated June 4, 2009, the Board affirmed the July 2, 2008 OWCP decision.⁶

On November 26, 2013 appellant requested reconsideration.

By decision dated March 28, 2014, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁵ Docket No. 14-1098 (issued July 2, 2015); Docket No. 09-1986 (issued June 4, 2009), *Order Denying Petition for Reconsideration* (issued September 25, 2009); Docket No. 09-0515 (issued January 12, 2007); Docket No. 03-0698 (issued August 3, 2004), *petition for recon. denied* (issued April 4, 2005); Docket No. 01-1157 (issued July 29, 2002); Docket No. 94-2110 (issued June 2, 1997); Docket No. 94-0333 (issued August 9, 1995); Docket No. 92-0560 (issued November 19, 1992).

⁶ Docket No. 08-1986 (issued June 4, 2009), *petition for recon. denied*, Docket No. 08-1986 (issued September 25, 2009).

On April 4, 2014 appellant filed a timely appeal to the Board. By decision dated July 2, 2015, the Board affirmed the March 28, 2014 decision, finding that OWCP properly determined that his request for reconsideration was untimely filed and failed to present clear evidence of error.⁷

On June 28, 2016 appellant again requested reconsideration. He argued that his benefits should be reinstated because OWCP failed to address his August 13, 2014 Privacy Act/FOIA request for information concerning whether Dr. Nutik and Dr. Robert A. Steiner, a Board-certified orthopedic surgeon, had contracted with his employer for fitness-for-duty examinations from 1989 through 1995. Appellant also alleged that an impartial medical examiner physician had indicated that he had permanent residuals. He resubmitted evidence previously of record.

In e-mail correspondence dated August 30, 2016, the employing establishment indicated “we can verify that we DID NOT have contracts with Dr. Nutik or Dr. Steiner.”

In a November 1, 2016 decision, OWCP denied appellant’s June 28, 2016 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant again requested reconsideration on October 30, 2017. Appellant argued that he discovered that Dr. Nutik and Dr. Steiner conducted fitness-for-duty examinations and therefore an appearance of impropriety had been created.

OWCP contacted Dr. Nutik on January 25, 2018 regarding his firm’s professional contracts with the employing establishment. On January 30, 2018 Dr. Nutik responded “no” with regard to whether he or any members of his firm had performed any fitness-for-duty examinations from 1989 through 1995.

By decision dated February 12, 2018, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On March 5, 2018 OWCP received a January 21, 2018 letter from Dr. Nutik, in which he confirmed that he had never performed fitness-for-duty examinations for any employer.

On June 18, 2018 appellant again requested reconsideration. He argued that he was submitting positive, precise, and explicit evidence that OWCP committed error. Appellant referred to the temporary modified limited-duty position from July 10, 1990 and argued that it did not comply with his physician’s restrictions. He noted that this was in contrast to his coworkers, whose temporary modified limited-duty positions complied with the restrictions of their attending physicians. Appellant further argued that the job offer had not been approved by his physician, but was approved by the referee physician.

In a separate letter dated June 16, 2018, appellant submitted a June 2, 1989 letter from K.J., an OWCP claims examiner. He noted that she indicated that Dr. Jack F. Loupe, an attending Board-certified orthopedic surgeon, acted as a consultant on behalf of OWCP and he was precluded from “hands on treatment of [appellant].” Appellant enclosed a copy of the letter.

OWCP also received a copy of a June 14, 1990 temporary limited-duty position. It also received a copy of a December 27, 1989 routing slip, August 20, 1990 correspondence to

⁷ Docket No. 14-1098 (issued July 2, 2015).

appellant's representative from OWCP related to a request to change his treating physician, and a January 6, 1989 appointment letter from OWCP advising appellant of his appointment to see a referee physician.

With a letter dated June 23, 2018, appellant enclosed a news article on the employing establishment's practices. He argued that a coworker, B.T., was allowed to have the limitations provided by his attending physician.

By decision dated June 29, 2018, OWCP denied appellant's June 18, 2018 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.⁸ This discretionary authority, however, is subject to certain restrictions.⁹ OWCP's regulations¹⁰ establish a one-year time limitation 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.¹¹ Timeliness is determined by the document receipt date, the received date in OWCP's integrated Federal Employees' Compensation System (iFECS).¹² Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹³

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.¹⁴ Its 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.¹⁵

In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁶ To demonstrate clear evidence of error, a claimant must

⁸ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

¹¹ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹³ *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).

¹⁴ *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).

¹⁵ See *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹⁶ *V.G.*, *supra* note 10; see *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

submit evidence relevant to the issue which was decided by OWCP.¹⁷ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ 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.²¹

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.²² 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.²³

ANALYSIS

The Board finds that OWCP properly denied appellant's requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations²⁴ and procedures²⁵ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁶ The most recent merit decision regarding the denial of appellant's claim for disability was the Board's June 4, 2009 decision. As appellant's October 30, 2017 and June 18, 2018 requests for reconsideration were received more than one year after the June 4, 2009 decision, the Board finds

¹⁷ *S.T.*, *supra* note 13; *see C.V.*, *supra* note 14; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁸ *S.T.*, *supra* note 13; *see E.P.*, *supra* note 16; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁹ *V.G.*, *supra* note 10; *see C.V.*, *supra* note 14; *Leon J. Modrowski*, *supra* note 14; *Jesus D. Sanchez*, *supra* note 14.

²⁰ *V.G.*, *supra* note 10; *see E.P.*, *supra* note 16; *Leona N. Travis*, *supra* note 18.

²¹ *Supra* note 16.

²² *D.G.*, *supra* note 15; *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²³ *L.B.*, Docket No. 19-0635 (issued August 23, 2019).

²⁴ 20 C.F.R. § 10.607(a); *see J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

²⁵ *Supra* note 12 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

that they were untimely filed. Therefore, he must demonstrate clear evidence of error by OWCP in its July 2, 2008 decision.²⁷

The Board further finds that appellant's reconsideration requests failed to demonstrate clear evidence of error on the part of OWCP in its July 2, 2008 merit decision.²⁸

In support of his October 30, 2017 reconsideration request, appellant argued that the employing establishment was unable to verify that Dr. Nutik and Dr. Steiner did not conduct fitness-for-duty examinations. He also provided e-mails dated September 28, 2015, that he argued were evidence that Dr. Nutik and Dr. Steiner conducted fitness-for-duty examinations, which created an appearance of impropriety. The Board notes that appellant is in error, as on August 30, 2016 the employing establishment confirmed that it did not have contracts with either Dr. Nutik or Dr. Steiner, and Dr. Nutik confirmed on January 30, 2018, that neither he nor any members of his practice performed any fitness-for-duty examinations from 1989 through 1995. Therefore, the Board finds that the new evidence from appellant does not demonstrate clear evidence of error on the part of OWCP in denying his claim for disability claims after February 5, 1991 due to his January 17, 1988 employment injury, and does not raise a substantial question as to the correctness of OWCP's June 4, 2009 merit decision. As such, the evidence and argument is insufficient to warrant further merit review.

In support of his June 18, 2018 reconsideration request, appellant presented a copy of his temporary modified limited-duty position from July 10, 1990, and argued that it did not comply with his physician's restrictions. He also submitted copies of a June 14, 1990 temporary limited-duty position, a December 27, 1989 routing slip, August 20, 1990 correspondence related to a request to change his treating physician; a news article, and a January 6, 1989 OWCP letter advising him of his appointment to see a referee physician.

Appellant noted that his coworkers had temporary modified limited-duty positions which complied with the restrictions of their attending physicians. He argued that error occurred because OWCP refused to accept his attending physician's restrictions, while his coworker, B.T., was allowed to have the limitations provided by his attending physician. Appellant also argued that Dr. Loupe acted as a consultant on behalf of OWCP and was precluded from "hands on treatment of [appellant]."

The Board notes that a question arose in 1989 as to whether appellant had been referred to Dr. Loupe by Dr. Jenkins, for purposes of medical billing as an authorized treating physician. Appellant has not shown that Dr. Loupe should have been prohibited from treating appellant, if appellant chose to continue treatment with Dr. Loupe. The Board notes that the decision to refer a case for another examination rests wholly with an OWCP claims examiner.²⁹ Regarding

²⁷ *Id.* at § 10.607(b); see *M.W.*, Docket No. 17-0892 (issued May 21, 2018); see *S.M.*, Docket No. 16-0270 (issued April 26, 2016). See *Debra McDavid*, 57 ECAB 149 (2005).

²⁸ While appellant claimed to be filing a request for reconsideration from the Board's June 4, 2009 decision, OWCP is not authorized to review Board decisions. The decision and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the Board's June 4, 2009 decision was the last merit decision, OWCP's July 2, 2008 decision was the appropriate subject of possible modification by OWCP.

²⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.5000.3(a) (July 2011).

appellant's argument that his coworkers were allowed to have the limitations provided by their attending physicians, it is of no probative value as matters regarding other workers' compensation cases of coworkers have no relevance in this case.³⁰ The underlying issue is medical in nature and must be addressed by medical evidence.³¹ Appellant has acknowledged that his job offer was within restrictions provided by an OWCP physician. In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.³² The Board notes that appellant has not submitted any evidence to demonstrate clear evidence of error.

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.³³ The evidence submitted does not manifest on its face that OWCP committed an error in denying appellants claim for disability after February 5, 1991 due to his January 17, 1988 employment 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 he has not demonstrated clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

³⁰ See *E.D.*, Docket No. 08-0204 (issued November 19, 2008).

³¹ See *E.C.*, Docket No. 17-1229 (issued December 13, 2017).

³² See *M.W.*, Docket No. 17-0892 (issued May 21, 2018); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

³³ *Supra* note 12 at Chapter 2.1602.5.a (February 2016); see *D.Y.*, Docket No. 19-0565 (issued August 13, 2019); see *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

ORDER

IT IS HEREBY ORDERED THAT the June 29 and February 12, 2018 decisions of Office of Workers' Compensation Programs are affirmed.

Issued: October 21, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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