

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

E.C., Appellant

and

DEPARTMENT OF THE NAVY, NAVAL AIR
WARFARE CENTER, China Lake, CA,
Employer

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**Docket No. 19-0646
Issued: February 26, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 28, 2019 appellant filed a timely appeal from a January 10, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from OWCP's last merit decision on this issue, dated June 4, 2007, to the filing of this appeal,¹ 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 the claim.³

¹ For final adverse decisions of OWCP issued prior to November 19, 2008, the Board's review authority is limited to appeals which are filed within one year from the date of issuance of OWCP's decision. See 20 C.F.R. § 501.3(d)(2) (2008).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 10, 2019 decision, appellant submitted additional evidence to OWCP and to the Board 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 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior orders are incorporated herein by reference. The relevant facts are as follows.

On April 29, 1992 appellant, then a 57-year-old painter, filed a traumatic injury claim (Form CA-1) alleging that on April 9, 1992 he strained his left shoulder when lifting heavy interior doors while in the performance of duty. He stopped work on April 29, 1992 and returned to work on May 15, 1992. OWCP accepted the claim for neck strain, left shoulder strain, left ulnar nerve neuropathy, degenerative cervical disc disease, bilateral carpal tunnel syndrome, bilateral trigger finger, and left lesion of the ulnar nerve. Appellant underwent a number of OWCP-authorized surgical procedures.⁵

Effective March 21, 1993, appellant worked as a water plant operator. By decision dated January 18, 1994, OWCP issued a loss of wage-earning capacity (LWEC) determination, finding that his position as a water plant operator at the employing establishment fairly and reasonably represented his wage-earning capacity. It advised appellant that his net wage-loss compensation rate every 28 days would be \$128.72, effective September 19, 1993.⁶

On April 3, 2003 appellant filed a notice of recurrence of disability (Form CA-2a), claiming a recurrence of disability commencing June 2002. By decisions dated October 7, 2003, October 14, 2004, April 14, 2005, and May 30, 2006, OWCP denied appellant's recurrence claim.

On August 28, 2006 appellant appealed to the Board. In an April 13, 2007 order, the Board set aside OWCP's May 30, 2006 decision, finding that OWCP should have adjudicated the case as a request for modification of an established LWEC as opposed to a recurrence claim.⁷

By decision dated June 4, 2007, OWCP modified appellant's January 18, 1994 LWEC determination as he had established a material worsening of his accepted conditions as of May 27, 2004.

On October 27, 2008 OWCP advised appellant that he would receive wage-loss compensation in the monthly amount of \$1,829.91 for the closed period of May 27, 2004 through

⁴ *Order Remanding Case*, Docket No. 06-1995 (issued April 13, 2007) and *Order Dismissing Appeal*, Docket No. 15-0859 (issued June 2, 2015).

⁵ Appellant's authorized surgical procedures included: left elbow exploration and anterior transportation of the ulnar nerve on October 20, 1993; left carpal tunnel release on February 10, 2000; right carpal tunnel release on March 23, 2000 and September 16, 2004; open neurolysis/decompression of the left median ulnar nerve on May 27, 2004 and of the right median ulnar nerve on September 16, 2004.

⁶ Appellant retired on July 19, 1997.

⁷ Docket No. 06-1995, *supra* note 4.

September 4, 2006.⁸ It enclosed an election form and informed him that, if he elected FECA benefits, any offset due to Office of Personnel Management and Social Security age-based benefits would be determined and the amount of FECA compensation due from September 4, 2006 would be calculated.

On October 1, 2018 appellant requested reconsideration of the June 4, 2007 decision. OWCP subsequently received an October 9 2018 letter from him indicating that his health had worsened since June 4, 2007 and that he required cervical surgery, but OWCP denied his request. Appellant noted that OWCP had advised him that he needed to provide recent medical records to establish that his medical condition had worsened since June 4, 2007. He indicated that he was submitting an April 11, 2017 magnetic resonance imaging (MRI) scan which clearly indicated that his medical condition had worsened. Medical evidence regarding appellant's cervical condition, including the April 11, 2017 MRI scan and reports from Dr. Manprit H. Dhillon, a neurologist, dated October 15 and 23, 2018 were submitted to the record. The record also contains an October 24, 2018 authorization for bilateral cervical injections.

In a November 10, 2018 letter, appellant alleged that he had established that his medical condition had worsened.

By decision dated January 10, 2019, 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.⁹ 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.¹⁰ The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.¹¹ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (IFECS)).¹² The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹³

OWCP may not deny a request for reconsideration solely because the application was not timely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake

⁸ The record does not reflect that appellant received any wage-loss benefits related to this claim after September 4, 2006.

⁹ 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).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

¹² *Id.* at Chapter 2.1602.4(b) (February 2016).

¹³ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

a limited review to determine whether the application demonstrates clear evidence of error.¹⁴ OWCP regulations and 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(a), if the claimant's request demonstrates clear evidence of error on the part of OWCP.¹⁵

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.¹⁶ The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁸ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.²⁰ In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.²¹ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.²²

ANALYSIS

The Board finds that OWCP improperly adjudicated appellant's request for modification of the June 4, 2007 LWEC determination as a request for reconsideration.

OWCP found that appellant's October 1, 2018 request for reconsideration of the June 4, 2007 LWEC determination was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that appellant's October 1, 2018 reconsideration request was, instead, a request for modification of the June 4, 2007 LWEC determination. Although appellant requested reconsideration, when the underlying issue involves an LWEC, the initial question is whether the claimant has submitted an application for reconsideration of a recent LWEC determination or has requested modification of the LWEC determination.²³ This requires that OWCP conduct a limited

¹⁴ See 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

¹⁵ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.5(a) (February 2016).

¹⁶ *G.G.*, *supra* note 14.

¹⁷ *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 13.

¹⁸ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹⁹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

²⁰ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

²¹ *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

²² *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

²³ *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

review of the evidence or argument submitted to determine if the claimant is alleging either that the original determination was in error or that his injury-related condition had worsened.²⁴ The Board has held that, when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification, OWCP must evaluate the evidence to determine if modification of the LWEC is warranted.²⁵

In the October 9, 2018 letter, appellant contended that his medical condition had worsened such that the June 4, 2007 LWEC determination should be modified. He submitted evidence including an April 11, 2017 MRI scan in support of his allegation, and new medical reports from Dr. Dhillon dated October 15 and 23, 2018. An assertion that the accepted condition has worsened is a basis on which a claimant may seek modification of an LWEC determination.²⁶

The Board thus finds that OWCP improperly adjudicated appellant's request for modification of the June 4, 2007 LWEC determination as a request for reconsideration. As appellant has requested modification of the LWEC determination, the time limitations for filing a request for reconsideration under 20 C.F.R. § 10.607(a) do not apply.²⁷ The Board will, therefore, remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision.

CONCLUSION

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

²⁴ *Supra* note 11 at Chapter 2.1501.4(b).

²⁵ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

²⁶ Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. *E.H.*, Docket No. 17-0963 (issued August 24, 2018); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

²⁷ *E.H.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 26, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board