

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

<p><b>J.S., Appellant</b></p> <p><b>and</b></p> <p><b>DEPARTMENT OF THE NAVY, NAVAL AIR WARFARE CENTER AIRCRAFT DIVISION, Lakehurst, NJ, Employer</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Docket No. 20-0337</b> <b>Issued: July 15, 2020</b></p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------	-------------------------------------------------------------------

<p><i>Appearances:</i> Robert D. Campbell, Esq., for the appellant<sup>1</sup> Office of Solicitor, for the Director</p>	<p><i>Case Submitted on the Record</i></p>
----------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On December 2, 2019 appellant, through counsel, filed a timely appeal from a July 18, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> The most recent merit decision was a decision of the Board dated April 20, 2018, which became final after

---

<sup>1</sup> 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.

<sup>2</sup> The Board notes that following the July 18, 2019 decision, OWCP received additional evidence. Appellant, through counsel also 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.*

30 days of issuance, and is not subject to further review.<sup>3</sup> As there was no merit decision issued by OWCP within 180 days from the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>4</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

### **ISSUE**

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

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 12, 2003 appellant, then a 49-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he sustained injuries which began on November 3, 2003 due to factors of his federal employment including working in stooped or kneeling positions. Following a brief work absence, he returned to work in a light-duty job on or about November 6, 2003. OWCP accepted the claim for lumbosacral and thoracic strains.<sup>6</sup>

On January 19, 2016 appellant file a schedule award claim (Form CA-7). The record contains employing establishment e-mails dated from May 27 to July 8, 2016 noting that appellant remained on light duty from 2003 through 2007 and had retired from federal service effective June 30, 2008. Appellant confirmed in a July 28, 2016 letter that from November 6, 2003 until his retirement, he performed miscellaneous light duties as he was medically disqualified from welding. Counsel noted in an August 2, 2016 letter that appellant never returned to his date-of-injury position, instead he did other jobs, but retained his welder job pay rate.

By decision dated September 22, 2016, OWCP granted appellant a schedule award for 38 percent permanent impairment of his left lower extremity. It utilized November 3, 2003 as the effective date of pay rate.

---

<sup>3</sup> 20 C.F.R. § 501.6(d); *see R.T.*, Docket No. 19-0604 (issued September 13, 2019); *M.S.*, Docket No. 18-0222 (issued June 21, 2018); *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> Docket No. 17-1277 (issued April 20, 2018).

<sup>6</sup> On March 17, 2015 appellant underwent an authorized left L1-2 hemilaminotomy, performed by Dr. Gordon D. Donald, III, a Board-certified orthopedic surgeon.

Counsel timely requested a review of the written record by OWCP's Branch of Hearings and Review, contending that appellant was entitled to a recurrent pay rate as he had performed light-duty work at a retained pay rate.

By decision dated March 29, 2017, an OWCP hearing representative affirmed OWCP's September 22, 2016 decision. The hearing representative found that appellant was not entitled to a recurrent pay rate as he had not returned to regular work, at any time, following the accepted injury. Appellant then appealed to the Board.

By decision dated April 20, 2018, the Board affirmed OWCP's March 29, 2017 decision finding that it properly determined appellant's pay rate in calculating the September 22, 2016 schedule award.<sup>7</sup>

On April 22, 2019 appellant, through counsel, requested reconsideration of the pay rate issue before OWCP. In a letter dated April 16, 2019, he contended that July 17 and August 17, 2009 reports by Dr. Donald, and a September 21, 2009 report by Dr. Alan Ng, a Board-certified psychiatrist, established appellant's entitlement to a recurrent pay rate.

By decision dated July 18, 2019, OWCP denied appellant's April 22, 2019 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.<sup>8</sup> 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.<sup>9</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>10</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>11</sup>

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>12</sup> OWCP's procedures provide that it 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

---

<sup>7</sup> *Supra* note 4.

<sup>8</sup> 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).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>11</sup> *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).

<sup>12</sup> *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).

claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.<sup>13</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>14</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>15</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which 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 merely to 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 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.

### 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<sup>16</sup> and procedures<sup>17</sup> 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.<sup>18</sup> The most recent merit decision was the Board's April 20, 2018 decision,<sup>19</sup> which affirmed the pay rate utilized in OWCP's March 29, 2017 hearing decision. The Board found that appellant had not resumed full duty following the accepted injury and therefore, was not entitled to a recurrent pay rate. As his request for reconsideration was not received by OWCP until April 22, 2019, more than one year after the April 20, 2018 Board decision, it was untimely filed.<sup>20</sup> Consequently,

---

<sup>13</sup> *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 10 at Chapter 2.1602.5 (February 2016).

<sup>14</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>15</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 10 at Chapter 2.1602.5(a) (February 2016).

<sup>16</sup> *F.N.*, Docket No. 18-1543 (issued March 6, 2019); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>17</sup> *Supra* note 10 at Chapter 2.1602.4 (February 2016); see *L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>18</sup> *J.W.*, *supra* note 14; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>19</sup> *Supra* note 4.

<sup>20</sup> 20 C.F.R. § 10.607(b); see *L.A.*, *supra* note 17; *Debra McDavid*, 57 ECAB 149 (2005).

appellant must demonstrate clear evidence of error by OWCP in determining appellant's pay rate for schedule award purposes.<sup>21</sup>

In support of his untimely request for reconsideration, appellant argued, through counsel, that medical reports from Drs. Donald and Ng established his entitlement to a recurrent pay rate. However, these reports do not raise a substantial question concerning the correctness of the Board's April 20, 2018 decision, which affirmed the schedule award's pay rate based on factual evidence demonstrating that appellant had not returned to full duty following the accepted injury. The Board has held that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence that on its face shows that OWCP made an error.<sup>22</sup> The pay rate issue was predicated on factual evidence regarding appellant's duty status following the accepted injury. Medical opinion is irrelevant to that issue. The medical reports submitted on reconsideration are therefore insufficient to demonstrate clear evidence of error in the Board's April 20, 2018 decision affirming the pay rate of the September 22, 2016 schedule award.<sup>23</sup>

Appellant has not submitted any argument or evidence to demonstrate clear evidence of error in the Board's April 20, 2018 decision. The Board thus finds that OWCP properly determined that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error.

On appeal counsel contends that new evidence submitted on appeal demonstrates that OWCP timely received appellant's request for reconsideration on April 19, 2019. However, the Board may not consider evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case.<sup>24</sup> Furthermore, timeliness is determined by the document received date in iFECS.<sup>25</sup>

### **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.

---

<sup>21</sup> 20 C.F.R. § 10.607(b); *see R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>22</sup> *G.B.*, Docket No. 19-1762 (issued March 10, 2020).

<sup>23</sup> *S.C.*, *supra* note 15.

<sup>24</sup> *See supra* note 2.

<sup>25</sup> *See supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2020  
Washington, DC

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

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

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