

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

U.C., Appellant)	
)	
and)	Docket No. 19-1753
)	Issued: June 10, 2020
NUCLEAR REGULATORY COMMISSION,)	
REGION I, King of Prussia, PA, Employer)	
)	

Appearances:
Analese B. Dunn, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 20, 2019 appellant, through counsel, filed a timely appeal from a March 8, 2019 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than one year has elapsed from OWCP's last merit decision, dated August 18, 2006, to the filing of this appeal,² pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

¹ 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.

² 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).

³ 5 U.S.C. § 8101 *et seq.*

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 prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On March 31, 2005 appellant, then a 62-year-old former reactor systems engineer, filed an occupational disease claim (Form CA-2) alleging that he suffered "a mysterious illness" resulting in multiple medical conditions due to exposure to radiation while in the performance of duty. He indicated that he first became aware of his conditions and their relationship to his federal employment on April 25, 2002. Appellant retired on disability effective January 28, 2000.

By decision dated March 10, 2006, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that his multiple medical conditions were caused, aggravated, accelerated or precipitated by factors of employment, as alleged

On April 8, 2006 appellant requested a review of the written record by an OWCP hearing representative and submitted additional evidence. The employing establishment acknowledged that appellant had repeatedly visited reactor sites in the performance of his duties, but the dosimetry readings supported only minimal, if any exposure.

By decision dated August 18, 2006, an OWCP hearing representative affirmed the March 10, 2006 OWCP decision.

On August 21, 2007 appellant requested reconsideration. He submitted numerous arguments and submitted multiple documents, including medical reports.

In a September 6, 2007 letter to the employing establishment, OWCP noted that appellant had filed a request for reconsideration which warranted a merit review. The employing establishment was invited to submit any pertinent supporting evidence or arguments within 20 days. No response was received from the employing establishment.

By decision dated November 19, 2007, OWCP denied appellant's request for reconsideration of the merits of the claim. It found the medical evidence was repetitious and/or irrelevant to the matter at hand and the reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant a review of the August 18, 2006 decision.

⁴ Docket No. 16-0855 (issued December 8, 2017).

On March 4, 2008 OWCP received appellant's February 26, 2008 letter requesting the status of his request for reconsideration of the August 18, 2006 denial of his claim. In a March 10, 2008 letter, it advised him that it had issued its decision on November 19, 2007.

On June 4, 2014 appellant requested reconsideration. He alleged that he never received OWCP's November 19, 2007 decision. Appellant provided additional arguments and new evidence. OWCP did not address the request for reconsideration at that time.

In letter received by OWCP on June 25, 2015, appellant again asserted that he never received the November 19, 2007 decision or any response to his letter asking the status of it. Additional evidence and arguments were submitted. OWCP treated this correspondence as a request for reconsideration.

By decision dated September 23, 2015, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. It noted that he had not provided evidence to support his contentions that an error was committed by OWCP in its August 18, 2006 decision.

On March 17, 2016 appellant, through counsel, filed an appeal with the Board. By decision dated December 8, 2017, the Board affirmed OWCP's September 23, 2015 nonmerit decision.⁵ The Board found the record devoid of evidence to rebut the presumption that appellant had received OWCP's November 19, 2007 nonmerit decision in due course. The Board also found that OWCP properly denied his request for reconsideration at it was untimely filed and that the evidence and arguments failed to demonstrate clear evidence of error of OWCP's August 18, 2006 decision. With regard to evidence previously of record, the Board found that appellant failed to explain how such evidence raised a substantial question as to the correctness of OWCP's decision. Additionally, the new evidence neither addressed the cause of his condition, nor related his symptoms to a work event, exposure to radiation.

On December 10, 2018 appellant requested "reconsideration" of the Board's December 8, 2017 decision.⁶ Counsel argued that OWCP's hearing representative erred in denying appellant's claim in the August 18, 2006 decision, which he acknowledged was the last merit decision in appellant's case file. He argued that the hearing representative did not analyze the evidence per the "relative circumstances -- unknown etiology" physician and relied upon speculative employing establishment information. Counsel set forth medical evidence he believed that established the causal relationship component of the claim and identified evidence which he deemed speculative pertaining to the amount of appellant's radiation exposure and causal relationship.

⁵ *Id.* The Board denied appellant's petition for reconsideration of its December 8, 2017 decision on August 21, 2018. The Board's decision dated December 8, 2017 therefore became final 30 days after issuance and is not subject to further review. 20 C.F.R. § 501.6(d). *See P.H.*, Docket No. 19-1354 (issued March 13, 2020); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

⁶ *Id.* On August 24, 2018 the Board issued an *Order Dismissing Appeal* as the Clerk of the Appellate Boards inadvertently assigned a new docket number to a petition for reconsideration of the Board's December 8, 2017 decision in Docket No. 16-0855. *See* Docket No. 18-0471 (issued August 24, 2018).

Counsel further contended OWCP erred in its November 19, 2007 decision denying appellant's reconsideration request without conducting a merit review. She indicated that appellant had provided timely, new, relevant, and pertinent evidence, which required a merit review. Counsel set forth the medical evidence he deemed pertinent which warranted a merit review. She also contended that OWCP's September 6, 2007 letter to the employing establishment specifically noted that, a merit review would be conducted, but as no merit review was provided, this violated the procedural requirement to perform a merit review after the evidence warranted a merit review and development of the evidence had begun. Counsel noted the November 19, 2007 decision contradicted the September 6, 2007 determination that a merit review was warranted. She also asserted that his December 5, 2018 letter requesting reconsideration was within one year of the December 8, 2017 decision.

By decision dated March 8, 2019, OWCP denied appellant's 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.⁷ 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.⁸ 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.⁹ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).¹⁰ 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.¹¹

OWCP may not deny a request for reconsideration solely because it was not timely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.¹² OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review,

⁷ 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).

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

¹⁰ *Id.* at Chapter 2.1602.4(b) (February 2016).

¹¹ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

¹² *See* 20 C.F.R. § 10.607(b); *G.G.*, *supra* note 5.

notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹³

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.¹⁴ The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁶ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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.¹⁹ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁰

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.

The last merit OWCP decision issued in this case was dated August 18, 2006. Appellant's latest request for reconsideration was received by OWCP on December 10, 2018 which postdated OWCP's August 18, 2006 merit decision by over 12 years. Because more than one year elapsed since the last merit decision, his December 10, 2018 request for reconsideration was untimely filed.²¹ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in determining that he failed to establish a medical condition causally related to the claimed exposure.²²

¹³ *Id.* at § 10.607(b); *supra* note 9 at Chapter 2.1602.5(a) (February 2016).

¹⁴ *G.G.*, *supra* note 5.

¹⁵ *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 11.

¹⁶ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹⁷ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

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

¹⁹ *See F.D.*, Docket No. 19-1663 (issued March 10, 2020); *A.F.*, 59 ECAB 714 (2008); *D.G.*, 59 ECAB 455 (2008).

²⁰ *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

²¹ 20 C.F.R. § 10.607(a); *F.D.*, *see supra* note 19.

²² *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

The Board's decision of December 8, 2017 affirmed OWCP's September 23, 2015 nonmerit decision which denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. On appeal and before OWCP counsel argued that appellant had timely requested reconsideration following the Board's December 8, 2017 decision. OWCP procedures require that a request for reconsideration be received within one year of a merit decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any merit decision by the Board.²³ However, the December 8, 2017 decision of the Board was not a merit decision and therefore did not extend the one year time limitation.

OWCP denied appellant's claim finding that he did not meet his burden of proof to establish a medical condition causally related to the claimed exposure. On August 18, 2006 an OWCP hearing representative affirmed the denial of appellant's occupational disease claim as he had not established that the amount of radiation he was exposed to was sufficient to establish his diagnosed conditions. The hearing representative specifically found that none of the physicians who noted a causal relationship were provided with the official dosimetry records and the evidence of record did not substantiate that appellant had excessive radiation exposure or long-term radiation exposure. Counsel argued that the hearing representative failed to analyze the evidence per the "relative circumstances -- unknown etiology" doctrine and relied upon speculative employing establishment information. While she set forth medical evidence he believed established the causal relationship component of the claim, counsel failed to explain how such evidence raised a substantial question as to the correctness of OWCP's decision.²⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.²⁵ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.²⁶ Further, while counsel deemed the employing establishment's letters and evidence as speculative pertaining to the amount of appellant's radiation exposure and causal relationship, she also did not explain how this argument raised a substantial question as to the correctness of OWCP's August 18, 2006 decision which relied on official dosimetry records. Appellant submitted no other factual documents in support of his argument that, on their face, demonstrated that OWCP's denial of the claim was erroneous or raised a substantial question as to the correctness of OWCP's determination.²⁷ The Board has held that the term clear evidence of error is intended to represent a difficult standard.²⁸ As such, the Board finds that this argument is insufficient to demonstrate clear evidence error in OWCP's August 18, 2006 decision.

Counsel offered arguments regarding alleged error in OWCP's November 19, 2007 decision denying reconsideration without merit review. The Board noted in its December 8, 2017

²³ *T.N.*, Docket No. 18-1613 (issued April 29, 2020); *supra* note 9 at Chapter 2.1602.4 (February 2016).

²⁴ *F.D.*, *see supra* note 19.

²⁵ *Supra* note 16.

²⁶ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

²⁷ *See P.O.*, Docket No. 13-0092 (issued April 4, 2013).

²⁸ *M.P.*, *supra* note 15.

decision that the underlying issue was whether appellant had established clear evidence of error in the last merit decision dated August 18, 2006. Counsel argued that OWCP erred in not providing a merit review contradicted a September 6, 2007 letter to the employing establishment that a merit review was warranted; and the November 19, 2007 decision used an incorrect standard of review by requiring substantive evidence to warrant a merit review. While OWCP's September 6, 2007 letter to the employing establishment indicated that appellant's application for reconsideration warranted a merit review of the case, this letter, on its face, does not show clear evidence of error of OWCP's August 18, 2006 decision. Furthermore, counsel's arguments pertaining to the evidence submitted and the standard of review does not demonstrate that OWCP's denial of appellant's claim was erroneous or raise a substantial question as to the correctness of OWCP's August 18, 2006 denial of appellant's claim. As noted, the term clear evidence of error is intended to represent a difficult standard.²⁹ Additionally, this evidence was before the Board at the time of its last decision.

The Board finds that appellant has not raised an argument or submitted positive, precise, and explicit evidence that manifests on its face that OWCP committed an error in the denial of his claim.³⁰ Appellant has therefore not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's August 18, 2006 decision. Thus, the Board finds that the request failed to demonstrate clear evidence of error.³¹

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.

²⁹ *Id.*

³⁰ *See J.V.*, Docket No. 18-0963 (issued February 13, 2020); *S.P.*, Docket No. 17-1708 (issued February 23, 2018).

³¹ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *M.P.*, Docket No. 19-0674 (issued December 16, 2019).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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