

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

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T.T., Appellant)	
)	
and)	Docket No. 19-1624
)	Issued: October 28, 2020
DEPARTMENT OF AGRICULTURE, FOOD)	
SAFETY & INSPECTION SERVICE,)	
Kinston, NC, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 26, 2019 appellant filed a timely appeal from a May 13, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from OWCP's last merit decision, dated January 5, 2017, to the filing of this appeal, pursuant to

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated October 23, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1624 (issued October 23, 2020). The Board's *Rules of Procedure* provide that an appeal in which a request for oral argument is denied by the Board will proceed to a decision based on the case record and the pleadings submitted. 20 C.F.R. § 501.5(b).

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 this case.³

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 been previously before the Board.⁴ 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 May 15, 2012 appellant, then a 30-year-old food inspector, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and a right trigger thumb while in the performance of duty inspecting poultry. OWCP accepted the claim for bilateral carpal tunnel syndrome. It subsequently expanded acceptance of the claim to include bilateral cubital tunnel syndrome and right trigger finger.

On April 19, 2015 appellant filed an occupational disease claim (Form CA-2) alleging that, on or before June 27, 2014, he sustained renal failure and PTSD consequential to the bilateral upper extremity conditions.

In reports dated September 30, 2015 to March 1, 2016, Dr. Lawrence N. Larabee, Jr., a Board-certified orthopedic surgeon, noted limited motion of the right shoulder.

In a March 16, 2016 report, Dr. Herbert White Jr., Board-certified in physical medicine and rehabilitation and serving as a DMA, noted 19 percent permanent impairment of the right shoulder due to restricted motion.

In a development letter dated June 22, 2016, OWCP advised appellant of the type of evidence needed to establish a consequential right shoulder condition. It afforded him 30 days to submit the necessary evidence.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 5, 2017 decision, OWCP received additional evidence. Appellant 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.*

⁴ Docket No. 17-1084 (issued April 2, 2018).

In response appellant submitted June 22 and August 8, 2016 statements requesting reinstatement on the periodic rolls and an attendant allowance. He also submitted claims for travel reimbursement.

By decision dated August 8, 2016, OWCP denied expansion of the claim to include a consequential right shoulder condition as the medical evidence of record was insufficient to establish causal relationship between that additional condition and to the accepted upper extremity conditions.

On October 29, 2016 appellant requested reconsideration. He alleged that Dr. Larabee had informed OWCP that appellant's work duties and bilateral carpal tunnel syndrome had caused a right shoulder condition.

In an August 30, 2016 report, Dr. Larabee noted appellant's complaint of the gradual onset of right shoulder pain over the past two months with no specific injury. On examination of the right shoulder, he observed moderate tenderness over the acromioclavicular joint at the internal insertion of the rotator cuff, positive Hawkins and Neers tests, and restricted motion. Dr. Larabee diagnosed right shoulder impingement. In a September 7, 2016 report, he opined that the diagnosed right shoulder impingement was not directly related to the accepted employment conditions.

Appellant also submitted a September 6, 2016 report by Dr. Harrison G. Tuttle, a Board-certified orthopedic surgeon, who diagnosed severe right ulnar nerve dysfunction affecting the right hand, wrist, and forearm. He also provided December 8, 2016 electrodiagnostic studies of the upper extremities.

By decision dated January 5, 2017, OWCP denied modification of the August 8, 2016 decision.

On March 14, 2018 appellant requested reconsideration and submitted additional evidence.

On July 13, 2017 Dr. Tuttle performed authorized right ulnar nerve decompression at elbow with ulnar nerve wrap and anterior muscular transposition with flexor pronator mass tendon lengthening. On November 16, 2017 he performed left ulnar nerve decompression at the wrist and left carpal tunnel release. Dr. Tuttle provided periodic progress notes. In a February 15, 2018 report, he noted that he could not provide an impairment rating for a shoulder condition as he was not a shoulder specialist.

In a report dated May 8, 2018, Dr. Semaan El-Khoury, an attending internist, diagnosed end-stage renal disease. He found appellant totally disabled from work.

Appellant also submitted a March 7, 2018 functional capacity evaluation by Nathan Hill, a physical therapist; a January 9, 2018 report by Ashley Mason, a physician assistant; March 6 and April 5, 2018 reports by Margaret Ann Dillon, a nurse practitioner; and literature regarding kidney conditions.

By decision dated June 8, 2018, OWCP denied appellant's March 14, 2018 request for reconsideration of the January 5, 2017 decision finding that it was untimely filed and failed to demonstrate clear evidence of error.

On April 4, 2019 appellant again requested reconsideration. He submitted statements asserting that Dr. Larabee's reports were sufficient to establish a consequential right shoulder condition. Appellant also submitted additional medical evidence.

In a July 10, 2018 report, Dr. Bruce D. Wilhelmsen, a Board-certified orthopedic surgeon, noted good abduction and forward flexion of the right arm. He obtained x-rays of the right shoulder, which demonstrated normal glenohumeral and lateral relationships. Dr. Wilhelmsen reassured appellant that his right shoulder was normal.

In reports dated August 8 and September 5, 2018, Dr. Larabee noted scapular wasting of the right shoulder with nerve pain. He diagnosed right scapular winging and impingement syndrome of the right shoulder.

A September 4, 2018 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated mild tendinosis of the supraspinatus and infraspinatus tendons.

In a February 18, 2019 report, Dr. El-Khoury diagnosed bilateral hand and wrist conditions but did not address appellant's right shoulder.

In a March 26, 2019 report, Dr. Larabee opined "with complete medical certainty, there is no question the right shoulder dysfunction, pain, rotator cuff partial tear, overuse syndrome, impingement" and acromioclavicular joint arthritis was exacerbated by the weakness of the right hand, elbow, and right wrist caused by accepted carpal tunnel syndrome and ulnar neuritis beginning in 2012.

Appellant also submitted March 6 and April 5, 2018 reports by Ms. Dillon, July 31, 2018 and May 2, 2019 reports by Penny Brown, a nurse practitioner, and a February 28, 2019 report by Ayanna Whitfield, a nurse practitioner.

By decision dated May 13, 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.⁵ 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.⁶ Timeliness is determined by the document receipt date (*i.e.*,

⁵ 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).

⁶ 20 C.F.R. § 10.607(a).

the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS)).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

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.⁹ 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 claimant’s request for reconsideration demonstrates “clear evidence of error” on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² 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.

The most recent merit decision on the issue of a consequential right shoulder condition was January 5, 2017. As appellant’s request for reconsideration was not received by OWCP until April 4, 2019, more than one year after the January 5, 2017 decision, it was untimely filed.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *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).

⁹ 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).

¹⁰ *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 7 at Chapter 2.1602.5 (February 2016).

¹¹ *J.S.*, Docket No. 20-0337 (issued July 15, 2020); *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).

¹² *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.¹³

In support of his untimely request for reconsideration, appellant asserted that medical reports from Dr. Larabee were sufficient to establish his claim for a consequential right shoulder condition. In reports dated August 8 and September 5, 2018, Dr. Larabee diagnosed right shoulder impingement syndrome and right scapular winging. He opined in a March 26, 2019 report that appellant developed right rotator cuff syndrome with impingement and acromioclavicular arthritis due to overcompensating for right hand weakness due to accepted carpal tunnel syndrome and cubital tunnel syndrome. However, these reports do not raise a substantial question concerning the correctness of OWCP's January 5, 2017 decision as they do not demonstrate the consequential injury claim was improperly denied since they merely show that the evidence could have been construed to produce a contrary conclusion.

Appellant also submitted a July 10, 2018 report from Dr. Wilhelmsen and a February 18, 2019 report from Dr. El-Khoury. However, as neither of these reports addressed a right shoulder condition, they are irrelevant to the underlying issue, and therefore insufficient to demonstrate clear evidence of error in OWCP's January 5, 2017 decision.¹⁴

Appellant also submitted reports by Ms. Brown and Ms. Dillon, both nurse practitioners. As nurse practitioners are not considered physicians under FECA, their medical findings and opinions are of no probative value and are insufficient to establish entitlement to compensation benefits.¹⁵ Likewise, the September 4, 2018 imaging study also lacks probative value as it does not address whether the accepted employment conditions caused or contributed to a right shoulder condition.¹⁶ Therefore this evidence is also insufficient to shift the weight of the evidence and raise a substantial question as to the correctness of OWCP's decision.¹⁷

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.¹⁸

¹³ 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).

¹⁴ *S.C.*, *supra* note 12.

¹⁵ 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See id.* at § 8101(2); *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *P.H.*, Docket No. 19-0119 (issued July 5, 2019); *T.K.*, Docket No. 19-0055 (issued May 2, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See W.Z.*, Docket No. 20-0191 (issued July 31, 2020) (a nurse practitioner is not considered a physician under FECA).

¹⁶ *M.C.*, Docket No. 19-1074 (issued June 12, 2020); *N.B.*, Docket No. 19-0221 (issued July 15, 2019).

¹⁷ *Supra* note 12.

¹⁸ *G.B.*, Docket No. 19-1762 (issued March 10, 2020).

It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁹

None of the evidence submitted by appellant in connection with his untimely reconsideration request manifests on its face that OWCP committed an error in its January 5, 2017 decision denying expansion of appellant's claim. Appellant has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.²⁰ The Board thus finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.²¹

CONCLUSION

The Board finds that 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.

¹⁹ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

²⁰ *C.D.*, Docket No. 19-1462 (issued June 26, 2020).

²¹ *See J.D.*, Docket No. 18-1765 (issued June 11, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2019 decision of the Office of Workers' Compensation Program is affirmed.

Issued: October 28, 2020
Washington, DC

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

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

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