

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

S.M., Appellant)	
)	
and)	Docket No. 19-1961
)	Issued: January 28, 2021
U.S. POSTAL SERVICE, BULK MAIL)	
CENTER, Forest Park, IL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 25, 2019 appellant filed a timely appeal from April 29 and September 9, 2019 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated March 10, 1999, which became final after 30 days of issuance and is not subject to further review.¹ As there is no merit decision by OWCP issued within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

¹ 20 C.F.R. § 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).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's September 20, 2018 and August 29, 2019 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.³ The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On September 30, 1987 appellant, then a 28-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained left carpal tunnel syndrome causally related to factors of his federal employment. OWCP accepted the claim for left carpal tunnel syndrome. Appellant stopped work on October 9, 1987.

On July 6, 1988 the employing establishment offered appellant a position as a modified custodial laborer. The position required intermittent standing and walking, lifting no more than 10 pounds, and occasional reaching above the shoulder. The duties of the position included cleaning tables and chairs in the lunchroom and spot sweeping bathroom floors.

On November 16, 1988 Dr. James D. Schlenker, a Board-certified surgeon, found that appellant could return to full-time duties as described, effective October 31, 1988. Appellant returned to work on November 4, 1988 as a modified custodial laborer.⁴

³ Docket No. 90-0321 (issued April 5, 1990); *Order Dismissing Appeal*, Docket No. 95-0082 (issued July 11, 1995); Docket No. 97-0670 (issued March 10, 1999), *denied petition for recon.*, Docket No. 97-0670 (issued August 19, 1999); *Order Dismissing Appeal*, Docket No. 00-2532 (issued January 31, 2001); *Order Dismissing Appeal*, Docket No. 02-1467 (issued January 22, 2002); Docket No. 02-1032 (issued October 22, 2002); *Order Remanding Case*, Docket No. 02-1209 (issued October 28, 2002); *Order Dismissing Appeal*, Docket No. 02-1143 (issued April 13, 2002); *Order Granting Petition for Reconsideration*, Docket No. 02-1467 (issued December 16, 2002); *Order Dismissing Appeal*, Docket No. 02-1467 (issued January 23, 2003); Docket No. 04-0757 (issued May 2, 2005); *Order Dismissing Appeal*, Docket No. 06-0457 (issued March 21, 2006); *Order Dismissing Appeal*, Docket No. 07-0068 (issued January 29, 2007); *Order Dismissing Appeal*, Docket No. 07-1774 (issued May 21, 2008); Docket No. 09-0151 (issued October 21, 2009), *denied petition for recon.*, Docket No. 09-0151 (issued April 13, 2010); *Order Dismissing Appeal*, Docket No. 11-0007 (issued June 11, 2011); Docket No. 10-2320 (issued July 19, 2011), *denied petition for recon.*, Docket No. 10-2320 (issued January 25, 2012); Docket No. 12-0174 (issued July 25, 2012); *Order Dismissing Appeal*, Docket No. 12-1967 (issued March 1, 2013); *Order Remanding Case*, Docket No. 13-1383 (issued December 16, 2013); Docket No. 14-0759 (issued July 1, 2014); Docket No. 15-0426 (issued April 20, 2015); Docket No. 16-0270 (issued April 26, 2016); *Order Dismissing Appeal*, Docket No. 17-0761 (issued June 20, 2017); Docket No. 18-0075 (issued April 11, 2018); *Order Dismissing Appeal*, Docket No. 18-1245 (issued November 9, 2018); and *Order Dismissing Appeal*, Docket No. 19-1254 (issued June 25, 2019).

⁴ By decision dated August 9, 1989, OWCP granted appellant a schedule award for seven percent permanent impairment of the left upper extremity. By decision dated April 5, 1990, the Board affirmed the August 9, 1989 decision. Docket No. 90-0321 (issued April 5, 1990).

On March 1, 1989 the employing establishment asked Dr. Schlenker to address whether appellant could perform additional job duties to include sweeping, dusting, and washing sinks and toilets.

On March 1, 1989 the employing establishment denied appellant's request for reassignment to a different work schedule.

Appellant stopped work on March 16, 1989, advising the employing establishment that he would not return until he was placed back on his original tour schedule, and preferably with a position in his own craft. On September 14, 1989 the employing establishment removed him from employment effective June 9, 1989 for unauthorized absence since March 1989.

On February 17, 1991 Dr. Timothy Norton, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), found that appellant could perform the modified position as set forth, but that additional duties like washing sinks and toilets would require too much repetitive movement. On May 2, 1991 the employing establishment advised that it had not assigned him additional duties, but continued with the duties provided in the July 6, 1988 offered position. It asserted that appellant had stopped work because he did not like his shift hours.

By decision dated July 6, 1992, OWCP denied appellant's request for wage-loss compensation beginning March 16, 1989. It found that the employing establishment provided him with work within his restrictions and that he stopped work for reasons unrelated to his employment injury. By decisions dated August 15, 1994 and October 27, 1995, OWCP denied modification of its finding that appellant had not established disability from work on or after March 16, 1989. By decision dated August 10, 1996, it modified its October 27, 1995 decision to reflect that he had performed duties not specifically approved by his physician. OWCP noted, however, that there was no evidence supporting that these duties exceeded the restrictions set forth by Dr. Schlenker. It found that the medical evidence of record was insufficient to establish that appellant was disabled from his modified employment beginning March 16, 1989. Appellant requested reconsideration. By decision dated November 13, 1996, OWCP denied his request for reconsideration, finding that he had not raised an argument or submitted evidence sufficient to warrant reopening his case for further merit review under 5 U.S.C. § 8128(a).

By decision dated March 10, 1999, the Board affirmed the August 10 and November 13, 1996 OWCP decisions.⁵ The Board determined that appellant had not established that he worked outside of his restrictions. The Board further found that the medical evidence of record was insufficient to establish show that he was disabled from his limited-duty position beginning March 16, 1989.

By decision dated October 22, 2002, the Board affirmed March 14 and November 29, 2001 and March 5, 2002 OWCP decisions denying appellant's requests to reopen his case for further merit review pursuant to 5 U.S.C. § 8128(a).⁶ In decisions dated May 2, 2005, October 21, 2009, July 19, 2011, and July 25, 2012, the Board affirmed OWCP decisions denying his requests for

⁵ Docket No. 97-0670 (issued March 10, 1999).

⁶ Docket No. 02-1032 (issued October 22, 2002).

reconsideration on the grounds they were untimely filed and failed to demonstrate clear evidence of error.⁷ In an order dated December 16, 2013, the Board set aside a May 10, 2013 nonmerit decision denying appellant's request for reconsideration under section 8128(a) and remanded the case for OWCP to apply the standards for untimely requests for reconsiderations.⁸ On July 1, 2014 and April 20, 2015 the Board affirmed OWCP nonmerit decisions finding that his requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.⁹

By decision dated April 26, 2016, the Board affirmed a November 16, 2015 OWCP nonmerit decision that again denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.¹⁰ The Board reviewed his contention that OWCP erred in failing to consider that the employing establishment withdrew his limited-duty position, noting that it had previously addressed this argument and that it was thus *res judicata*.¹¹

By decision dated April 11, 2018, the Board affirmed a September 29, 2017 OWCP decision denying appellant's request for reconsideration as untimely filed and failing to demonstrate clear evidence of error.¹²

On May 17, 2018 appellant again requested reconsideration. He argued that OWCP should have referred him for a work capacity evaluation. Appellant also maintained that the August 10, 1996 decision indicated that he performed duties not approved by his physician.

By decision dated May 23, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.¹³

On September 20, 2018 appellant again requested reconsideration. He contended that OWCP had withheld evidence from Dr. Schlenker, noting that it had provided questions and a statement of accepted facts (SOAF) to the DMA, but not to his physician. Appellant asserted that a conflict existed between Dr. Schlenker and the DMA regarding whether he could perform the

⁷ Docket No. 04-0757 (issued May 2, 2005); Docket No. 09-0151 (issued October 21, 2009); Docket No. 10-2320 (issued July 19, 2011); Docket No. 12-0714 (issued July 25, 2012). On January 25, 2010 the Board denied appellant's petition for reconsideration of its July 19, 2011 decision. *Order Denying Petition for Reconsideration*, Docket No. 10-2320 (issued January 25, 2012). On March 1, 2013 the Board dismissed appellant's appeal of an information letter. *Order Dismissing Appeal*, Docket No. 12-1967 (issued March 1, 2013).

⁸ *Order Remanding Case*, Docket No. 13-1383 (issued December 16, 2013).

⁹ Docket No. 14-0759 (issued July 1, 2014); Docket No. 15-0426 (issued April 20, 2015). The Board denied appellant's petition for reconsideration on October 27, 2015. *Order Denying Petition for Reconsideration*, Docket No. 15-0426 (issued October 27, 2015).

¹⁰ Docket No. 16-0270 (issued April 26, 2016).

¹¹ On February 21, 2017 appellant sought an appeal before the Board from a purported December 19, 2016 decision. In an order dated June 20, 2017, the Board dismissed his appeal as there was no final adverse decision over which it had jurisdiction. *Order Dismissing Appeal*, Docket No. 17-0761 (issued June 20, 2017).

¹² Docket No. 18-0075 (issued April 11, 2018).

¹³ Appellant appealed the May 23, 2018 decision to the Board; however, he subsequently requested that the appeal be dismissed. *Order Dismissing Appeal*, Docket No. 18-1245 (issued November 9, 2018).

modified position. He advised that in its August 10, 1996 decision OWCP acknowledged that his physician had not reviewed all the duties of the position he returned to on November 5, 1988. Appellant asserted that a June 14, 1996 union document established that he had to perform duties outside those set forth in the July 6, 1988 job offer.¹⁴

By decision dated April 29, 2019, OWCP denied appellant's September 20, 2018 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP subsequently received a report dated August 14, 2019, wherein Dr. Salman Chaudri, an osteopath, advised that he had reviewed some of Dr. Schlenker's medical reports and other factual evidence. Dr. Chaudri opined that the duties of stocking custodial supplies and cleaning tables and chairs four to six hours per day were outside appellant's work capacity due to their repetitive nature. He further found that the duties exceeded the restrictions set forth by his attending physician. Dr. Chaudri related that the additional duties "would have been too much for his condition and would likely aggravate the condition of his hands and cause recurrent problems."

Appellant, on August 29, 2019, requested reconsideration. He argued that the August 14, 2019 report from Dr. Chaudri established that he was unable to perform the duties of the modified position. Appellant noted that on February 17, 1991 a DMA had found that he could not perform additional duties as they were repetitive and would aggravate his condition. He described the evidence reviewed by Dr. Chaudri in reaching his conclusion. Appellant discussed reports from Dr. Schlenker dated June 7, 1988, February 24, 1989, and September 14, 1990 and the June 14, 1996 statement from the union president.

By decision dated September 9, 2019, OWCP denied appellant's August 29, 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.¹⁵ 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.¹⁶ Timeliness is determined by the document receipt date (*i.e.*,

¹⁴ In a June 14, 1996 statement, union president J.W., related that she had worked with appellant from approximately November 1988 to March 1989. She indicated that he was assigned to maintain supply cages and clean tables and chairs in the lunchroom for four to six hours per day. J.W. advised that appellant had to unpack, lift, and arrange custodial supplies.

¹⁵ 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).

¹⁶ 20 C.F.R. § 10.607(a).

the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS)).¹⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁸

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.¹⁹ 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.²⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.²¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²² 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 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.²³

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁸ *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).

¹⁹ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

²⁰ *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 17 at Chapter 2.1602.5 (February 2016).

²¹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

²² *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 17 at Chapter 2.1602.5(a) (February 2016).

²³ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

error.²⁴ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's September 20, 2018 and August 29, 2019 requests for reconsideration as they were untimely filed.

OWCP's regulations²⁶ and procedures²⁷ 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.²⁸ The most recent merit decision was the Board's March 10, 1999 decision. As appellant's September 20, 2018 and August 29, 2019 requests for reconsideration were received more than one year after the March 10, 1999 merit decision, the Board finds that they were untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation beginning March 16, 1989.²⁹

The Board further finds that appellant's reconsideration requests failed to demonstrate clear evidence of error on the part of OWCP.

In his September 20, 2018 reconsideration request, appellant contended that OWCP erred in failing to provide Dr. Schlenker with a SOAF and questions. He maintained that a conflict existed between Dr. Schlenker and the DMA. Appellant further asserted that OWCP, in its August 10, 1996 decision, had found that he was performing duties not listed in the offered position or approved by his physician and that a June 14, 1996 statement supported that he worked outside the duties provided in the July 6, 1988 job offer. The Board, however, in its March 10, 1999 decision previously considered the evidence from Dr. Schlenker, the February 17, 1991 report from the DMA, the findings by OWCP in its August 10, 1996 decision, and the June 14, 1996 statement from J.W., the union president. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP.³⁰ Therefore, appellant's assertions are insufficient to demonstrate clear evidence of error.

²⁴ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 17 at Chapter 2.1602.5(a) (February 2016).

²⁵ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

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

²⁷ *Supra* note 17 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²⁸ 20 C.F.R. § 10.607(b); *see A.M.*, Docket No. 20-0143 (issued October 28, 2020); *Debra McDavid*, 57 ECAB 149 (2005).

²⁹ *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).

³⁰ *See V.G.*, Docket No. 19-0038 (issued June 18, 2019); *B.W.*, Docket No. 17-0366 (issued June 7, 2017).

In support of his August 29, 2019 request for reconsideration, appellant submitted an August 14, 2019 report from Dr. Chaudri. Dr. Chaudri opined that the stocking custodial supplies and cleaning tables and chairs four to six hours per day constituted repetitive work outside the restrictions found by Dr. Schlenker. He noted that the additional duties would likely have aggravated his hand condition and resulted in recurrent problems. The Board finds that Dr. Chaudri's opinion is insufficient to demonstrate clear evidence of error by OWCP. As discussed, clear evidence of error is intended to represent a difficult standard.³¹ The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.³² Dr. Chaudri's opinion fails to manifest on its face that OWCP committed an error in denying appellant's claim and is thus insufficient to demonstrate clear evidence of error by OWCP in finding that he had not established that he was disabled from his limited-duty position beginning March 16, 1989.

Appellant again argued in his August 29, 2019 reconsideration request that the DMA found that he could not perform additional duties, and that the February 24, 1989, and September 14, 1990 reports from Dr. Schlenker and the June 14, 1996 statement from the union president established that he could not perform the modified position. The Board, however, has previously considered this evidence. The Board found that this evidence was insufficient to show that appellant was disabled from his modified employment beginning March 16, 1989 is *res judicata* absent further merit review by OWCP.³³

Appellant further referenced a June 7, 1988 form report from Dr. Schlenker; however, this evidence is not relevant to the issue of whether he could perform the duties of his modified position effective March 16, 1989. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.³⁴

Appellant has not provided evidence of sufficient probative value or raised a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that he has not demonstrated clear evidence of error.³⁵

On appeal appellant reiterated arguments previously raised in his reconsideration requests. As explained above, they are insufficient to demonstrate clear evidence of error.

³¹ A.A., Docket No. 19-1219 (issued December 10, 2019); J.F., Docket No. 18-1802 (issued May 20, 2019); J.D., Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

³² *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

³³ See *B.W.*, Docket No. 17-0366 (issued June 7, 2017).

³⁴ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

³⁵ See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

CONCLUSION

The Board finds that OWCP properly denied appellant's September 20, 2018 and August 29, 2019 requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 9 and April 29, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 28, 2021
Washington, DC

Alec J. Koromilas, 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