

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

_____)	
T.B., Appellant)	
)	
and)	Docket No. 21-0053
)	Issued: October 25, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Cincinnati, OH, Employer)	
_____)	

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 October 16, 2020 appellant filed a timely appeal from a September 14, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated June 6, 2018, which became final 30 days after issuance, and is not subject to further review.¹ As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, 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 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).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant 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.*

ISSUE

The issue is whether OWCP properly denied appellant's July 11 and August 8, 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.⁴ The facts and circumstances of the case as set forth in the Board's prior decisions and an order are incorporated herein by reference. The relevant facts are as follows.

On November 15, 1995 appellant, then a 39-year-old modified mail processor, filed an occupational disease claim (Form CA-2) alleging that on November 6, 1995 she experienced discomfort in her hands and right shoulder due to repetitive motions required while casing mail. OWCP assigned this claim OWCP File No. xxxxxx340. At that time, appellant had a previously-accepted claim for aggravation of chondromalacia of the right knee in OWCP File No. xxxxxx731 and she was working in a modified sedentary position.⁵ She stopped work on November 9, 1995 and returned to work on November 25, 1995. OWCP accepted appellant's claim for bilateral sprain/strain of the hands, wrists, and right shoulder.

On April 25, 1997 appellant filed a traumatic injury claim (Form CA-1) alleging that she sustained left shoulder, arm, and hand injuries while throwing mail on April 19, 1997. OWCP assigned this claim File No. xxxxxx601 and accepted the claim for left shoulder sprain and tendinitis of the left forearm. Appellant stopped work on April 19, 1997 and OWCP paid her wage-loss compensation through November 17, 1999. On November 18, 1999 OWCP terminated her wage-loss compensation as she failed to accept an offer of suitable employment, pursuant to 5 U.S.C. § 8106(c)(2).

On June 9, 2016 appellant filed a claim for compensation (Form CA-7) for wage loss for the period April 19, 1997 to June 9, 2016. By decision dated August 23, 2016, OWCP denied her claim for wage-loss compensation.

On September 19, 2016 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated June 29, 2017, the hearing representative affirmed OWCP's August 23, 2016 decision.

Appellant appealed to the Board on August 14, 2017. By decision dated June 6, 2018, the Board affirmed the June 29, 2017 OWCP decision.⁶

⁴ *Order Remanding Case*, Docket No. 20-0426 (issued July 27, 2020); Docket No. 19-0029 (issued June 21, 2019), Docket No. 17-1761 (issued June 6, 2018); Docket No. 12-0471 (issued October 2, 2012).

⁵ OWCP File No. xxxxxx340 has been administratively combined with OWCP File No. xxxxxx601, with the latter serving as the master file.

⁶ Docket No. 17-1761 (issued June 6, 2018).

On July 3, 2018 appellant requested reconsideration. She detailed her history of complaints of severe pain in her hands and right shoulder dating back to 1995 and noted that she worked until April 1997, when she could no longer move her hands. Appellant also argued that the employing establishment provided her with offers to return to work based upon inaccurate and incomplete medical reports. She argued that OWCP committed error, as her physicians provided detailed medical reports, and her injuries were caused by work at the employing establishment. Appellant submitted a number of medical reports from various physicians dating from 1995 to 2018.

By decision dated September 20, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board on October 3, 2018. By decision dated June 21, 2019, the Board affirmed OWCP's September 20, 2018 decision, finding that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).⁷

On July 11, 2019 appellant requested reconsideration. She argued that OWCP committed error when it administratively combined her claims. Appellant indicated that she was attaching a seven-page report from Dr. Marvin H. Lucas, a Board-certified internist, which established that her injuries had never resolved. Dr. Lucas' report was not attached.

On August 1, 2019 OWCP denied appellant's request for reconsideration, finding that the request was untimely filed and failed to demonstrate clear evidence of error.

Appellant again requested reconsideration on August 8, 2019 and argued that Dr. Michael Porody, a Board-certified internist, believed that the termination of her compensation benefits was made in error. She stated that she was resubmitting four reports from Dr. Porody that had not been properly reviewed by OWCP in the past. Appellant specifically noted that OWCP needed to consider Dr. Porody's September 25, 2016 report and also referenced submission of a report from Dr. Lucas. She also alleged that OWCP administratively combined her current claim with OWCP File No. xxxxxx601, never paid her compensation for her 1995 injury, and did not resolve the conflict in medical evidence prior to the termination of her compensation benefits.

By letter dated September 27, 2019, appellant provided additional argument. She again alleged that OWCP had committed error as it deliberately continued to confuse her claim numbers. Appellant submitted a copy of her August 3, 2019 letter requesting reconsideration, with an addendum in which she alleged that OWCP had previously referred to a June 30, 2019 request for reconsideration, but this was error as she had requested reconsideration on June 18, 2018. She argued that returning to work in 1995 worsened and exacerbated her condition. Appellant noted that she was forwarding reports dated March 6, 2006, April 21, 2008, December 14, 2012, and a September 25, 2016 report from Dr. Porody. She argued these reports established her condition was work related. Appellant also referred to a September 25, 2019 report from Dr. Tara Adhikari, a Board-certified rheumatologist, and a September 25, 2019 after visit summary and medication list. In an addendum dated August 7, 2019, she noted that she requested reconsideration on June 18, 2018 pertaining to Docket No. 17-1761, and that she had submitted 44 enclosures.

⁷ Docket No. 19-0029 (issued June 21, 2019).

OWCP received a copy of the September 25, 2016 report from Dr. Pordy. It also received a September 25, 2019 after-visit summary from Dr. Adhikari, which noted that appellant was seen for primary osteoarthritis involving multiple joints. In a letter dated September 25, 2019, Dr. Adhikari related that appellant required a disability parking permit as she could not walk more than 200 feet without resting.

By decision dated October 30, 2019, OWCP denied appellant's request for reconsideration, finding that the request was untimely filed and failed to demonstrate clear evidence of error. It did not address the evidence or argument submitted with the reconsideration request.

On December 16, 2019 appellant filed a timely appeal to the Board from the August 1 and October 30, 2019 nonmerit decisions.

By decision dated July 27, 2020, the Board issued an order remanding case, setting aside the August 1 and October 30, 2019 decisions.⁸ The Board found that OWCP failed to analyze appellant's arguments and the evidence submitted. The Board remanded the case for findings of fact and a statement of reasons, followed by an appropriate decision.

By decision dated September 14, 2020, OWCP again denied appellant's July 11 and August 8, 2019 requests for reconsideration of the merits of her claim, finding that they were 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. OWCP's regulations establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision.¹⁰ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹¹ Timeliness is determined by the document receipt date, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).¹² Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹³

When a reconsideration request is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's final merit decision was

⁸ Docket No. 20-0426 (issued July 27, 2020).

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

¹¹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

¹² *Supra* note 10 at Chapter 2.1602.4(b) (February 2016).

¹³ *A.M.*, Docket No. 20-0143 (issued October 28 2020); *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

in error.¹⁴ Its 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, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹⁵ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁷ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁹ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.²⁰ 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.²¹ 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.²² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.²³

ANALYSIS

The Board finds that OWCP properly denied appellant's July 11 and August 8, 2019 requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

¹⁴ *L.N.*, Docket No. 20-0742 (issued October 26, 2020); *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹⁶ *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *W.H.*, Docket No. 20-0395 (issued October 23, 2020); *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁸ *S.T.*, *supra* note 13; *Pasquale C. D'Arco*, 54 ECAB 560 (2003).

¹⁹ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *Leon J. Modrowski*, *supra* note 14.

²⁰ *W.H.*, *supra* note 17; *V.G.*, Docket No. 19-0038 (issued June 18, 2019).

²¹ *L.B.*, *supra* note 19; *V.G.*, *id.*

²² *D.G.*, *supra* note 15.

²³ *See P.A.*, Docket No. 20-0061 (issued January 29, 2021); *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

In this case, the most recent merit decision was issued by the Board on June 6, 2018. OWCP received appellant's requests for reconsideration on July 11 and August 8, 2019, which was more than one year after the Board's June 6, 2018 merit decision.²⁴ The Board, therefore, finds that OWCP properly determined that appellant's requests for reconsideration were untimely filed.

Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for wage-loss compensation for the period August 19, 1997 to June 9, 2016, causally related to the accepted November 6, 1995 employment injury.²⁵

In support of her July 11 and August 8, 2019 requests for reconsideration, appellant argued that OWCP committed error in the handling of her claims, that she was never paid compensation for her 1995 injury, that her return to work in 1995 worsened and exacerbated her conditions, and that OWCP did not resolve the conflict in the medical evidence prior to the termination of her wage-loss compensation benefits. She, however, made substantially similar arguments in her September 19, 2016 letter, which was reviewed by the Board in its June 6, 2018 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.²⁶

Appellant also alleged that Dr. Lucas supported her opinion that her injuries had never resolved, and that she was attaching his report for review. OWCP, however, did not receive the referenced new report from Dr. Lucas. Appellant also argued that Dr. Pordy believed that OWCP erroneously terminated her compensation benefits. She indicated that she was submitting four reports from Dr. Pordy; however, she only resubmitted his September 25, 2016 report, which was previously reviewed by OWCP and the Board.

OWCP received September 25, 2019 reports from Dr. Adhikari; however, these reports are not relevant as they did not address the underlying issue, appellant's alleged entitlement to wage-loss compensation from August 19, 1997 to June 9, 2016.

The Board, therefore, finds that appellant's arguments and evidence submitted on reconsideration failed to demonstrate that OWCP's last merit decision dated June 29, 2017 was incorrect at the time it was issued.²⁷ Appellant's arguments and evidence were not positive, precise, and explicit in manifesting on its fact that OWCP committed an error,²⁸ nor did they shift the weight of the evidence in appellant's favor.²⁹ Clear evidence of error is intended to represent

²⁴ *S.T.*, *supra* note 13; *Pasquale C. D'Arco*, *supra* note 18; *Leona N. Travis*, 43 ECAB 227 (1991).

²⁵ *See P.A.*, *supra* note 23; *B.C.*, Docket No. 20-0465 (issued November 19, 2020);

²⁶ *A.G.*, Docket No. 18-0329 (issued July 26, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

²⁷ *See E.R.*, Docket No. 19-1553 (issued April 22, 2021); *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Leona N. Travis*, *supra* note 24.

²⁸ *See E.R.*, *id.*; *R.C.*, Docket No. 17-0198 (issued January 28, 2019); *A.S.*, Docket No. 16-0902 (issued September 28, 2016).

²⁹ *Supra* note 22.

a difficult standard.³⁰ Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. It is not enough to show that evidence could be construed so as to produce a contrary conclusion.³¹

Accordingly, the Board finds that OWCP properly denied appellant's July 11 and August 8, 2019 reconsideration requests, as they were untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's July 11 and August 8, 2019 requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2021
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

³⁰ See Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.5(a) (February 2020); see also *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

³¹ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).