

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

|   |   |                                 |
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| M.W., Appellant                               | ) |                                 |
|   | ) |                                 |
| and   | ) | <b>Docket No. 21-0841</b>       |
|   | ) | <b>Issued: October 26, 2021</b> |
| <b>DEPARTMENT OF JUSTICE, FEDERAL</b>         | ) |                                 |
| <b>BUREAU OF INVESTIGATION, Quantico, VA,</b> | ) |                                 |
| <b>Employer</b>                               | ) |                                 |
|   | ) |                                 |

*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 May 13, 2021 appellant filed a timely appeal from an April 27, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 20, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</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, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On October 15, 2019 appellant, then a 26-year-old law enforcement agent, filed a traumatic injury claim (Form CA-1) alleging that on October 3, 2019 she sustained rhabdomyolysis during a required physical training class while in the performance of duty. On the reverse of the claim form, C.A., appellant's supervisor, indicated that he concurred with appellant's account of events and acknowledged that she was injured while in the performance of duty.

In an October 3, 2019 hospital emergency department report, Dr. Robert Evans Fines, Jr., Board-certified in emergency medicine, diagnosed myalgia, dehydration, and elevated liver function tests following physical training at the employing establishment.

OWCP received an authorization for examination and/or treatment (Form CA-16) completed and signed by C.A. on October 4, 2019.

In an October 4, 2019 hospital emergency department report, Dr. Timothy D. Weber, Board-certified in emergency medicine, diagnosed myalgia, dehydration, and elevated liver function tests.

OWCP also received October 3 and 4, 2019 laboratory test results and discharge instructions.

In a development letter dated October 28, 2019, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond. No response was received.

By decision dated November 29, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as she described. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 26, 2019 appellant requested reconsideration. She submitted a February 5, 2020 letter noting a change of address. On February 13, 2020 appellant indicated that she was attempting to obtain a narrative medical report.

By decision dated March 20, 2020, OWCP denied modification of the November 29, 2019 decision.

In an August 9, 2020 statement, appellant responded to the deficiencies noted in OWCP's November 29, 2019 decision. She explained that, during October 3, 2019 physical defense training and strenuous exercise, she became achy and fatigued. After class, appellant noticed blood in her urine. The class counselor sent her to an employing establishment nurse, who obtained a urine sample indicative of rhabdomyolysis and sent appellant to a hospital emergency department. As appellant's symptoms recurred the following day, the nurse sent her back to the hospital emergency department. Appellant noted that she had submitted additional medical evidence,

including October 3 and 4, 2019 hospital emergency department reports from a physician. She submitted additional medical evidence.<sup>2</sup>

In an April 23, 2020 report, Dr. Weber reviewed appellant's October 3, 2019 chart notes. He recalled that she had presented with an elevated creatinine kinase (CK) level "in line with a vigorous workout." Dr. Weber opined that appellant's physical training certainly "could have contributed to dehydration and the elevated CK, but [her] kidneys" were not in danger and there was no "lasting disability from that episode." He noted that her emergency department treatment with intravenous fluids, with instructions to rest and recover for a few days, was appropriate for her clinical presentation.

On April 15, 2021 appellant requested reconsideration. She also submitted an April 15, 2021 letter from supervisor C.A., requesting that OWCP review the medical evidence of record. He contended that medical documentation had been difficult to obtain because of the COVID-19 pandemic. C.A. asserted that a timely reconsideration request had been "mailed out within the deadline."

By decision dated April 27, 2021, 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.<sup>3</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>4</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>5</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>6</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 claimant's request for reconsideration demonstrates "clear evidence of error" on the part of

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<sup>2</sup> OWCP also received copies of medical evidence and laboratory test results previously of record.

<sup>3</sup> 5 U.S.C. § 8128(a); *C.S.*, Docket No. 20-1075 (issued December 31, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> *J.J.*, Docket No. 19-0977 (issued December 31, 2020); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> See 20 C.F.R. § 10.607(b); *W.J.*, Docket No. 20-0489 (issued December 21, 2020); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

OWCP.<sup>7</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>8</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</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 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.<sup>10</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>11</sup> 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 insufficient to demonstrate clear evidence of error.<sup>12</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP improperly determined that appellant's request for reconsideration was untimely filed.

The case record contains appellant's August 9, 2020 letter, received by OWCP on August 9, 2020, in which she specifically addressed the deficiencies noted in OWCP's March 20, 2020 decision.

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<sup>7</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); Federal (FECA) Procedure Manual, Part 2 – Claims, *Reconsiderations*, Chapter 2.1602.5 (September 2020).

<sup>8</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>9</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 7 at Chapter 2.1602.5(a) (September 2020).

<sup>10</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>11</sup> *Supra* note 7 at Chapter 2.1602.4(b) (September 2020).

<sup>12</sup> *J.J.*, *supra* note 5.

<sup>13</sup> *Id.*

Although appellant's August 9, 2020 letter does not mention the word reconsideration, the Board has found that there may be a request for reconsideration in situations where a letter does not contain the word reconsideration.<sup>14</sup> No special form is required as long as the request is made in writing, identifies the decision and specific issue to be considered, and is accompanied by relevant and pertinent new evidence not previously considered.<sup>15</sup> The word reconsideration does not need to be stated in the request for it to be considered valid, but sufficient detail should be provided to discern the decision being contested.<sup>16</sup>

In this case, appellant explicitly responded to the deficiencies in her claim as noted in OWCP's March 20, 2020 decision. She specifically addressed the issue of whether her claim should be accepted by submitting additional factual information about the October 3, 2019 employment events, and Dr. Weber's April 23, 2020 report addressing the causal relationship between those events and the diagnosed conditions. Accordingly, the Board finds that appellant's August 9, 2020 letter, received by OWCP on August 9, 2020, submitted with the medical evidence, constituted a timely request for reconsideration.<sup>17</sup>

Thus, appellant filed a request for reconsideration within one year of the March 20, 2020 OWCP decision. The Board finds that OWCP improperly denied her reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).<sup>18</sup> Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.<sup>19</sup>

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<sup>14</sup> *P.S.*, Docket No. 20-1192 (issued July 20, 2021); *E.S.*, Docket No. 17-0698 (issued July 14, 2017); *Jack D. Johnson*, 57 ECAB 593 (2006); *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

<sup>15</sup> *Id.*

<sup>16</sup> *P.S.*, *supra* note 14; *E.S.*, *supra* note 14; *see M.H.*, Docket No. 14-1389 (issued October 22, 2014).

<sup>17</sup> *P.S.*, *supra* note 14; *E.S.*, *supra* note 14; *C.M.*, Docket No. 11-1988 (issued June 6, 2012).

<sup>18</sup> 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provide that an application for reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

<sup>19</sup> *E.S.*, *supra* note 14; *Dewayne C. Davis*, Docket No. 94-2346 (issued August 14, 1997).

**CONCLUSION**

The Board finds that OWCP improperly found that appellant's request for reconsideration of OWCP's March 20, 2020 decision was untimely filed.<sup>20</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 27, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 26, 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

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<sup>20</sup> The employing establishment completed and signed a Form CA-16 on October 4, 2019. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. See 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).