

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

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<b>A.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0345</b>
	)	<b>Issued: August 29, 2022</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	
<b>NORTON AIR FORCE BASE, CA, Employer</b>	)	
_____	)	

*Appearances:*  
*Christina Faliero, Esq., for the appellant*<sup>1</sup>  
*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 January 2, 2022 appellant, through counsel, filed a timely appeal from an August 12, 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 June 29, 2012, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## 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 previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On December 27, 1978 appellant, then a 33-year-old jet engine mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained a back injury when helping to move an engine fan case while in the performance of duty. He described the nature of his injury as "left side of back (possible pulled muscle)." OWCP accepted appellant's claim for low back strain and herniated nucleus pulposus at L4-5.

A statement of accepted facts (SOAF) dated June 26, 1995 included, appellant's name and age, the job held at the time of injury, the mechanism of injury, conditions claimed or accepted, work history since the injury, and a description of medical treatment since the injury.

OWCP declared a conflict in medical opinion evidence and referred appellant to Dr. William Zaayer, a Board-certified orthopedic surgeon. In an impartial medical evaluation report dated September 4, 1998, Dr. Zaayer opined that appellant's injury in 1978 was likely just a very mild back strain without any neurological deficits. Asked if there was a herniated nucleus pulposus, Dr. Zaayer responded that appellant's current magnetic resonance imaging (MRI) scan did not support a herniated nucleus pulposus. There was a bulging annulus, but no extrusion stemming from profound arthritic changes, and nothing in the diagnostic tests had shown any evidence of nerve root impingement or radiculopathy in the usual sense.

Dr. Zaayer stated that, if an MRI scan had been taken in December 1978, it likely would have shown some disc bulging at L4-5. X-rays showed slight disc space narrowing and minimal osteophyte formation. Dr. Zaayer explained, that over time, this degenerative process continues to grow and mature and advance, and this is exactly what happened in appellant's low back. He noted that appellant had disc problems in his neck and low back and had osteoarthritis in virtually every area that was x-rayed. This represented the ongoing progression of the degenerative process in appellant's back, which existed prior to the 1978 work incident. Dr. Zaayer indicated that appellant had flat feet and abundantly tight hamstring muscles, all of which aggravated a mechanical low back situation without significant neurological aspects.

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<sup>3</sup> Docket No. 18-0015 (issued June 11, 2019); Docket No. 14-1367 (issued October 14, 2014); Docket No. 10-206 (issued February 26, 2010), *petition for recon. denied*, Docket No. 10-206 (issued June 30, 2010); Docket No. 09-23 (issued June 16, 2009), *petition for recon. denied*, Docket No. 09-23 (issued September 18, 2009); Docket No. 06-746 (issued September 7, 2006), *petition for recon. denied*, Docket No. 06-746 (issued February 7, 2007); Docket No. 96-1544 (issued June 15, 1998).

Dr. Zaayer explained that the simple mild back sprain did not aggravate anything in appellant's back, as no single event of this type would have any effect upon the ongoing degenerative process, which he added, would have become symptomatic absent the 1978 work incident. He noted that it was the ongoing degenerative process aggravated by tight hamstring muscles and flat feet was the cause and that it had nothing to do with the December 27, 1978 incident. He concluded that, at the time of his examination, there was no objective evidence to support the accepted employment-related conditions.

By decision dated December 29, 1998, OWCP terminated appellant's wage-loss compensation and medical benefits, finding that the weight of the medical evidence, as represented by Dr. Zaayer, the impartial medical specialist, established that he no longer had residuals or disability due to the accepted employment conditions.

On January 8, 1999 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on June 21, 1999. By decision dated February 17, 2000, an OWCP hearing representative affirmed the December 29, 1998 termination decision.

Appellant subsequently exercised his appeal rights several times, but the December 29, 1998 termination decision remained upheld.

On May 8, 2012 appellant again requested reconsideration. By decision dated June 29, 2012, OWCP denied modification of its prior decisions relating to the December 29, 1998 termination of appellant's wage-loss compensation and medical benefits.

Appellant continued to submit multiple requests for reconsideration. However, OWCP issued nonmerit decisions denying his requests, finding that he had not presented relevant and pertinent new medical evidence or argument sufficient to warrant merit review.

On August 2, 2013 appellant, through counsel, requested reconsideration. By decision dated December 5, 2013, OWCP found that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On May 29, 2014 appellant filed an appeal from a December 5, 2013 nonmerit decision of OWCP. By decision dated October 14, 2014, the Board affirmed OWCP's December 5, 2013 decision. In its October 14, 2014 decision, the Board found that Dr. Zaayer concluded that appellant's accepted low back strain had resolved, and his current MRI scan did not show a herniated disc. His report, as that of the impartial medical specialist, was entitled to special weight.

On June 20, 2017 appellant, through counsel, again requested reconsideration of OWCP's June 29, 2012 decision. Counsel argued that a recurrence would be appropriate in appellant's claim and attached several reports from Dr. James Bryan Cooper, a Board-certified neurologist.<sup>4</sup>

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<sup>4</sup> By letter dated June 14, 2016, appellant, through counsel, had filed a notice of recurrence (Form CA-2a) commencing September 1, 2011. Counsel noted that a recent medical report indicated that appellant's medical problems continued to worsen at the same site of the original injury. He argued that this was a natural progression of the original injury, and as appellant had not been working, there was no question of filing a new claim based on new factors of employment.

By decision dated June 22, 2017, OWCP denied appellant's request for reconsideration of its June 29, 2012 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error. It further noted that because his work-related injury had resolved, it could not consider recurrence.

Appellant, through counsel, appealed OWCP's June 22, 2017 decision to the Board.

By decision dated June 11, 2019, the Board affirmed OWCP's June 22, 2017 nonmerit decision.<sup>5</sup> The Board found that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

In a statement dated June 27, 2020, appellant disputed the reports of Dr. Benjamin G. Cox, a neurosurgeon, to whom OWCP referred appellant for a second opinion in 1998, and Dr. Zaayer, the impartial medical specialist, selected to resolve a conflict of medical opinion as to whether appellant continued to suffer residuals of his accepted conditions. Appellant alleged that OWCP had engaged in "doctor shopping."

On March 22, 2021 appellant, through counsel, again requested reconsideration. Counsel argued that the termination of appellant's wage-loss compensation and medical benefits had been erroneous based on an inappropriate and nonprobative report from Dr. Zaayer. She alleged that the SOAF relied upon by Dr. Zaayer in his report of September 4, 1998 was incomplete and inaccurate. Counsel further alleged that Dr. Zaayer disavowed accepted conditions of the claim and was not well rationalized. She contended that OWCP had disregarded medical evidence demonstrating that residuals of appellant's accepted conditions had not ceased. As such, counsel argued, OWCP did not meet its burden of proof to terminate his benefits on December 29, 1998.

By decision dated August 12, 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>6</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>7</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

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<sup>5</sup> Docket No. 18-0015, *supra* note 3.

<sup>6</sup> 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>7</sup> 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).<sup>8</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>9</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>10</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>11</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>12</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>13</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> 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.<sup>16</sup> 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>17</sup>

OWCP's procedures provide that the term clear evidence of error is intended to represent a difficult standard.<sup>18</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

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>9</sup> See *M.E.*, *supra* note 6; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>10</sup> 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).

<sup>11</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); see also *id.* at § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (September 2020).

<sup>12</sup> *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); see *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

<sup>14</sup> *Id.*

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

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Supra* note 8.

development, is not clear evidence of error.<sup>19</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>20</sup>

### ANALYSIS

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

The last merit decision in this case was dated June 29, 2012. Appellant had one year from that decision to request reconsideration. As his reconsideration request was not received until March 22, 2021, more than one year after the June 29, 2012 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the June 29, 2012 decision.<sup>21</sup>

In support of appellant's request for reconsideration, OWCP received a statement from counsel dated March 22, 2021 and a statement from appellant dated June 27, 2020. Counsel argued on reconsideration that the SOAF relied upon by Dr. Zaayer in his impartial medical evaluation report of September 4, 1998 was incomplete and inaccurate. She further alleged that Dr. Zaayer disavowed accepted conditions of the claim and that his report was not well rationalized. She concluded, therefore, that OWCP did not meet its burden to terminate appellant's wage-loss compensation and medical benefits on December 29, 1998.

The Board finds that the SOAF contained the essential elements, including the accepted conditions, which was properly relied upon by Dr. Zaayer, the impartial medical specialist. As such, counsel's argument does not demonstrate clear evidence of error.

In a statement dated June 27, 2020, appellant ostensibly disputes that Dr. Zaayer's impartial medical evaluation report constituted the special weight of the medical evidence. The Board notes that it considered arguments regarding the weight of Dr. Zaayer's report in its October 14, 2014 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP, under section 8128 of FECA.<sup>22</sup>

As the arguments submitted in support of appellant's untimely request for reconsideration are insufficient to shift the weight of the evidence in favor of his claim or raise a substantial question that OWCP erred in its June 29, 2012 decision, the Board finds that OWCP properly denied his reconsideration request as it was untimely and failed to demonstrate clear evidence of error.

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<sup>19</sup> *P.H.*, Docket No. 19-1354, (issued March 13, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5a (September 2020).

<sup>20</sup> *See M.E.*, *supra* note 6; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>21</sup> *See* 20 C.F.R. § 10.607(a) (a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought).

<sup>22</sup> *J.T.*, Docket No. 18-1757 (issued April 19, 2019).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim as it was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 29, 2022  
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