

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

M.D., Appellant	)	
	)	
and	)	Docket No. 22-0542
	)	Issued: August 17, 2022
FEDERAL DEPOSIT INSURANCE	)	
CORPORATION, Arlington, VA, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 1, 2022 appellant, through counsel, filed a timely appeal from a January 31, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was an August 3, 2017 decision of the Board, which became final 30 days after issuance, and is not subject to further review.<sup>2</sup> As there was no merit decision issued by OWCP within 180 days from the filing of this appeal, pursuant to the Federal Employees'

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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> 20 C.F.R. § 501.6(d). *See S.S.*, Docket No. 21-0627 (issued June 22, 2022); *S.M.*, Docket No. 21-0392 (issued August 12, 2021); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

Compensation Act<sup>3</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.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the prior Board decisions and order are incorporated herein by reference. The relevant facts are as follows.

On June 9, 2015 appellant, then a 57-year-old financial analyst, filed a traumatic injury claim (Form CA-1) alleging on February 20, 2015 he tripped on a strip of concrete when walking between the first and second floors of the employing establishment parking garage and "flew" forward, headfirst, into a concrete staircase, while in the performance of duty. He alleged that, as a result, he sustained a large bruise on his upper right arm and skinned both knees. Appellant also experienced a sore right thigh, forearm cramps, soreness in his back, and tingling in his right hand and fingers.

After initial development, by decision dated July 28, 2015, OWCP denied appellant's claim, finding that he had not established that the February 20, 2015 incident occurred as alleged. OWCP also advised appellant that he had not submitted any medical evidence containing a medical diagnosis causally related to the alleged incident.

On June 7, 2016 appellant, through counsel, requested reconsideration and submitted additional evidence in support of his request.

By decision dated August 24, 2016, OWCP denied modification of the July 28, 2015 decision. It found that appellant had not responded to its June 25, 2015 letter to establish the factual component of his claim.

OWCP subsequently received additional medical evidence.

In reports dated March 1 and April 7, 2016, Dr. Michael E. Goldsmith, a Board-certified orthopedic surgeon, reviewed diagnostic testing, provided examination findings, and diagnosed low back pain, lumbar region intervertebral disc degeneration, and status post lumbar fusion.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Docket No. 17-0086 (issued August 3, 2017); *Order Remanding Case*, Docket No. 19-1957 (issued June 22, 2020); Docket No. 21-0022 (issued August 18, 2021).

On October 20, 2016 appellant, through counsel, appealed to the Board. By decision dated August 3, 2017,<sup>5</sup> the Board affirmed OWCP's August 24, 2016 decision, as modified. The Board found that the evidence submitted was sufficient to establish that the February 20, 2015 incident occurred as alleged, and that appellant was in the performance of duty during its occurrence. However, the Board further found that appellant had not submitted sufficient medical evidence to establish that the accepted employment incident caused an employment injury.

On August 7, 2018 appellant, through counsel, requested reconsideration. Additional evidence was submitted in support of his request.

In a report dated November 3, 2015, Dr. Goldsmith related that appellant was seen that day for bilateral leg and low back pain. In his report, he provided examination findings, reviewed diagnostic tests, and detailed a history of injury, noting that appellant developed severe right leg pain following a fall in February 2015. Dr. Goldsmith diagnosed lumbago and lumbar pseudarthrosis and spinal stenosis.

A February 15, 2016 operative report from Dr. Goldsmith noted diagnoses of lumbar pseudarthrosis with L4-5 and L5-S1 degenerative disc disease. Dr. Goldsmith related that appellant had undergone removal of L4-S1 hardware and posterior L5-S1 spinal fusion.

In an October 24, 2017 report, Dr. Goldsmith noted that appellant was seen for complaints of neck pain. He noted a 1995 motor vehicle accident and that appellant complained of increased neck discomfort while clearing rocks on September 10, 2016. Examination and diagnostic test findings and medical history were detailed. Dr. Goldsmith diagnosed cervical spinal stenosis, cervical disc degeneration, and cervical disc displacement.

In reports dated February 20 and March 20, 2018 report, Dr. Goldsmith diagnosed low back pain, cervical disc degeneration with spinal stenosis, cervical disc displacement, cervicgia, peripheral neuropathy, and two years status post lumbar fusion. He detailed appellant's complaints, reviewed diagnostic tests, and provided examination findings.

By decision dated August 1, 2019, OWCP denied modification, finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical condition and the accepted February 20, 2015 employment incident.

On September 24, 2019 appellant, through counsel, filed an appeal with the Board. By an order dated June 22, 2020, the Board set aside the August 1, 2019 decision, finding that OWCP applied the standard of review for timely requests for reconsideration.<sup>6</sup> The Board remanded the case to OWCP for application of the appropriate standard of review for untimely requests for reconsideration.

By decision dated August 14, 2020, OWCP denied appellant's August 7, 2018 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>5</sup> Docket No. 17-0086 (issued August 3, 2017).

<sup>6</sup> *Order Remanding Case*, Docket No. 19-1957 (issued June 22, 2020).

On October 7, 2020 appellant, through counsel, filed an appeal with the Board. By decision dated August 18, 2021, the Board set aside the August 14, 2020 OWCP nonmerit decision, finding OWCP's decision failed to contain findings of fact and a statement of reasons.<sup>7</sup> The Board remanded the case to OWCP to provide findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

By decision dated January 31, 2022, OWCP reviewed Dr. Goldsmith's reports submitted since November 3, 2015. It denied appellant's August 7, 2018 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>8</sup> This discretionary authority, however, is subject to certain restrictions.<sup>9</sup> OWCP's regulations establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision.<sup>10</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>11</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).<sup>12</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>13</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>14</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>15</sup>

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<sup>7</sup> Docket No. 21-0022 (issued August 18, 2021).

<sup>8</sup> *Supra* note 3 at § 8128(a); *see P.A.*, Docket No. 20-0061 (issued January 29, 2021); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> *Id.* at § 10.607(a); *T.T.*, Docket No. 19-1624 (issued October 28, 2020); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>11</sup> *J.W., id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

<sup>13</sup> *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).

<sup>14</sup> *See supra* note 9 at § 10.607(b); *S.J.*, Docket No. 21-0217 (issued December 16, 2021); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>15</sup> *Y.J.*, Docket No. 18-0495 (issued December 10, 2019); *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *supra* note 9 at § 10.607(b); *supra* note 12 at Chapter 2.1602.5 (September 2020).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.<sup>16</sup> The evidence must be positive, precise, and explicit, and must manifest on its face that OWCP committed an error.<sup>17</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>18</sup> It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.<sup>19</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>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

### 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.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the timeliness of appellant's August 7, 2018 reconsideration request, as the Board found in its June 22, 2020 order that his request was untimely filed. Findings made in prior Board decisions and/or orders are *res judicata* absent further merit review by OWCP under section 8128 of FECA.<sup>23</sup>

As appellant's request for reconsideration was untimely filed, appellant must demonstrate clear evidence of error on the part of OWCP in its August 24, 2016 decision.

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<sup>16</sup> *P.A.*, *supra* note 8; *W.H.*, Docket No. 20-0395 (issued October 23, 2020); *S.T.*, *supra* note 13; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>17</sup> *Y.J.*, *supra* note 15; *R.C.*, Docket No. 18-1441 (issued October 21, 2019); *S.T.*, *supra* note 13.

<sup>18</sup> *P.A.*, *supra* note 8; *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 10; *Leon J. Modrowski*, 55 ECAB 196 (2004).

<sup>19</sup> *P.A.*, *supra* note 8; *W.H.*, *supra* note 16; *V.G.*, *supra* note 10; *see E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>20</sup> *P.A.*, *supra* note 8; *L.B.*, *supra* note 18; *V.G.*, *supra* note 10; *see E.P.*, *id.*; *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>21</sup> *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Leon D. Faidley, Jr.*, *supra* note 13.

<sup>22</sup> *I.A.*, Docket No. 19-1910 (issued September 29, 2020); *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

<sup>23</sup> *S.J.*, *supra* note 14; *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

On reconsideration appellant submitted a series of medical reports dated November 3, 2015 to March 20, 2018 from Dr. Goldsmith, which noted appellant's history of injury and diagnosed lumbago, lumbar pseudarthrosis and spinal stenosis, cervical spinal stenosis, cervical disc degeneration, and cervical disc displacement.

The Board finds that the medical evidence submitted on reconsideration is insufficient to demonstrate clear of evidence of error in OWCP's August 24, 2016 decision.<sup>24</sup>

Appellant's claim was denied by OWCP because he had not submitted sufficient medical evidence to establish that the diagnosed medical conditions were causally related to the accepted employment incident of February 20, 2015. None of the reports from Dr. Goldsmith received on reconsideration contained an opinion on the causal relationship between the incident of February 20, 2015, which resulted in diagnoses of diagnosed lumbago, lumbar pseudarthrosis and spinal stenosis, cervical spinal stenosis, cervical disc degeneration, and cervical disc displacement, and is of no probative value on the issue of causal relationship.<sup>25</sup>

The term "clear evidence of error" is intended to represent a difficult standard and the evidence provided here is not the type of positive, precise, and explicit evidence, which manifested on its face that OWCP committed an error in its August 24, 2016 decision.<sup>26</sup> The Board finds that the medical evidence submitted on reconsideration is insufficient to shift the weight of the evidence in favor of his claim or raise a fundamental question as to the correctness of OWCP's decision denying her request for reconsideration.<sup>27</sup>

As the evidence submitted in support of appellant's untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of her claim or raise a substantial question as to the correctness of OWCP's August 24, 2016 decision, the Board finds that OWCP properly denied his reconsideration request.

### 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.

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<sup>24</sup> *R.W.*, Docket No. 21-1164 (issued April 5, 2022); *A.S.*, Docket No. 18-1556 (issued September 17, 2019); *L.B.*, *supra* note 18.

<sup>25</sup> *R.W.*, *id.*; *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>26</sup> *Supra* note 12 at Chapter 2.1602.5 (September 2020); *see also* 20 C.F.R. § 10.607(b).

<sup>27</sup> *R.W.*, *supra* note 24; *C.M.*, Docket No. 19-0585 (issued August 15, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 31, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board