

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

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<b>J.A., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1483</b>
	)	<b>Issued: December 19, 2022</b>
<b>DEPARTMENT OF THE ARMY, FORT A.P.</b>	)	
<b>HILL, Bowling Green, VA, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On August 4, 2020 appellant filed a timely appeal from a February 24, 2020 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated June 19, 2018 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.<sup>2</sup>

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

<sup>2</sup> 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 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

On December 5, 2017 appellant, then a 37-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that on December 1, 2017 he developed back pain when he bent down to pick up a paint brush in the performance of duty. He stopped work on December 1, 2017.

A December 1, 2017 hospital record prepared by a registered nurse related that appellant had sudden back pain when bending over to pick up a paint brush. Appellant had also indicated that he had a previous incident a year ago due to L5/6 bulging discs.

December 1, 2017 lumbar computerized tomography (CT) scans noted mild diffuse disc bulges from L3/S1.

In a December 1, 2017 work/school release form Dr. Robert D. Strangl, a Board-certified internist, released appellant to return to work on December 5, 2017.

OWCP received Duty Status Reports (Form CA-17) dated December 5, 2017 from Dr. Stephen D. Reinhardt, a Board-certified family practice physician, and December 13, 2017 from Dr. Kara Foster-Weiss, a Board-certified family practice physician. These forms noted a December 1, 2017 injury when appellant bent to pick up a paint brush, and diagnosed lumbar disc herniation due to the incident. Work restrictions were provided.

In a December 14, 2017 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion.

In a December 5, 2017 narrative report, Dr. Reinhardt related appellant's history of injury, provided examination findings and diagnosed lumbar disc disease and herniated lumbar disc without myelopathy.

In a December 13, 2017 report, Dr. Foster-Weiss noted the employment incident, reviewed a CT scan, and provided examination findings. She diagnosed lumbar herniated disc without myelopathy. In a work capacity evaluation (Form OWCP-5c) dated December 22, 2017, Dr. Foster-Weiss diagnosed L5-S1 herniated disc and provided work restrictions.

In a Form CA-17 dated December 28, 2017, Dr. Reinhardt provided work restrictions, and diagnosed L5-S1 herniated disc.

By decision dated January 16, 2018, OWCP denied the claim finding that the evidence of record was insufficient to establish causal relationship between appellant's diagnosed condition and the accepted employment incident.

On January 28, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP continued to receive evidence. In a Form OWCP-5c and progress notes dated January 9, 2018, Dr. Marc Caligtan, a Board-certified physiatrist, diagnosed chronic pain syndrome, provided examination findings, and listed work restrictions.

In a report dated January 25, 2018, Dr. Jennifer Hopp, a family medicine specialist and Board-certified sports medicine physician, noted appellant's medical history and related that on December 1, 2017 he sustained an injury while moving/installing/painting cabinets. She reviewed diagnostic testing and diagnosed L3-4, L4-5, and L5-S1 disc herniations. Dr. Hopp opined that appellant's midline low back pain and surrounding paraspinal muscular spasms were consistent with a central lumbar disc herniation and likely caused by heavy lifting performed on December 1, 2017.

Dr. Reinhardt, in a January 25, 2018 report, diagnosed midline L5-S1 herniated disc based on review of a CT scan and examination findings. In a February 6, 2018 report, Dr. Caligtan diagnosed low back strain and chronic pain syndrome.

By decision dated June 19, 2018, OWCP's hearing representative affirmed the January 16, 2018 decision.

In a July 19, 2018 report, Dr. Caligtan related that appellant's lumbar strain had resolved. He noted that appellant's back pain began on December 1, 2017 while renovating a kitchen at work.

On August 13, 2019 appellant requested reconsideration and submitted a witness statement from W.B., a coworker, dated August 9, 2019.

OWCP also received a July 19, 2018 report, wherein Dr. Reinhardt listed diagnoses of lumbar disc disease and lumbar herniated disc without myelopathy. Dr. Reinhardt explained that appellant's medical history included a prior disc bulge, but no disc herniation was noted until the December 1, 2017 CT scan. He opined that it was reasonable to conclude that appellant's disc herniation had been caused by the accepted December 1, 2017 employment incident.

On August 15, 2018 Dr. Caligtan described the December 1, 2017 employment incident and noted that appellant was seen for acute lumbar pain on January 9, 2018. He opined that the diagnosed lumbar strain and appellant's symptoms were caused by the work incident. With respect to a prior incident of back pain, Dr. Caligtan indicated that it had occurred more than one year prior to the December 1, 2017 injury, was transient, treated with medication, and that appellant had returned to full duty the following day.

In an October 4, 2018 report, Dr. Reinhardt concluded that it was reasonable to attribute appellant's lumbar pain and herniated disc to the accepted December 1, 2017 employment incident.

In a December 9, 2019 report, Dr. Charles Vokac, a physical medicine and rehabilitation specialist, noted appellant's history of injuries in 2016 and on December 1, 2017. A review of the

December 1, 2017 lumbar CT scan revealed disc bulges and slight L5-S1 herniation. Dr. Vokac indicated that it was difficult to comment on appellant's case as he was not the initial treating physician and due to the passage of time. However, he opined, based on appellant's history and the lack of any other injuries, that it was likely that the 2016 and 2017 injuries were responsible for appellant's 2018 symptoms.

By decision dated February 24, 2020, OWCP denied appellant's reconsideration request, 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> Timeliness is determined by the document receipt date (*i.e.*, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>5</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>6</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>7</sup> Its 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.<sup>8</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>9</sup>

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

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<sup>3</sup> 5 U.S.C. § 8128(a); *M.D.*, Docket No. 20-0868 (issued April 28, 2021); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2020).

<sup>6</sup> *M.D.*, *supra* note 3; *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).

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *M.D.*, *id.*; *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>8</sup> *F.B.*, Docket No. 20-0910 (issued April 23, 2021); *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 5 at Chapter 2.1602.5 (February 2016).

<sup>9</sup> *M.D.*, *supra* note 3; *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>10</sup> *M.D.*, *id.*; *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

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>11</sup>

OWCP's 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. 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.<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 properly determined that appellant's August 13, 2019 reconsideration request was untimely filed.

OWCP's regulations<sup>14</sup> and procedures<sup>15</sup> 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.<sup>16</sup> The most recent merit decision was OWCP's hearing representative's June 19, 2018 decision. As appellant's request for reconsideration was received by OWCP on August 13, 2019 more than one year after the June 19, 2018 OWCP decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his traumatic injury claim.<sup>17</sup>

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<sup>11</sup> *S.M.*, Docket No. 19-1961 (issued January 28, 2021); *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>12</sup> *F.B.*, *supra* note 8; *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

<sup>13</sup> *R.O.*, Docket No. 20-1552 (issued March 29, 2021); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>14</sup> 20 C.F.R. § 10.607(a); *see S.M.*, Docket No. 19-1961 (issued January 28, 2021); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>15</sup> *S.M.*, *id.*; *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>16</sup> 20 C.F.R. § 10.607(b); *see A.M.*, Docket No. 20-0143 (issued October 28, 2020); *Debra McDavid*, 57 ECAB 149 (2005).

<sup>17</sup> *Id.* at § 10.607(b); *see S.M.*, *supra* note 14; *M.W.*, Docket No. 17-0892 (issued May 21, 2018); *see S.M.*, Docket No. 16-0270 (issued April 26, 2016).

The Board further finds, however, that this case is not in posture for decision as to whether appellant's August 13, 2019 reconsideration request demonstrated clear evidence of error.

OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.<sup>18</sup> Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>19</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.<sup>20</sup> As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>21</sup>

In denying appellant's August 13, 2019 reconsideration request, OWCP failed to analyze the evidence as to whether it was sufficient to demonstrate clear evidence of error.<sup>22</sup> The February 24, 2020 decision simply noted: "the submitted information does not provide evidence that [OWCP] erred in issuing the contested decision." However, OWCP provided no discussion relative to the new medical evidence submitted by appellant.<sup>23</sup> The Board will therefore set aside OWCP's February 24, 2020 decision and remand the case for an appropriate decision on his untimely reconsideration request, which describes the evidence submitted on reconsideration and provides detailed reasons for accepting or rejecting the reconsideration request.<sup>24</sup>

### CONCLUSION

The Board finds that OWCP properly determined that appellant's August 13, 2019 request for reconsideration was untimely filed. However, the Board further finds that the case is not in posture for decision with regard to whether the untimely reconsideration request demonstrates clear evidence of error.

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<sup>18</sup> *V.R.*, Docket No. 19-0536 (issued February 22, 2021); *T.P.*, Docket No. 19-1533 (issued April 30, 2020).

<sup>19</sup> 5 U.S.C. § 8124(a).

<sup>20</sup> 20 C.F.R. § 10.126.

<sup>21</sup> *Supra* note 5 at Chapter 2.1400.5 (February 2013).

<sup>22</sup> *See V.R.*, *supra* note 18; *Order Remanding Case, J.K.*, Docket No. 20-0556 (issued August 13, 2020).

<sup>23</sup> *See V.R.*, *id.*; *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

<sup>24</sup> *See V.R.*, *id.*; *Order Remanding Case, C.D.*, Docket No. 20-0450 (issued August 13, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 19, 2022  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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