

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

<b>M.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-1203</b>
	)	<b>Issued: December 22, 2022</b>
<b>DEPARTMENT OF THE NAVY,</b>	)	
<b>EXPEDITIONARY MEDICAL SUPPORT</b>	)	
<b>COMMAND, Williamsburg, VA, 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, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On August 3, 2021 appellant filed a timely appeal from a February 5, 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 27, 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, following the February 5, 2021 decision, appellant submitted additional evidence to OWCP. 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, 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 as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 2, 2008 appellant, then a 49-year-old inventory management specialist, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sprained his right ankle when he slipped on loose rocks and twisted his ankle while in the performance of duty.<sup>4</sup> He stopped work on that date. OWCP accepted appellant's claim for right ankle sprain, deltoid ligament; knee sprain, lateral collateral ligament; and right venous embolism and deep vein thrombosis (DVT) of the right lower extremity.

Appellant continued to receive medical treatment. In office notes dated September 16 and October 17, 2016, Dr. Matthew Hopson, a podiatrist, recounted appellant's complaints of right ankle pain and noted an onset of 20 years ago. Upon examination of appellant's right ankle, he observed pain and instability along the right ankle joint. Dr. Hopson diagnosed post-traumatic osteoarthritis of the right ankle and foot. He explained that, after discussing conservative and surgical options, appellant chose to move forward with right ankle stabilization procedure and ankle arthroscopy.

On March 27, 2017 OWCP received a request for authorization for right ankle arthroscopy surgery.

On March 28, 2017 OWCP informed appellant that it was unable to authorize his request for right ankle arthroscopic surgery and repair of the right ankle ligament because the medical evidence of record was insufficient to establish that the requested procedure resulted from his accepted injury.

In an April 11, 2017 report, Dr. Hopson reviewed appellant's history and explained that appellant had arthritis of his ankle due to instability from an anterior talofibular (ATF) ligament tear. He recommended a lateral ankle stabilization and repair of the torn ligament to prevent or slow the process of further osteoarthritic changes in the ankle and ankle arthroscopy to clean out some of the arthritic areas in the ankle joint.

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<sup>3</sup> Docket No. 20-0537 (issued September 24, 2020).

<sup>4</sup> The record reflects that appellant has a prior accepted claim for a February 6, 2003 right ankle fracture under OWCP File No. xxxxxx179. That claim has not been administratively combined with the current claim.

By decision dated April 20, 2017, OWCP denied authorization for right ankle arthroscopy surgery and repair, finding that the medical evidence of record was insufficient to establish that the proposed surgery was necessary to treat his September 2, 2008 employment injury.

Appellant subsequently submitted additional medical evidence.

In treatment notes dated April 7 through October 18, 2017, Dr. John Paschold, a Board-certified internist specializing in hematology and medical oncology, reviewed appellant's laboratory test results and provided examination findings. He noted diagnoses of DVT disorder, factor V Leiden mutation disorder, and ankle pain.

In reports dated November 20 and December 5, 2017, Dr. Hopson indicated that appellant was treated for chronic right ankle pain. He indicated that appellant's computerized tomography (CT) scan revealed osteoarthritic changes along the right ankle joint and the chronic ossifications along the ATF ligament consistent with the old ankle sprain injury. Dr. Hopson provided examination findings and assessed right ankle post-traumatic osteoarthritis and right ankle pain. He explained that, after discussion about an ankle implant versus ankle joint fusion due to the arthritic condition of the subtalar joints, appellant decided to undergo joint replacement surgery.

In reports dated January 3 through March 27, 2018, Dr. Michael E. Landis, a Board-certified vascular surgeon, indicated that appellant had a history of a remote right ankle injury, recurrent chronic right lower extremity DVT, and chronic venous insufficiency with ulceration. He noted that appellant was scheduled for right ankle surgery, but it was delayed. Dr. Landis noted examination findings and diagnosed chronic venous insufficiency with recurrent stasis ulceration of the right lower extremity DVT and right ankle degenerative joint disease following remote trauma.

Appellant underwent right lower extremity duplex scans on January 18, February 27, and March 9, 2018.

In a March 9, 2018 examination report, Dr. Paschold noted right lower extremity findings and assessed DVT disorder, factor V Leiden mutation disorder, and ankle pain. He indicated that appellant was considering right ankle replacement surgery.

In a May 23, 2018 report, Dr. Hopson indicated that he had treated appellant since late 2016 for unstable ankle as a result of ATF, talofibular, and deltoid ligament damage. He explained that appellant's ankle joint had deteriorated to the point that surgical repair was no longer an option and he now recommended right ankle replacement surgery. Dr. Hopson opined that the sprain that occurred in September 2008 was a contributing factor to appellant's current condition. He reported that ankle replacement surgery was the best option to treat appellant's current ankle condition, which had continued to deteriorate as a result of the 2008 sprain.

On June 18, 2018 appellant requested reconsideration.

By decision dated June 27, 2018, OWCP denied modification of its April 20, 2017 decision.

In an August 7, 2018 office visit note, Dr. Hopson indicated that he treated appellant for complaints of worsening right ankle pain. He reviewed appellant's history, provided examination findings, and assessed right ankle joint pain and right ankle post-traumatic osteoarthritis. Dr. Hopson reported that appellant was scheduled for right ankle surgery.

In office notes and laboratory test results dated May 22, 2018 through April 1, 2019, Dr. Paschold noted examination findings of right medial malleolus hyperpigmentation varicosities in the extremities. He assessed DVT disorder, factor V Leiden disorder, and ankle pain.

In a report dated May 14, 2019, Dr. Landis recounted appellant's continued complaints of pain and discomfort on the dorsum of his right foot. He noted that appellant had a history of arthritis in his right ankle. Dr. Landis indicated that appellant was scheduled for a total joint replacement.

On June 28, 2019 appellant requested reconsideration. He asserted that combining his claims would address the concerns about his history of ankle injuries. Appellant also argued that his treating physicians had provided rationalized medical opinion to establish causal relationship.

Appellant submitted a July 8, 2011 report by Dr. Loel Z. Payne, a Board-certified orthopedic surgeon, who diagnosed talar dome osteochondritis dissecans. Dr. Payne opined that the diagnosed condition was "due to his previous inversion sprain injury several years ago." He recommended an MRI scan and possible surgical intervention in the form of an arthroscopic chondroplasty.

In an October 22, 2018 note, Dr. Aasta Pederson, a Board-certified orthopedic surgeon who specializes in sports medicine, related that appellant was previously seen for right ankle osteoarthritis. She reviewed appellant's history and noted physical examination findings of chronic venous stasis changes in the right ankle and tenderness to palpitation in the anterior dorsal tibia. Dr. Pederson opined that appellant had post-traumatic arthritis secondary to ankle fracture and multiple sprains/instability.

In reports dated November 27, 2018 through May 28, 2019, Dr. Paschold noted diagnoses of right lower extremity DVT, factor V Leiden heterozygote, and right ankle pain. He indicated that appellant was considering right ankle replacement surgery.

Appellant also submitted a July 8, 2011 report by Dr. Payne, and laboratory and diagnostic test results.

By decision dated July 12, 2019, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated September 24, 2020, the Board affirmed the July 12, 2019 OWCP decision in part, finding that the June 28, 2019 reconsideration request was untimely filed. The Board, however, set aside the July 12, 2019 OWCP decision in part, finding that OWCP failed to properly explain its findings in its July 12, 2019 decision. The Board remanded the case for OWCP to issue an appropriate decision, which made proper findings of facts and provided a statement of reasons explaining why the evidence appellant submitted did not demonstrate clear evidence of error.

By decision dated February 5, 2021, OWCP again denied appellant's June 28, 2019 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>5</sup> To be entitled to a merit review of an OWCP decision, 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>6</sup> Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).<sup>7</sup> The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>8</sup>

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>9</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 demonstrates clear evidence of error on the part of OWCP.<sup>10</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>11</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> This entails a limited review by

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<sup>5</sup> 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).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

<sup>8</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> See 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>10</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); see also *id.* at § 10.607; *supra* note 7 at Chapter 2.1602.5(a) (September 2020).

<sup>11</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>12</sup> 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>13</sup> See *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.<sup>14</sup> To demonstrate clear evidence of error, the evidence 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>15</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>16</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The Board, in its September 24, 2020 decision found that appellant's request for reconsideration was untimely filed as it was received on June 28, 2019, more than one year after the June 27, 2018 OWCP merit decision. However, the Board remanded the case for OWCP to provide findings of fact and a statement of reasons, in accordance with FECA and its implementing regulations, regarding whether appellant's reconsideration request demonstrated clear evidence of error.<sup>17</sup> Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.<sup>18</sup>

In his untimely reconsideration request, appellant asserted that combining the current claim with his prior claims would address the concerns about his history of ankle injuries. However, to demonstrate clear evidence of error, the evidence 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>19</sup> Appellant's argument, therefore, is insufficient to demonstrate clear evidence of error.

In support of his untimely reconsideration request, appellant submitted new medical evidence, including an August 7, 2018 report by Dr. Hopson, who provided examination findings and diagnosed right ankle joint pain and right ankle post-traumatic osteoarthritis. Appellant also submitted medical reports dated May 22, 2018 through May 28, 2019 by Dr. Paschold and a May 14, 2019 report by Dr. Landis who provided examination findings and noted diagnoses of

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<sup>14</sup> *B.W.*, *supra* note 13.

<sup>15</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>16</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>17</sup> *Supra* note 3.

<sup>18</sup> *A.A.*, Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>19</sup> *Supra* note 16.

DVT disorder, factor V Leiden disorder, and ankle pain. However, as Drs. Hopson, Landis, and Paschold merely reiterated the findings and diagnoses made in medical reports that were previously considered by OWCP, this evidence is insufficient 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>20</sup>

OWCP also received a July 8, 2011 report by Dr. Payne and an October 22, 2018 note by Dr. Pederson. The physicians did not, however, provide an opinion on how the requested right ankle surgery was necessary to treat appellant's September 2, 2008 employment injury. These reports, therefore, also do not raise a substantial question regarding the correctness of the June 27, 2018 merit decision.<sup>21</sup> As appellant's request for reconsideration does not demonstrate on its face that OWCP committed an error in denying his request for right ankle surgery, the Board finds that OWCP properly determined that his June 28, 2019 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.<sup>22</sup>

### CONCLUSION

The Board finds that 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>20</sup> See *R.T.*, Docket No. 22-0481 (issued July 20, 2022).

<sup>21</sup> See *W.C.*, Docket No. 22-0246 (issued June 14, 2022).

<sup>22</sup> *O.K.*, Docket No. 21-708 (issued September 29, 2021); *S.C.*, Docket No. 19-1424 (issued September 15, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 5, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board