

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

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L.S., Appellant)	
)	
and)	Docket No. 22-0541
)	Issued: October 3, 2022
U.S. POSTAL SERVICE, WATERFORD POST OFFICE, Waterford, WI, Employer)	
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Appearances:
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 1, 2022 appellant, through counsel, filed a timely appeal from a January 14, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated December 8, 2020 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 18, 2019 appellant, then a 61-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she could not lift her arm past her shoulder due to factors of her federal employment, including "repetition." She reported that she first became aware of her condition and its relation to her federal employment on August 24, 2019. On the reverse side of the claim form appellant's supervisor noted that appellant had modified her work techniques to accommodate her restrictions. Appellant did not stop work.

In support of her claim, appellant submitted an undated statement indicating that she had worked for the employing establishment for 18 years and that her right shoulder recently started to hurt to the point that she was unable to lift her arm past her shoulder. She attributed this to the physical nature of her job, including lifting heavy parcels daily and opening and closing her heavy door over one hundred times a day.

Appellant also submitted a November 18, 2019 work restriction note from Dr. Scott M. Dresden, Board-certified in occupational medicine, who diagnosed right shoulder tendinitis and right shoulder strain, indicating that the conditions were work related. Dr. Dresden advised that appellant could return to work with restrictions of no lifting, carrying, pushing, or pulling with the right hand over 10 pounds and no above-shoulder work with the right arm.

In a development letter dated December 4, 2019, OWCP informed appellant of the deficiencies in her claim. It advised her of the additional evidence needed to establish her occupational disease claim and afforded her 30 days to respond. In a separate letter dated January 3, 2020, OWCP requested clarification from Dr. Dresden, including a complete factual history and rationalized medical opinion regarding causal relationship.

OWCP subsequently received a January 20, 2020 work restriction note from Dr. Dresden, diagnosing right shoulder tendinitis, right shoulder strain, right glenohumeral arthritis, and right rotator cuff injury, indicating that these conditions were work related. Dr. Dresden released appellant for work with restrictions and noted that surgical intervention was needed.

By decision dated February 19, 2020, OWCP denied appellant's occupational disease claim, finding that the medical evidence submitted was insufficient to establish causal relationship between her diagnosed condition and the accepted factors of her federal employment.

Appellant subsequently submitted November 12, 2019 progress notes from Kim T. Duczak, a nurse practitioner, relating appellant's yearlong history of worsening right shoulder pain and decreased range of motion (ROM), which she attributed to the repetitive nature of her job and heavy lifting. Appellant's symptoms had not improved with physical therapy. Ms. Duczak's examination of the right shoulder revealed a large soft effusion in the anterior aspect of the bicep

with tenderness to palpation, reproducible supraspinous tenderness, limited adduction, and decreased strength. She diagnosed chronic right shoulder pain.

November 18, 2019 progress notes from Dr. Dresden related that appellant experienced insidious development of right shoulder pain over the course of her work delivering mail and parcels and that, by August 24, 2019, she noticed difficulty lifting her arm above shoulder level. Dr. Dresden's examination of appellant's right shoulder and upper extremity revealed increased prominence and swelling, as well as moderate tenderness to palpation, over the anterior shoulder along the inferior and anterior glenohumeral space, moderate tenderness to palpation over the bicipital tendon and just medial to the aforementioned prominence, mild-to-moderate tenderness to palpation over the anterior and lateral subacromial space, including subdeltoid bursa distribution, markedly attenuated ROM of the right shoulder in abduction, positive Neer impingement, Hawkins Kennedy, and empty can tests, equivocal O'Brien's compression test, tenderness over the midline cervical or thoracic spine, and mild tenderness to palpation over the right posterior neck musculature. Dr. Dresden reviewed a right shoulder x-ray taken that day and diagnosed right shoulder tendinitis with concurrent severe right shoulder osteoarthritis. He indicated that the work-relatedness of appellant's right shoulder condition was of undetermined status. Dr. Dresden explained that, while her work activities certainly played a role in the development of the very apparent degenerative changes in her right shoulder and aggravated the associated tendinitis and pain, appellant's osteoarthritis had many other influencing factors. He released appellant for work with restrictions.

In December 16, 2019 progress notes, Dr. Dresden noted that appellant continued to have a good deal of pain over her right shoulder with difficulty lifting the arm up to shoulder level. He reviewed a December 9, 2019 magnetic resonance imaging (MRI) scan arthrogram of the right shoulder, which demonstrated severe erosive glenohumeral joint arthropathy with little evidence of any remaining supportive labrum tissue. Dr. Dresden diagnosed right glenohumeral arthritis, right shoulder tendinitis, and right shoulder strain. He again noted that the injury was of undetermined work-relatedness and released appellant for work with restrictions. In a workers' compensation report of even date, Dr. Dresden repeated his diagnoses, released appellant for work with restrictions, and indicated that the injury was of undetermined work relatedness.

A January 14, 2020 report from Dr. Navjot S. Kohli, a Board-certified orthopedic surgeon, related that appellant had considerable right shoulder pain since an August 24 2019 employment incident. Dr. Kohli's examination of the right shoulder revealed pain through ROM and weakness with external rotation. He reviewed the earlier x-ray and MRI scan studies and diagnosed right shoulder rotator cuff tear arthropathy. Dr. Kohli recommended right reverse total shoulder arthroscopy (TSA). In a work excuse note of even date, he indicated that appellant was under his care and could return to regular-duty work beginning on January 15, 2020.

In January 20, 2020 progress notes, Dr. Dresden noted that appellant had decided to go forward with a reverse TSA after consultation with Dr. Kohli. He diagnosed right shoulder tendinitis, right shoulder strain, right glenohumeral arthritis, and right rotator cuff injury and released appellant for work with restrictions. In a workers' compensation report of even date, Dr. Dresden provided his earlier diagnoses, released appellant for work with restrictions, and indicated that appellant's conditions were work related.

A May 26, 2020 surgical follow-up report from Dr. Kohli indicated that appellant had undergone right reverse TSA on March 11, 2020, and reported right-sided arm and hand weakness. Dr. Kohli's examination revealed good ROM of the right shoulder, but limited flexion at her distal interphalangeal and proximal interphalangeal joints of her thumb through middle fingers. Dr. Kohli reviewed a May 21, 2020 MRI scan of the brachial plexus, right upper extremity, which revealed myoedema involving the right infraspinatus muscle belly with sparing laterally and multilevel degenerative disc disease. He diagnosed status post right reverse TSA and median nerve contusion and indicated that appellant should be off work until October 31, 2020. In a June 30, 2020 report, Dr. Kohli noted that appellant was doing well with regards to her right shoulder, but reported constant right elbow pain and limited use of her right hand. An x-ray of the right elbow taken that day revealed no abnormalities. Dr. Kohli diagnosed status post reverse TSA. In a September 15, 2020 report, his examination revealed weak motor function in the median nerve distribution on the right, good ROM of the right shoulder and elbow without pain, and good strength of the right shoulder. Dr. Kohli reviewed a September 14, 2020 electromyography (EMG) of the right upper extremity and diagnosed status post shoulder replacement and median mononeuropathy.

On November 10, 2020 appellant, through counsel, requested reconsideration. By decision dated December 8, 2020, OWCP denied modification of its prior decision.

On December 27, 2021 appellant, through counsel, requested reconsideration. She submitted a November 9, 2021 report by Dr. Kohli, contending although late, was sufficient to establish causal relationship.

In a November 9, 2021 report, Dr. Kohli explained that appellant developed arthritis and rotator cuff disease, noting that the arthritis was a preexisting condition. However, he opined that appellant's repetitive use of her arm with repetitive carrying of a mailbag and packages over the years contributed to the injury and was a material, permanent, exacerbating factor of her shoulder condition. Dr. Kohli further explained his belief that "physical labor, especially repetitive in nature, over years can contribute to arthritic changes, can contribute to rotator cuff pathology and can contribute to patient's disability necessitating surgery."

By decision dated January 14, 2022, 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.³ 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.⁴ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

³ 5 U.S.C. § 8128(a); *see also* A.B., Docket No. 19-1539 (issued January 27, 2020); W.C., 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

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.⁷ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ 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.¹² 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.¹³

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁴ The claimant must present evidence, which on its face shows that OWCP made an error.¹⁵ Evidence such as a detailed, well-rationalized medical report which, if

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

⁶ *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).

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

⁸ *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 (September 2020).

⁹ *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); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹¹ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹³ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

¹⁴ *See supra* note 5 at Chapter 2.1602.5(a) (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁵ *C.C.*, Docket No. 21-0896 (issued December 2, 2021); *R.G.*, Docket No. 21-0540 (issued November 9, 2021); *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

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

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.¹⁸ As appellant's request for reconsideration was not received by OWCP until December 27, 2021, more than one year after OWCP's December 8, 2020 decision, it was untimely filed.¹⁹ Consequently, she must demonstrate clear evidence of error by OWCP.²⁰

The Board further finds that appellant has not demonstrated clear evidence of error. On reconsideration appellant submitted Dr. Kohli's November 9, 2021 report. Although Dr. Kohli addressed the issue of causal relationship, the Board finds that this report does not demonstrate clear evidence of error because it does not show that OWCP committed an error in finding that appellant failed to establish causal relationship between her medical condition and the accepted factors of her federal employment. As such, it does not raise a substantial question as to the correctness of OWCP's December 8, 2020 merit decision.²¹

As noted, clear evidence of error is intended to represent a difficult standard.²² Even a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.²³

¹⁶ *Id.*

¹⁷ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁸ *See supra* note 5.

¹⁹ According to OWCP's procedures, the one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. *See supra* note 5 at Chapter 2.1602.4a (September 2020).

²⁰ *Supra* note 8.

²¹ *See D.R.*, Docket No. 21-0061 (issued May 24, 2021).

²² *See supra* note 15.

²³ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

The Board finds that appellant's request for reconsideration does not demonstrate on its face that OWCP committed error when it found in its December 8, 2020 decision that she had not established an employment-related shoulder injury.²⁴ Therefore, OWCP properly determined that appellant did not demonstrate clear evidence of error in its December 8, 2020 decision.

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.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁴ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).