

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

_____)	
E.L., Appellant)	
)	
and)	Docket No. 22-0631
)	Issued: October 31, 2022
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, USP ATLANTA, Atlanta, GA,)	
Employer)	
_____)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 13, 2022 appellant filed a timely appeal from a January 12, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated February 28, 2020 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 12, 2022 OWCP decision, appellant submitted additional evidence to the Board. 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 June 28, 2019 appellant, then a 50-year-old correctional officer, filed an occupational disease claim (Form CA-2) alleging that he developed an "illness" due to factors of his federal employment, including typing and office paperwork that caused cramping in both arms. He indicated that he had not been medically evaluated. Appellant reported that he first became aware of his condition and its relation to his federal employment on June 28, 2019. On the reverse side of the claim form, appellant's supervisor indicated that the employing establishment first received notice on the same date. Appellant did not stop work.

In support of his claim, appellant submitted an undated statement indicating that he had worked for the employing establishment for over 23 years. His job duties included repetitively applying and removing restraints from inmates' legs, waists, and hands; rotating the key to lock and unlock cell and office doors; opening and closing heavy doors; as well as extensive typing to complete reports and responses, loading and unloading large caliber firearms, and having his wrists locked in position for 5 hours at a time, for up to 15 hours, while escorting and transporting inmates. Appellant noted that his hobbies included cooking, woodworking, gardening, and automotive repair. In June 2019, he began experiencing numbness and tingling in both wrists. During the night, the tingling would wake him up, and during the day, the numbness varied depending on his duties for the day. Appellant noted that the pain and numbness had progressed over the last three years, and he was now completely losing feeling in his hands. He indicated that he had never had a similar condition.

In a development letter dated July 3, 2019, OWCP informed appellant of the deficiencies of his claim. It advised of the additional evidence needed to establish his occupational disease claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor. It afforded both parties 30 days to respond.

OWCP subsequently received an August 23, 2019 progress note from Dr. Daniel R. Orcutt, a Board-certified orthopedic surgeon, relating that appellant experienced frequent, mild bilateral numbness and tingling in his hands for the last six months, as well as cramping at night, which was aggravated by lifting, gripping, pushing, and pulling. Appellant reported being injured on the job and experienced muscle aches and arthralgias/joint pain. On examination Dr. Orcutt noted decreased median nerve distribution bilaterally, decreased sensation to the radial digits, positive carpal tunnel compress test, and ulnar symptoms. He noted that x-rays revealed no fracture, dislocation, or arthritis, but did reveal mild degenerative joint disease. Dr. Orcutt diagnosed pain in the right hand, pain in the finger of the left hand, and bilateral carpal tunnel syndrome.

By decision dated August 26, 2019, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in

connection with the accepted factors of his federal employment. It concluded, therefore, that he had not met the requirements to establish an injury as defined under FECA.

Appellant subsequently submitted a September 27, 2019 progress note from Dr. Orcutt relating that appellant's elbows remained the most symptomatic. Physical examination revealed bilateral tenderness along the ulnar nerve, as well as bilateral mildly decreased sensation of the ulnar digits. Dr. Orcutt reviewed a September 24, 2019 electromyography/nerve conduction velocity (EMG/NCV) study of the bilateral upper extremities, which demonstrated moderate left carpal tunnel syndrome and increased latency of the bilateral upper extremities at the elbows, consistent with bilateral cubital tunnel syndrome. He diagnosed pain in the right hand, pain in the finger of the left hand, bilateral carpal tunnel syndrome, and pain in the right shoulder and noted that appellant may need cubital tunnel release in the future. In a progress note of even date, Dr. Orcutt released appellant for full-duty work as of that date and indicated that appellant still had pain and cramping. In an October 25, 2019 progress note, he diagnosed pain in the right hand, pain in the finger of the left hand, bilateral carpal tunnel syndrome, and pain in the right shoulder. In a work-status report of even date, Dr. Orcutt released appellant for full-duty work and diagnosed cubital tunnel syndrome, greater on the left than the right. In a November 27, 2019 progress note, he indicated that his examination revealed decreased ulnar and median nerve distribution bilaterally and positive carpal compression tests bilaterally. Dr. Orcutt opined that appellant's carpal tunnel syndrome and cubital tunnel syndrome were both consistent with work-related injuries and should be accepted for workers' compensation. He diagnosed pain in the right hand, pain in the finger of the left hand, bilateral carpal tunnel syndrome, and pain in the right shoulder.

In a November 27, 2019 letter, Dr. Orcutt related appellant's history of treatment under his care. He noted that the September 24, 2019 EMG/NCV study showed carpal tunnel syndrome and increased latency of the bilateral upper extremities at the elbow, consistent with cubital tunnel syndrome, which was more symptomatic for appellant. Dr. Orcutt added that appellant had ulnar symptoms along with numbness, tingling, and severe discomfort. He opined that both the carpal and cubital tunnel syndromes were consistent with work-related injuries and should be covered under workers' compensation.

On December 8, 2019 appellant requested reconsideration.

In a December 18, 2019 progress note, Dr. Orcutt indicated that his examination revealed decreased ulnar and median nerve distribution bilaterally and positive carpal compression tests bilaterally. He again opined that appellant's conditions were consistent with work-related injuries and should be accepted for workers' compensation. Dr. Orcutt diagnosed pain in the right hand, pain in the finger of the left hand, bilateral carpal tunnel syndrome, and pain in the right shoulder. In a work status report of even date, he released appellant for full-duty work and noted that appellant had pain and numbness.

By decision dated February 28, 2020, OWCP modified the August 26, 2019 decision to find that the evidence of record contained a medical diagnosis. The claim remained denied, however, as the evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted factors of his federal employment.

On March 30, 2020 OWCP received an undated change of address from appellant, indicating that he had relocated to from Georgia to Texas.

In a November 18, 2021 memorandum of telephone call (Form CA-110), OWCP noted that appellant had called and inquired regarding the status of his case, as he had not received the February 28, 2020 decision by mail.

On December 28, 2021 appellant requested reconsideration.

In support of his request, appellant submitted an undated statement asserting that he had not received all correspondence due to his relocation to Texas. He explained that he was assigned repetitive duties throughout his 24 years of working for the employing establishment. These duties included applying handcuffs and leg irons to inmates, performing pat searches on all inmates entering the institution or the bus, driving a bus long distances and gripping the steering wheel, which sometimes caused pain to his wrists, repetitive gripping of inmates that did not conform to rules and procedures, typing on a keyboard sometimes for days to complete assignments and reports, and sitting with his elbows on the desk and podium within the unit for long periods of time. Appellant noted that his pain had increased since he filed his claim and was at times unbearable.

By decision dated January 12, 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 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

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).

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).

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 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

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).

¹⁶ *Id.*

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

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration 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 28, 2021, more than one year after OWCP's February 28, 2020 decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP.¹⁹

The Board further finds that appellant has not demonstrated clear evidence of error. On reconsideration, appellant submitted a statement reiterating his repetitive employment duties and arguing that they supported fact of injury. He also stated that his pain had increased and was at times unbearable. These statements, however, do not show that OWCP committed an error in finding that appellant failed to establish causal relationship between his medical condition and the accepted factors of his federal employment. As such, they do not raise a substantial question as to the correctness of OWCP's February 28, 2020 merit decision and are insufficient to demonstrate clear evidence of error.²⁰

Appellant also argued that he did not receive a copy of the February 28, 2021 decision until after November 18, 2021. The Board has held that absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is called the mailbox rule.²¹ The evidence of record establishes that the February 28, 2020 decision was properly mailed to appellant at his last known address of record and was not returned to OWCP as undeliverable.

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

¹⁸ See *supra* note 4.

¹⁹ *Supra* note 7.

²⁰ See *D.R.*, Docket No. 21-0061 (issued May 24, 2021).

²¹ See *J.W.*, Docket No. 21-0869 (issued January 14, 2022); *V.C.*, Docket No. 20-0798 (issued November 16, 2020).

²² See *supra* note 14.

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

As appellant's request for reconsideration does not demonstrate on its face that OWCP committed error in its February 28, 2020, the Board finds that OWCP properly determined that het did not demonstrate clear evidence of error.

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 12, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 31, 2022
Washington, DC

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

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

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