

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

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| J.F., Appellant |) | |
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| and |) | Docket No. 22-0572 |
| |) | Issued: September 20, 2022 |
| U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer |) | |
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Appearances:
Joyce Fuller, for the appellant¹
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 7, 2022 appellant, through his representative, filed a timely appeal from a February 15, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 22, 2002, 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.³

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 an 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.*

³ The Board notes that appellant submitted evidence and argument 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, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 10, 2000 appellant, then a 36-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right shoulder injury, clavicle strain, and right rotator cuff injury on August 9, 2000 when a coworker tapped him on the shoulder, causing him to "go to his knees."⁵

By merit decisions dated November 22, 2000, May 21, 2001, and April 22, 2002, OWCP denied the claim, finding that the medical evidence of record was insufficient to establish that the diagnosed conditions were causally related to the accepted August 9, 2000 employment incident.

Following the April 22, 2002 merit decision, appellant continued to request reconsideration of the merits of his claim. OWCP denied his requests for reconsideration and he filed appeals to the Board. By decision dated May 20, 2019, the Board affirmed an August 29, 2018 OWCP nonmerit decision, finding that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.⁶

On November 30, 2020 appellant, through his representative, again requested reconsideration, contending that there were administrative delays by OWCP after the Board issued its May 20, 2019 decision. Appellant's representative further contended that the evidence submitted on reconsideration demonstrated clear evidence of error as it included an unsigned case notes initial assessment dated August 22, 2000 which noted that appellant had been tapped on the shoulder on August 9, 2000, after a previous injury to the same shoulder. Appellant's diagnosis was listed as right shoulder rule out rotator cuff. OWCP also received: a copy of appellant's Form

⁴ Docket No. 0407 (issued November 10, 2021); Docket No. 18-1802 (issued May 20, 2019); *Order Dismissing Appeal* in Docket No. 20-1433 and *Dismissing Petition for Reconsideration* in Docket No. 18-1802, Docket Nos. 20-1433 & 18-1802 (issued August 28, 2020); Docket No. 18-0250 (issued July 6, 2018); Docket No. 16-0871 (issued June 10, 2016); Docket No. 14-1589 (issued November 24, 2014); Docket No. 12-1749 (issued February 5, 2013), *petition for recon. denied*, Docket No. 12-1749 (issued August 2, 2013); Docket No. 10-2378 (issued August 16, 2011), *petition for recon. denied*, Docket No. 10-2378 (issued February 23, 2012); Docket No. 09-1027 (issued December 17, 2009), *petition for recon. denied*, Docket No. 09-1027 (issued May 6, 2010); Docket No. 08-271 (issued June 20, 2008); Docket No. 07-978 (issued August 17, 2007); Docket No. 04-2283 (issued December 21, 2005).

⁵ The record indicates that appellant also has a claim for a May 3, 2000 traumatic injury under OWCP File No. xxxxxx590, accepted for right shoulder strain; and a claim for a September 18, 1991 traumatic injury accepted for left elbow lateral epicondylitis, left shoulder adhesive capsulitis, left brachial plexus lesions, left tenosynovitis of the hand/wrist and sprain/strains of the right shoulder, upper arm and acromioclavicular joint under OWCP File No. xxxxxx559. Appellant's claims have been administratively combined by OWCP with OWCP File No. xxxxxx559 serving as the master file.

⁶ Docket No. 18-1802 (issued May 20, 2019).

CA-1; copies of OWCP's May 21, 2001, October 1, 2002, and August 29, 2018 decisions; a partial copy of the Board's May 20, 2018 decision; copies of appellant's requests for reconsideration dated June 3, 2019, March 23, 2020, and July 20, 2020; OWCP's August 10, 2020 acknowledgement letter; the Board's November 8, 2020 letter regarding its lack of jurisdiction over Board Docket Nos. 20-1433 and 18-1802; and two USPS Tracking forms showing delivery dates.

By decision dated December 29, 2020, OWCP 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.

Appellant appealed the December 29, 2020 decision to the Board.

OWCP thereafter received a March 18, 2021 magnetic resonance imaging (MRI) scan of appellant's left shoulder and a March 23, 2021 MRI scan of his left elbow.

By order dated November 10, 2021, the Board set aside OWCP's December 29, 2020 decision.⁷ The Board found that OWCP had summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.⁸ The Board remanded the case for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's reconsideration request.

By decision dated February 15, 2022, OWCP again denied appellant's November 30, 2020 request for reconsideration, finding that the request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ 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).¹⁰ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹¹

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

⁷ *Order Remanding Case*, Docket No. 21-0407 (issued November 10, 2021).

⁸ *M.D.*, Docket No. 20-0868 (issued April 28, 2021); *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607.

⁹ 20 C.F.R. § 10.607(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

¹¹ *D.R.*, Docket No. 21-0061 (issued May 24, 2021); *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

review to determine whether the request demonstrates clear evidence of error.¹² OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹³

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.¹⁴ Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁷ The Board makes an independent determination as to 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.¹⁸

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁹ The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁰

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.

¹² 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ *Supra* note 9; *supra* note 10 at Chapter 2.1602.5a (September 2020).

¹⁴ 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).

¹⁵ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

²⁰ *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

OWCP received appellant's request for reconsideration on November 30, 2020, more than one year after the April 22, 2002 merit decision. Appellant's request was, therefore, untimely filed. Consequently, he must demonstrate clear evidence of error.²¹

The Board further finds that appellant has not demonstrated clear evidence of error.

On reconsideration appellant submitted unsigned case notes dated August 22, 2000 which related that he had been tapped on the shoulder on August 9, 2000, after a previous injury to the same shoulder. His diagnosis was listed as right shoulder rule out rotator cuff. The Board has held that medical evidence containing an illegible signature, or which is unsigned has no probative value, as it is not established that the author is a physician.²² Appellant also submitted additional medical evidence in the form of MRI scan reports. MRI scan reports, however, do not demonstrate that OWCP committed an error in finding that he failed to establish causal relationship between his diagnosed conditions and the accepted August 9, 2000 employment incident, nor do they raise a substantial question as to the correctness of OWCP's April 22, 2002 decision.²³ As noted above, evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁴

The term clear evidence of error is intended to represent a difficult standard. 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.²⁵ The Board finds that appellant's request for reconsideration did not show on its face that OWCP committed error when, in its April 22, 2002 decision, it determined that the medical evidence was insufficient to establish a causal relationship between appellant's diagnosed conditions and the August 9, 2000 employment incident. Thus, the evidence is insufficient to demonstrate clear evidence of error.

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

CONCLUSION

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.

²¹ *Supra* notes 9 and 10.

²² *See T.C.*, Docket No. 21-1123 (issued April 5, 2022); *Z.G.*, 19-0967 (issued October 21, 2019); *see R.M.*, 59 ECAB 690 (2008); *Merton J. Sills*, 39 ECAB 572, 575 (1988); *Bradford L. Sullivan*, 33 ECAB 1568 (1982).

²³ *C.D.*, Docket No. 19-1462 (issued June 26, 2020); *see also P.T.*, Docket No. 18-0494 (issued July 9, 2018).

²⁴ *Supra* note 20.

²⁵ *L.N.*, Docket No. 20-0742 (issued October 26, 2020).

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 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