

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

L.T., Appellant	)	
	)	
and	)	Docket No. 21-0844
	)	Issued: April 21, 2023
U.S. POSTAL SERVICE, POST OFFICE,	)	
Cordova, TN 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 May 13, 2021 appellant filed a timely appeal from a December 17, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> The most recent merit decision was a Board decision dated December 1, 2017, which became final after 30 days of issuance and is not subject to further review.<sup>2</sup> As there was no merit decision by OWCP issued within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation

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<sup>1</sup> Appellant noted on the application for review (AB-1 Form) that she was also appealing from a purported September 23, 2020 decision of OWCP. However, the only decision found in the case record dated September 23, 2020 was a Board order. *Order Remanding Case* in Docket No. 19-1964 and *Order Dismissing Petition for Recon.* in Docket No. 17-1537 (issued September 23, 2020). To the extent that this appeal constitutes a petition for reconsideration of the Board's September 23, 2020 order in Docket No 19-1964, the Board finds that this petition for reconsideration is untimely as its order became final upon the expiration of 30 days from the date of issuance. 20 C.F.R. § 501.6(d). As appellant did not file his disagreement with the Board's September 23, 2020 order until May 13, 2021, this submission may not be deemed as a timely petition for reconsideration as it was filed in excess of 30 days from the date of issuance. *See id.* at § 501.7(a). Thus, the petition for reconsideration of the September 23, 2020 Board order in Docket No. 19-1964 must be dismissed as untimely.

<sup>2</sup> 20 C.F.R. § 501.6(d). *See M.D.*, Docket No. 22-0542 (issued August 17, 2022); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

### **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>4</sup> The facts and circumstances as set forth in the Board's prior decision and prior order are incorporated herein by reference. The relevant facts are as follows.

On December 2, 2015 appellant, then a 41-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that while delivering mail on November 12, 2015 she tore her right shoulder rotator cuff when reaching behind to get a package while in the performance of duty. She stopped work on November 16, 2015 and returned on December 1, 2015.

In a December 8, 2015 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

On December 15, 2015 appellant completed the development questionnaire, indicating that she had informed her supervisor that her shoulder hurt when she returned to the employing establishment on November 12, 2015. She also indicated that she had similar work-related injuries. In a December 17, 2015 statement, an employing establishment supervisor indicated that appellant reported a work injury on November 12, 2015.

On November 24, 2015 Dr. Thomas W. Throckmorton, a Board-certified orthopedic surgeon, noted a history of right shoulder pain since November 12, 2015 when appellant felt sharp pain while reaching for something in her mail truck. He described physical examination findings, noting that it was significant for a positive Hawkins sign. Dr. Throckmorton diagnosed right rotator cuff strain. He advised that appellant could return to work with a lifting restriction of five pounds and no overhead work.

Also of record is medical evidence dated March 30 through May 17, 2006.<sup>5</sup> These medical reports included diagnoses of shoulder, wrist, and arm pain.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> *Order Remanding Case* in Docket No. 19-1964 and *Order Dismissing Petition for Recon.* in Docket No. 17-1537 (issued September 23, 2020); Docket No. 17-1537 (issued December 1, 2017).

<sup>5</sup> Appellant has a prior occupational disease claim (Form CA-2), assigned OWCP File No. xxxxxx593, for bilateral shoulder and hand pain as of March 31, 2006. The claim was adjudicated by OWCP on June 16, 2006 and was denied. OWCP has not administratively combined appellant's claims.

By decision dated January 12, 2016, OWCP denied appellant's traumatic injury claim. It accepted that the November 12, 2015 incident occurred as alleged, but found that the evidence submitted was insufficient to establish that her medical condition was causally related to the accepted November 12, 2015 employment incident.

On March 29, 2016 appellant requested reconsideration.<sup>6</sup> In a January 5, 2016 treatment note, Dr. Throckmorton indicated that she felt her shoulder had somewhat improved, but that her pain had not resolved. He recommended a magnetic resonance imaging (MRI) scan. On February 1, 2016 Dr. Throckmorton indicated that when appellant reached for a parcel in her mail truck on November 12, 2015 she felt a pull or pop in her right shoulder, and that this action was the direct cause of her current shoulder condition. On a February 1, 2016 attending physician's report (Form CA-20), he noted a positive Hawkins sign, diagnosed bursitis and right shoulder rotator cuff impingement, and reiterated her physical restrictions.

A February 24, 2016 MRI scan of the right shoulder was normal. In a treatment note dated February 24, 2016, Dr. Throckmorton noted that appellant had significant right shoulder pain. He described the MRI scan findings and noted the positive biceps tenderness and Hawkins tests. Dr. Throckmorton diagnosed right shoulder impingement and right biceps tendinitis. He recommended right shoulder arthroscopic surgery.

In a June 27, 2016 decision, OWCP denied modification of its prior decision. It found the medical evidence of record insufficient to establish the claim.

On March 1, 2017 appellant through her then-counsel, requested reconsideration. A July 25, 2016 operative report indicated that Dr. Throckmorton performed right shoulder arthroscopic surgery. In a treatment note dated August 22, 2016, he referenced his February 1, 2016 report. Dr. Throckmorton advised that appellant was first treated by Dr. Garnett Andrew Murphy, a Board-certified orthopedic surgeon, on November 16, 2015 and was then referred to him for treatment of right shoulder pain. At that time, appellant reported a roughly two-day history that, when she was reaching back for a parcel, she heard a popping in her shoulder that led to progressive pain.

An August 28, 2016 emergency department report, completed by Dr. Timothy Edward Long, a Board-certified internist, noted that appellant was three weeks post right shoulder surgery and had right arm pain and swelling. He described examination findings and diagnosed swelling of upper extremity, carpal tunnel syndrome, hypertension, and diabetes.

A September 7, 2016 electromyogram and nerve conduction velocity (EMG/NCV) study demonstrated severe right brachial plexopathy involving all peripheral nerves in the right upper extremity, with the median nerve distribution most affected.

On September 9, 2016 Dr. Throckmorton discussed the EMG/NCV findings and noted physical examination findings which demonstrated a resting tremor in the right hand. He advised that appellant essentially could not be examined due to pain. Dr. Throckmorton diagnosed status

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<sup>6</sup> Appellant had initially requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. On March 18, 2016 she withdrew the request.

post right shoulder arthroscopy with biceps tenodesis, subacromial decompression, and labral debridement, and right reflex sympathetic dystrophy versus Parsonage-Turner syndrome. In a September 16, 2016 form report, he noted positive EMG/NCV findings and advised that appellant could work with one hand only.<sup>7</sup>

On January 16, 2017 Dr. Apurva R. Dalal, a Board-certified orthopedic surgeon, noted a history of previous surgery and ongoing severe right shoulder pain and loss of range of motion. He described physical examination findings noting minimal tenderness over the acromioclavicular (AC) joint and diminished right shoulder motion. Right shoulder ultrasound demonstrated fluid collection in the subacromial space and moderate arthrosis of the AC joint with a normal-appearing rotator cuff. Dr. Dalal injected appellant's right shoulder. On January 23, 2017 he noted full right shoulder range of motion with negative supraspinatus and impingement tests. Dr. Dalal diagnosed right shoulder rotator cuff tendinitis.

On February 16, 2017 Dr. Dalal noted that appellant's right shoulder was doing well, but that she had significant problems in the median nerve distribution with burning pain and significantly decreased pinch strength. He noted the EMG/NCV findings and reported evidence of brachial plexopathy and carpal tunnel syndrome on examination with positive Phalen's and Tinel's tests. Dr. Dalal diagnosed right carpal tunnel syndrome and injected appellant's right hand.

By decision dated May 19, 2017, OWCP denied modification of its prior decisions.

Appellant, through her then-counsel, appealed to the Board. By decision dated December 1, 2017, the Board affirmed OWCP's May 19, 2017 decision, finding that appellant had not met her burden of proof to establish a right shoulder injury causally related to the accepted November 12, 2015 employment incident.<sup>8</sup>

On December 13, 2018 appellant requested reconsideration.<sup>9</sup> In support thereof, she submitted a number of medical reports dated from November 16, 2015 to December 12, 2018. In the November 16, 2015 note, Dr. Murphy, a Board-certified orthopedic surgeon, diagnosed subacromial bursitis *versus* small rotator cuff tear, right shoulder. He noted appellant's history of reaching back for a parcel in her delivery vehicle and experiencing a pop or pull in her shoulder.

On July 25, 2018 Dr. Throckmorton performed right shoulder arthroscopy with biceps tenodesis, subacromial decompression, and labral debridement.

Appellant provided a November 20, 2018 narrative statement describing her employment incident.

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<sup>7</sup> The record does not indicate when appellant stopped work.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> OWCP's April 2, 2019 decision notes that appellant's request for reconsideration was received on December 4, 2018. This, however, appears to be a typographical error as the record establishes that it was received on December 13, 2018.

In a December 12, 2018 report, Dr. Throckmorton noted that he first examined appellant in November 2015 and described her accepted November 12, 2015 employment incident. He found that, due to the consistent history of injury as well as the temporal relationship between the onset of pain immediately upon reaching for an object in her vehicle while at work, it was more likely than not that her diagnosed condition resulted from the employment incident. Dr. Throckmorton reported that appellant underwent shoulder arthroscopy and developed pronounced reflex sympathetic dystrophy as a consequential injury.

By decision dated April 2, 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 order dated September 23, 2020,<sup>10</sup> the Board found that OWCP failed to properly explain the findings with respect to the issue presented so that she could understand the basis for the decision, *i.e.*, whether she had demonstrated clear evidence that OWCP's last merit decision was incorrect. The Board set aside OWCP's April 2, 2019 decision and remanded the case for findings of fact and a statement of reasons, to be followed by an appropriate decision.

By decision dated December 17, 2020, OWCP found that appellant's request for reconsideration 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>11</sup> OWCP's regulations<sup>12</sup> establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one-year also accompanies any subsequent merit decision on the issues.<sup>13</sup> Timeliness is determined by the document receipt date, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).<sup>14</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>15</sup>

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision

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<sup>10</sup> *Supra* note 4.

<sup>11</sup> 5 U.S.C. § 8128(a); *L.H.*, Docket No. 19-1174 (issued December 23, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>12</sup> 20 C.F.R. § 10.607(a).

<sup>13</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>15</sup> *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

was in error.<sup>16</sup> Its 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, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>17</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>18</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>19</sup> The evidence must be positive, precise, and explicit, and must manifest on its face that OWCP committed an error.<sup>20</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>21</sup> It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.<sup>22</sup> 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.<sup>23</sup> To demonstrate clear evidence of error, the evidence submitted 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>24</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>25</sup>

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<sup>16</sup> *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>17</sup> *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>18</sup> *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>19</sup> *S.T.*, *supra* note 15; *C.V.*, *supra* note 16; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>20</sup> *S.T.*, *id.*; *E.P.*, *supra* note 18; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>21</sup> *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 18; *C.V.*, *supra* note 16; *Leon J. Modrowski*, *supra* note 16; *Jesus D. Sanchez*, *supra* note 16.

<sup>22</sup> *V.G.*, *supra* note 18; *E.P.*, *supra* note 18; *Leona N. Travis*, *supra* note 20.

<sup>23</sup> *L.B.*, *supra* note 21.

<sup>24</sup> *D.G.*, *supra* note 17; *Leon D. Faidley, Jr.*, *supra* note 15.

<sup>25</sup> *C.V.*, *supra* note 16; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

## 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.

OWCP's regulations<sup>26</sup> and procedures<sup>27</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 issue(s).<sup>28</sup> The most recent merit decision addressing appellant's traumatic injury claim was the December 1, 2017 decision of the Board.<sup>29</sup> As her request for reconsideration was not received by OWCP until December 13, 2018, more than one year after the December 1, 2017 decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error.

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether the evidence of record is sufficient to establish that her right shoulder condition is causally related to the accepted November 12, 2015 employment incident. In support of appellant's request for reconsideration, OWCP received a report from Dr. Throckmorton dated December 12, 2018. Dr. Throckmorton's opinion, however, did not include medical rationale, did not manifest on its face that OWCP committed an error in denying appellant's claim, and was not of sufficient probative value to raise a substantial question as to the correctness of OWCP's merit decision.<sup>30</sup> Thus, this report is insufficient to demonstrate clear evidence of error. The remainder of the medical evidence submitted with appellant's untimely request for reconsideration also did not address the issue of causal relationship between appellant's right shoulder condition and the accepted November 12, 2015 employment incident. Thus, this medical evidence is irrelevant to the underlying issue of her traumatic injury claim and fails to manifest on its face that OWCP committed an error in denying appellant's traumatic injury claim.<sup>31</sup> None of the evidence manifests. Appellant has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.<sup>32</sup> Thus, the Board finds that the evidence submitted on reconsideration is insufficient to demonstrate clear evidence of error on the part of OWCP in its May 19, 2017 decision.<sup>33</sup>

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<sup>26</sup> 20 C.F.R. § 10.607(a); *see J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>27</sup> *Supra* note 14 at Chapter 2.1602.4.

<sup>28</sup> 20 C.F.R. § 10.607(b).

<sup>29</sup> *See N.P.*, Docket No. 21-0042 (issued August 18, 2021) (a timely request for reconsideration must be filed within one year of the Board's decision, as it was the most recent merit decision).

<sup>30</sup> *Supra* notes 21 and 22.

<sup>31</sup> *J.C.*, Docket No. 20-1250 (issued May 24, 2021).

<sup>32</sup> *Id.*

<sup>33</sup> *See W.R.*, Docket No. 18-1042 (issued February 12, 2019).

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

**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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 17, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2023  
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