

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

S.T., Appellant	)	
	)	
and	)	<b>Docket No. 22-1019</b>
	)	<b>Issued: April 10, 2023</b>
DEPARTMENT OF THE ARMY, McALESTER	)	
ARMYAMMUNITION PLANT, McAlester, OK,	)	
Employer	)	
	)	

*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 24, 2022 appellant filed a timely appeal from April 25 and June 8, 2022 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 5, 2019, 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.

**ISSUES**

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error; and (2) whether OWCP properly denied appellant's request for an oral hearing as reconsideration was previously requested.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On September 12, 2019 appellant, then a 30-year-old explosives worker/materials handler, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral carpal tunnel syndrome due to factors of her federal employment, including using hand tools, pushing buggies, cleaning lugs, and performing other repetitive work duties on a daily basis. She noted that she first became aware of her claimed injury on January 1, 2019 and realized its relation to her federal employment on June 26, 2019. Appellant stopped work on July 8, 2019.

In an accompanying statement, appellant indicated that her job required her to repetitively push heavy objects, squeeze pliers, and make twisting and swirling motions with a wire brush. She indicated that during each 50-hour week she worked in 2018 she had to push 30 bomb carts carrying three bombs weighing 2,000 pounds each, pull three plugs out of each bomb with pliers, and clean the threads of each bomb with a wire brush. Appellant submitted a description of the position of explosives worker/materials handler and a November 25, 2018 notification of personnel action Standard Form (SF) 50 memorializing a within-grade basic pay increase in the position.

In an October 4, 2019 development letter, OWCP notified appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding appellant's allegations. It afforded both parties 30 days to respond.

In an October 17, 2019 letter, appellant's supervisor indicated that appellant removed plugs from each 2,000-pound bomb with pliers, sprayed the bomb threads with an alcohol solution, and cleaned the lug holes with a wire brush. The supervisor maintained that appellant cleaned six lug holes at a time, a task that would take approximately one minute. She asserted that, in a normal work shift of approximately seven hours, appellant would clean a total of 174 lug holes during a normal 10-hour work shift. The supervisor indicated that she generally had her workers perform other tasks to avoid too much repetition of the same task.

Appellant submitted an October 23, 2019 report from Dr. Patrick R. Gannon, a Board-certified orthopedic surgeon, who indicated that appellant reported that she had bilateral wrist pain/numbness, which she believed was caused by repetitive movement of her wrists at work. He reported physical examination findings, including the results of range of motion (ROM) testing of the wrists. Dr. Gannon diagnosed bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, and ordered diagnostic testing of the wrists.

By decision dated November 5, 2019, OWCP accepted the implicated employment factors; however, it denied her claim, finding that she did not submit sufficient medical evidence to establish a medical condition casually related to the accepted employment factors.

On April 21, 2022 appellant requested reconsideration of the November 5, 2019 decision.

In an October 22, 2019 report, Dr. Gannon noted that appellant reported numbness and tingling in her wrists. He reported physical examination findings, including bilateral elbow

tenderness in the cubital tunnels and bilateral positive Tinel's signs. Dr. Gannon diagnosed bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, left arm pain, and right wrist pain. He indicated that appellant engaged in strenuous use of her hands at her federal job, including frequently pushing carts laden with 6,000 pounds of bombs, engaging in strenuous and repetitive use of pliers, and frequent cleaning with brushes. Dr. Gannon opined that these repetitive, strenuous work-related tasks are more likely than not responsible for, or at the very least severely aggravated, appellant's carpal and cubital tunnel syndromes.

In an October 21, 2020 report, Dr. Matthew L. Jenkins, an osteopath and Board-certified family medicine specialist, indicated that appellant reported that she had been stung by a wasp approximately one hour prior to presenting to him. He provided physical examination findings and diagnosed hornet sting.

Appellant submitted a November 10, 2020 report from Dr. John W. Ellis, a Board-certified environmental and family medicine specialist, who indicated that appellant described her work duties, including pushing carts weighing 3,000 pounds and buggies weighing 500 pounds, pulling three plugs out of each bomb with pliers, spraying the plugs with cleaning solution by using a device that vibrated, and cleaning the lug hole threads with a wire brush. Appellant advised that she performed this procedure on approximately 100 bombs per day. Dr. Ellis noted that appellant complained of pain and numbness in her upper extremities, including pain in the volar and radial aspect of her wrist and the medial and lateral aspects of her elbows.<sup>2</sup> He reported the findings of his physical examination, noting that in each elbow appellant had mild tenderness to palpation over the medial and lateral epicondyles with negative Tinel's sign. Appellant exhibited a positive Finkelstein test in each wrist/hand, and a positive Tinel's sign over the median and ulnar nerves in each wrist/hand. Dr. Ellis diagnosed cervical strain and the following bilateral conditions: carpal tunnel syndrome, wrist tendinitis/de Quervain's stenosing tenosynovitis, elbow cubital tunnel syndrome, medial/lateral epicondylitis, shoulder strain, and brachial plexus impingement.

In the portion of the report discussing the causal relationship between the diagnosed conditions and work duties, Dr. Ellis detailed FECA precedent and indicated that a given condition is compensable if employment factors contributed, in any way, to the condition. He opined that, based on his examination findings, review of the evidence, and education, training, and experience, that "the injuries, impairments and disabilities set forth in my diagnosis, findings and impairments, arose out of and in the course of the employee's employment and that employment factors and work duties contributed to, aggravated and/or caused this employee's said injuries, disabilities, and impairments set forth in this report." Dr. Ellis maintained that appellant's repetitive heavy work caused multiple strains of the posterior cervical muscles, the lower cervical muscles, and shoulder girdle muscles, which caused straining of the acromioclavicular joint bilaterally. He indicated that appellant's repetitive work with vibratory tools and with torquing and wiping caused the tendons of the medial and lateral aspects of both elbows to become hypertrophied. Appellant's elbows then became inflamed with tendinitis and caused impingement of the ulnar nerves of the elbows, which in turn caused cubital tunnel syndrome with objective findings of ulnar nerve impingement seen on an electromyogram/nerve conduction velocity (EMG/NCV) study. Dr. Ellis

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<sup>2</sup> Dr. Ellis indicated that on June 18, 2020 appellant underwent right carpal tunnel and cubital tunnel releases. The procedures were not authorized by OWCP.

opined that appellant's repetitive gripping and use of vibratory tools and spray wands caused strains of the volar aspect of both wrists and the radial aspect of both wrists with de Quervain's stenosing tenosynovitis. He maintained that the hypertrophied tendons in the wrists then impinged the median nerve, a condition which constituted bilateral carpal tunnel syndrome found on the EMG/NCV study. Dr. Ellis noted, "[t]he complexity of her symptoms of the upper extremities including the neck are consistent with her heavy manual work being aggravated, contributing to and accelerating her conditions in a young woman that would not have occurred if she had not been working at the [employing establishment]." He opined that appellant was temporarily partially disabled and could not perform overtime work. In a November 10, 2020 work status form, Dr. Ellis indicated that appellant could work eight hours per day with restrictions, including continuously lifting no more than 10 pounds, intermittently lifting no more than 20 pounds, and reaching above shoulder level for no more than four hours per day. Appellant could not engage in any climbing.

In December 9, 2020, March 10, May 5, June 23, September 22, and October 20, 2021 reports, Dr. Ellis restated his discussion of appellant's work duties and diagnoses as he provided in his November 10, 2020 report. He provided the same discussion of the causal relationship between the diagnosed conditions and work duties as he provided in his November 10, 2020 report.

In December 9, 2020 and January 28, March 10, April 28, and May 3 and 5, 2021 work status reports, Dr. Ellis indicated that appellant could work eight hours per day and provided work restrictions, including restrictions on lifting, reaching above shoulder level, and climbing.

By decision dated April 25, 2022, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On May 19, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated June 8, 2022, OWCP determined that appellant was not entitled to an oral hearing as a matter of right because she had previously requested reconsideration of her claim on April 21, 2022. OWCP, in its discretion, then considered appellant's request and determined that the request was denied for the reason that the issue of the case could equally well be addressed by requesting reconsideration and submitting new evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>3</sup> 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.<sup>4</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

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

<sup>4</sup> 20 C.F.R. § 10.607(a).

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

OWCP may not deny a request for reconsideration 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.<sup>7</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>8</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>11</sup> 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 request for reconsideration bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>12</sup> 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.<sup>13</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>14</sup> The claimant must present evidence, which on its face shows that OWCP made an error.<sup>15</sup> 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

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

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *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).

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

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

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

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

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

<sup>15</sup> *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

development, is not clear evidence of error.<sup>16</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>17</sup>

### **ANALYSIS -- ISSUE 1**

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.

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.<sup>18</sup> As appellant's request for reconsideration was not received by OWCP until April 21, 2022, more than one year after issuance of its November 5, 2019 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its November 5, 2019 merit decision.

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

Appellant submitted a November 10, 2020 report from Dr. Ellis who provided a description of appellant's work duties, reported physical examination findings, and diagnosed cervical strain and numerous bilateral upper extremity conditions, including carpal tunnel syndrome and cubital tunnel syndrome. In the portion of the report discussing the causal relationship between the diagnosed conditions and work duties, he opined that "the injuries, impairments and disabilities set forth in my diagnosis, findings and impairments, arose out of and in the course of the employee's employment and that employment factors and work duties contributed to, aggravated and/or caused this employee's said injuries, disabilities, and impairments set forth in this report." Dr. Ellis maintained that appellant's repetitive heavy work caused multiple strains of the posterior cervical muscles, the lower cervical muscles, and shoulder girdle muscles, which caused straining of the acromioclavicular joint bilaterally and caused the tendons of the medial and lateral aspects of both elbows to become hypertrophied and inflamed. He asserted that this circumstance caused impingement of the ulnar nerves of the elbows, which in turn caused cubital tunnel syndrome. Dr. Ellis opined that appellant's repetitive gripping and use of vibratory tools and spray wands caused strains of the volar aspect of both wrists and the radial aspect of both wrists with de Quervain's stenosing tenosynovitis. He maintained that the hypertrophied tendons in the wrists then impinged the median nerve, a condition that constituted bilateral carpal tunnel syndrome. Dr. Ellis asserted that appellant's cervical and upper extremity symptoms were consistent with her heavy manual work and "would not have occurred if she had not been working at the [employing establishment]." He opined that appellant was temporarily partially disabled and could not perform overtime work. In December 9, 2020, March 10, May 5, June 23, September 22, and October 20, 2021 reports, Dr. Ellis repeated his diagnoses and opinion on causal relationship between the diagnosed conditions and work duties as he provided in his November 10, 2020 report.

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<sup>16</sup> *Id.*

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

<sup>18</sup> *See supra* notes 11 and 13.

The Board finds that these reports of Dr. Ellis do not raise a substantial question concerning the correctness of OWCP's November 5, 2019 decision. These reports do not demonstrate that OWCP improperly concluded in its November 5, 2019 decision that appellant failed to establish a work-related injury.<sup>19</sup> As noted above, clear evidence of error is intended to represent a difficult standard. 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. Instead, the evidence must shift the weight in appellant's favor.<sup>20</sup> The reports of Dr. Ellis are insufficient to shift the weight in appellant's favor with respect to her claim.

In an October 22, 2019 report, Dr. Gannon diagnosed bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, left arm pain, and right wrist pain. He indicated that appellant engaged in strenuous use of her hands at her federal job, including frequently pushing carts laden with 6,000 pounds of bombs, engaging in strenuous and repetitive use of pliers, and frequent cleaning with brushes. Dr. Gannon opined that these repetitive, strenuous work-related tasks were more likely than not responsible for, or at the very least severely aggravated, appellant's carpal and cubital tunnel syndromes. The Board finds, however, that this report does not raise a substantial question concerning the correctness of OWCP's November 5, 2019 decision.<sup>21</sup>

Appellant submitted an October 21, 2020 report, wherein Dr. Jenkins provided physical examination findings and diagnosed hornet sting. This report does not establish clear evidence of error in OWCP's November 5, 2019 decision because it bears no relationship to appellant's claim and thus does not raise a substantial question concerning the correctness of OWCP's November 5, 2019 decision.<sup>22</sup>

In November 10 and December 9, 2020, and January 28, March 10, April 28, and May 3 and 5, 2021 work status reports, Dr. Ellis indicated that appellant could work eight hours per day and provided work restrictions, including restrictions on lifting, reaching above shoulder level, and climbing. However, these reports do not raise a substantial question concerning the correctness of OWCP's November 5, 2019 decision.<sup>23</sup>

The Board finds that the evidence submitted on reconsideration does not demonstrate on its face that OWCP committed error when it found in its November 5, 2019 decision that appellant failed to establish a medical condition causally related to the accepted employment factors.<sup>24</sup> Therefore, OWCP properly denied her untimely request for reconsideration.

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<sup>19</sup> See *supra* notes 10 and 15.

<sup>20</sup> See *supra* notes 13, 14, and 16.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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

## LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>25</sup> Section 10.615 of OWCP's federal regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.<sup>26</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>27</sup> The date of filing is fixed by postmark or other carrier's date marking.<sup>28</sup>

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.<sup>29</sup> Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA, which provided the right to a hearing,<sup>30</sup> when the request is made after the 30-day period for requesting a hearing,<sup>31</sup> when the request is for a second hearing on the same issue,<sup>32</sup> and when the request is made after a reconsideration request was previously submitted.<sup>33</sup> In these instances, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>34</sup>

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<sup>25</sup> 5 U.S.C. § 8124(b)(1).

<sup>26</sup> 20 C.F.R. § 10.615.

<sup>27</sup> *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>28</sup> *See* 20 C.F.R. § 10.616(a).

<sup>29</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>30</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>31</sup> *E.R.*, Docket No. 20-1110 (issued December 23, 2020); *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>32</sup> *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>33</sup> *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007). Section 10.616(a) of OWCP's regulations provides that the claimant seeking a hearing must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. 20 C.F.R. § 10.616(a).

<sup>34</sup> *See Rudolph Bermann*, *supra* note 27.



## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for an oral hearing as reconsideration was previously requested.

The case record establishes that appellant requested a hearing on May 19, 2022, after she had requested reconsideration on April 21, 2022. Hence, the Board finds that she was not entitled to a hearing as a matter of right.<sup>35</sup> OWCP, in its discretion, then properly considered appellant's request and determined that the request was denied for the reason that the issue of the case could equally well be addressed by requesting reconsideration and submitting new evidence.<sup>36</sup>

The Board has held that as the only limitation on OWCP's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions from known facts.<sup>37</sup> The Board thus finds that OWCP properly denied appellant's request for a hearing.

## **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. The Board further finds that OWCP properly denied her request for an oral hearing as reconsideration was previously requested.

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<sup>35</sup> See *supra* note 33.

<sup>36</sup> See *S.J.*, *supra* note 33.

<sup>37</sup> See *S.I.*, Docket No. 22-0538 (issued October 3, 2022); *R.Z.*, Docket No. 10-1915 (issued May 19, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 25 and June 8, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 10, 2023  
Washington, DC

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

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

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