

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 6, 2019 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained rotator cuff shoulder pain and knee pain related to duties of his federal employment including casing mail, entering and exiting his postal vehicle. He first became aware of the conditions, and first realized that they were caused or aggravated by duties of his federal employment on August 11, 2019. OWCP accepted appellant's claim for right shoulder impingement syndrome, unspecified rotator cuff tear or rupture of the right shoulder, sprain of the right rotator cuff capsule, temporary aggravation of internal derangement of the medial meniscus of the right knee, and complex tear of the right knee medial meniscus. Its records indicate that he worked in a limited-duty status until he stopped work on November 25, 2020. The record reflects that appellant received intermittent wage-loss compensation on the supplemental and periodic rolls commencing November 25, 2020.

Appellant submitted multiple claims for compensation (Forms CA-7 and CA-7a) for intermittent leave without pay for the period December 21, 2018 through January 2, 2020.

By decision dated January 9, 2020, OWCP denied appellant's claim for compensation for disability from December 21, 2018 and continuing. It reviewed the submitted medical evidence of record, and found that appellant had not submitted sufficient medical evidence to establish that he was disabled for the relevant period.

On January 16, 2020 appellant requested reconsideration.

By decision dated March 18, 2020, OWCP reviewed the merits of appellant's claim, and denied modification of its January 9, 2020 decision. It again noted the medical evidence of record, and found that he had not submitted sufficient medical evidence to establish that he was disabled for the claimed dates and hours of leave without pay.

On May 8, 2020 appellant requested reconsideration. By decision dated May 28, 2020, OWCP denied modification.

On April 8, 2022 appellant, through counsel, requested reconsideration of OWCP's March 18, 2020 decision, denying wage-loss compensation from June 19, 2019 until November 25, 2020. Counsel stated that the basis of the request was a new legal argument, to wit: "[Appellant's] doctors and the second opinion doctor all agree that [appellant] could only work light duty during [the claimed period], the agency did not offer a limited-duty job offer during this period, the [statement of accepted facts] was inaccurate, and the medical [evidence] established that [appellant] suffered residuals of the accepted conditions which entitled him to wage compensation[.]"

Submitted with the request for reconsideration was an August 27, 2020 report from Dr. Michael Einbund, a Board-certified orthopedic surgeon serving as a second opinion physician, which had previously been received by OWCP on September 8, 2020; and a work capacity

evaluation for musculoskeletal conditions (Form OWCP-5c) dated September 3, 2020 in which Dr. Einbund recommended work restrictions of no reaching above the shoulder, restrictions related to pulling, pushing, and lifting no more than 50 pounds; and no more than one hour per day of squatting or kneeling. Appellant also submitted a work status report dated April 8, 2019 from Dr. Jeffrey Schultz, a Board-certified orthopedic surgeon, in which Dr. Schultz recommended that appellant return to modified work on that date with limited use of the right arm and hand, and limited pushing, pulling, and grasping with the right hand. Finally, appellant resubmitted his June 6, 2019 Form CA-2. OWCP also received a copy of an employing establishment letter to appellant dated October 27, 2020 which noted that appellant had been off work since May 18, 2019; however, appellant had not submitted acceptable documentation to substantiate his absence from duty.

By decision dated July 7, 2022, 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.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include preresoupment hearing decisions.⁷ Timeliness is determined by the document receipt date of the reconsideration request, *i.e.* the received date in the Integrated Federal Employees' Compensation System (iFECS). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.⁸

OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error on the part of it in its most recent merit decision. The request must establish, on

⁴ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application.” 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

⁷ *Id.* at Chapter 2.1602.4a. (September 2020).

⁸ *Id.* at Chapter 2.1602.4b (September 2020); *see also S.J.*, Docket No. 19-1864 (issued August 12, 2020); *W.A.*, Docket No. 17-0225 (issued May 16, 2017).

its face, that such decision was erroneous.⁹ The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the request by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, as it was untimely filed, and failed to demonstrate clear evidence of error.¹¹

OWCP's regulations establish a one-year time limit for requesting reconsideration, which begins on the date of the original merit decision. The most recent merit decision on this issue was the March 18, 2020 decision denying modification of OWCP's January 9, 2020 decision. As OWCP received appellant's request for reconsideration on April 8, 2022, more than one year after the March 18, 2020 merit decision, the Board finds that the request was untimely filed.¹²

The Board further finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether he has submitted sufficient medical evidence to establish disability intermittently from December 21, 2018 through January 2, 2020, the period addressed in OWCP's January 9, 2020 decision. On reconsideration, appellant submitted a brief from counsel arguing that OWCP committed error. He also submitted medical records including an August 27, 2020 report from Dr. Einbund, which had previously been received by OWCP on September 8, 2020; and a work capacity evaluation for musculoskeletal conditions (Form OWCP-5c) dated September 3, 2020 in which Dr. Einbund recommended work restrictions of no reaching above the shoulder, restrictions related to pulling, pushing, and lifting no more than 50 pounds; and no more than one hour per day of squatting or kneeling. Appellant also submitted a work status report dated April 9, 2019 from Dr. Schultz, in which he recommended that appellant return to modified work on that date with limited use of the right arm and hand, and limited pushing, pulling, and grasping with the right hand. Additionally, he resubmitted his June 6, 2019 Form CA-2.

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.¹³ The Board finds that the argument and evidence submitted on reconsideration do not show that OWCP committed error in its July 7, 2022 decision. Appellant has not otherwise submitted evidence sufficient to raise a substantial question as to the correctness of OWCP's July 7, 2022 decision.

⁹ *W.A., id.; D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ *Supra* note 6 at Chapter 2.1602.5a. (September 2020).

¹¹ *D.B.*, Docket No. 19-0648 (issued October 21, 2020); *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

¹² *Id.*

¹³ *H.H.*, Docket No. 21-1137 (issued January 26, 2023).

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

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2023
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