

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

_____)	
D.S., Appellant)	
)	
and)	Docket No. 23-0396
)	Issued: December 27, 2023
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Omaha, NE, Employer)	
_____)	

Appearances:
Guadalupe Dominguez, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 17, 2023 appellant, through his representative, filed a timely appeal from a September 21, 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 February 17, 2021, 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, following the September 21, 2022 decision, OWCP received additional evidence and appellant submitted additional evidence 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

On January 5, 2010 appellant, then a 33-year-old realty specialist, filed a traumatic injury claim (Form CA-1) alleging that on June 20, 2009 he sustained injury to both shoulders when he was unloading furniture from a truck while in the performance of duty.

OWCP accepted the claim for bilateral shoulder impingement syndrome; left shoulder calcifying tendinitis; disorder of bursae and tendons in left shoulder; and sprain of left shoulder, left upper arm, and left rotator cuff. Appellant underwent OWCP-authorized left shoulder rotator cuff repair and left arthroscopic subacromial decompression surgery on July 8, 2010.

On December 8, 2020 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of medical treatment as of June 20, 2009, the same date as his accepted employment injury. He noted that due to work, he was only able to receive treatment for his left shoulder and he had been favoring his right shoulder and now needed medical treatment for the right shoulder.

In a development letter dated December 4, 2020, OWCP advised appellant of the deficiencies of his recurrence claim. It informed him of the type of evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. No response was received within the time allotted.

By decision dated February 17, 2021, OWCP denied appellant's claim for a recurrence of the need for medical treatment as the medical evidence of record was insufficient to establish that he required additional medical treatment due to a worsening of his accepted work-related conditions, without an intervening cause. It also found that the medical evidence of record was insufficient to establish that his current condition was related to his original injury, without an intervening cause.

In a development letter dated March 9, 2021, OWCP again advised appellant of the deficiencies of his recurrence claim and informed him of the type of evidence required. It provided a questionnaire for his completion and afforded him 30 days to submit the necessary evidence.

On March 29, 2021 OWCP received appellant's March 24, 2021 response to its development questionnaire. He indicated that around October 2019 he was carrying his backpack and felt a sharp pain while lifting it onto his right shoulder. Appellant explained that he was released to regular work by his physician but told to monitor the right shoulder. He explained that it was "never fixed" and he continued to have pain off and on, which had worsened.

OWCP received diagnostic reports and treatment notes that addressed appellant's additional right shoulder conditions and need for surgical treatment.

In a letter dated July 16, 2021, appellant requested an "expansion" of the acceptance of his claim to include a right rotator cuff tear caused by his accepted June 20, 2009 employment injury. He noted that on January 25, 2010 diagnostic tests were performed on both shoulders and uploaded. Appellant reported that despite being told by a physician that his right shoulder

condition would repair itself, he continued to experience increasing pain and could hardly lift his right arm. He indicated that on March 26, 2016 he was advised by a second physician that rotator cuff surgery was promptly needed because he did not undergo the surgery earlier.

OWCP subsequently received additional medical evidence.

In a memorandum of telephone call (Form CA-110) dated August 11, 2021, appellant informed OWCP that he had been trying to obtain the status of his “recon[sideration] request” uploaded July 16, 2021.” He related that he was told by a congressional office that he should have received an acknowledgement letter. An OWCP claims examiner indicated that appellant’s request was indexed as an incoming/statement and reports and not as an incoming reconsideration request. She further indicated that she had “reindexed” his request as of August 11, 2021 and it was now being tracked. The claims examiner then informed appellant that his reconsideration request would be assigned to a quality assurance and mentoring examiner (QAM) for review, a decision would be issued within 90 days, and an acknowledgement letter would be forthcoming.

On September 15, 2022 appellant, through his representative, requested reconsideration of the February 17, 2021 decision. She contended that appellant had submitted sufficient medical evidence to establish a recurrence of the need for medical treatment due to the worsening of his accepted employment-related conditions.

In a decision dated September 21, 2022, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.⁴

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁵ To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.⁶ 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

⁴ The Board notes that while OWCP’s September 21, 2022 letter was not accompanied by appeal rights, it was a final adverse decision issued by OWCP. In that letter, OWCP found that the appellant’s request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. In considering whether a document constitutes a final decision, it is not the form, but the content and the intention of OWCP that is determinative. *K.K.*, Docket No. 19-0652 (issued September 19, 2019); *see Henry F. Dyer*, Docket No. 05-452 (issued May 13, 2005) (the Board held that a July 22, 2004 letter with no appeal rights attached constituted a final decision. The Board concludes, therefore, that the September 21, 2022 letter was an appealable final decision subject to review under 20 C.F.R. §§ 501.2(c) and 501.3(a). *See B.K.*, Docket No. 23-0126 (issued May 10, 2023); *R.G.*, Docket No. 21-0706 (issued April 17, 2023); *K.W.*, Docket No. 18-0055 (issued March 8, 2019); *L.L.*, Docket No. 18-0117 (issued February 25, 2019).

⁵ 5 U.S.C. § 8128(a); *see M.M.*, Docket No. 21-1203 (issued December 22, 2022); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

(iFECS).⁷ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

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 review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁹ OWCP's procedures provide that it 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 demonstrates clear evidence of error on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

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.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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 evidence of error on the part of OWCP.¹⁴ To demonstrate clear evidence of error, the evidence 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.¹⁵ 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.¹⁶

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁸ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ See 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); see also *id.* at § 10.607; *supra* note 7 at Chapter 2.1602.5a (September 2020).

¹¹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² 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).

¹³ See *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ *B.W.*, *supra* note 12.

¹⁵ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 11.

¹⁶ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Board finds that OWCP improperly determined that appellant's request for reconsideration was untimely filed.

OWCP denied appellant's claim for a recurrence of the need for medical treatment by decision dated February 17, 2021, as the medical evidence of record was insufficient to establish that he required additional medical treatment due to a worsening of his accepted June 20, 2009 work-related conditions or that he sustained an additional condition causally related to his employment-related injury, without an intervening cause. In its September 21, 2022 decision, OWCP found that it received appellant's request for reconsideration more than one year after the February 17, 2021 merit decision. Because appellant's request was untimely filed, it applied the clear evidence of error standard in determining whether to undertake further merit review of the claim. OWCP ultimately concluded that appellant had not demonstrated clear evidence of error, and thus, denied further merit review of the claim. The Board finds, however, that appellant timely requested reconsideration on July 16, 2021.

In a July 16, 2021 letter, received by OWCP on that date, appellant requested an "expansion" of the acceptance of his claim to include a right rotator cuff tear caused by his accepted June 20, 2009 employment injury. He noted that diagnostic tests had been performed on both shoulders and uploaded to his case file. Appellant submitted additional medical evidence in support of his claim. No special form is required as long as the request is made in writing, identifies the decision and specific issue to be considered, and is accompanied by relevant and pertinent new evidence not previously considered.¹⁷ The word reconsideration does not need to be stated in the request for it to be considered valid, but sufficient detail should be provided to discern the decision being contested.¹⁸ Although the July 16, 2021 letter does not mention the word reconsideration, appellant intimated that he wanted a review of his recurrence claim as he specifically addressed whether he sustained an additional employment-related right shoulder condition by noting his submission of supportive medical evidence.

Moreover, the record contains a Form CA-110 dated August 11, 2021, which indicated that appellant specifically requested reconsideration on July 16, 2021, and that OWCP incorrectly processed his request. On August 11, 2021 appellant inquired about the status of his "recon[sideration] request" uploaded July 16, 2021." He reported that he had not received an acknowledgment letter regarding his request. In response, an OWCP claims examiner acknowledged that appellant's July 16, 2021 request was incorrectly processed as an incoming/statement and reports rather than an incoming reconsideration request. She "reindexed" his request for reconsideration as of August 11, 2021, and advised him that his reconsideration request would be assigned to a QAM for review, a decision would be issued within 90 days, and an acknowledgement letter would be forthcoming.

¹⁷ *P.H.*, Docket No. 21-0364 (May 13, 2022); *M.W.*, Docket No. 21-0841 (issued October 26, 2021); *E.S.*, Docket No. 17-0698 (issued July 14, 2017); *R.D.*, Docket No. 14-896 (issued August 1, 2014); *Jack D. Johnson*, 57 ECAB 593 (2006); *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

¹⁸ *Id.*; see also *M.H.*, Docket No. 14-1389 (issued October 22, 2014).

In light of the foregoing, the Board finds that appellant's July 16, 2021 letter and medical evidence constituted a timely request for reconsideration.¹⁹

As appellant filed a request for reconsideration within one year of the February 17, 2021 OWCP decision, the Board finds that OWCP improperly denied his reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).²⁰ Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request, to be followed by an appropriate decision.²¹

CONCLUSION

The Board finds that OWCP improperly determined that appellant's request for reconsideration was untimely filed.

¹⁹ *Supra* note 17; *see also D.S.*, Docket No. 15-1841 (issued June 8, 2016); *C.M.*, Docket No. 11-1988 (issued June 6, 2012).

²⁰ 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provide that a request reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

²¹ *Supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2022 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 27, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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