

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

J.T., widow of J.T., Appellant)	
)	
and)	Docket No. 23-0863
)	Issued: December 29, 2023
DEPARTMENT OF DEFENSE, DEFENSE)	
DEPOT, Memphis, TN, Employer)	
)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 9, 2023 appellant filed a timely appeal from a December 13, 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 November 29, 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 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 December 13, 2022 decision, the Board received additional evidence. 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 of the merits of her claim, finding that it was untimely filed, and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated hereby by reference. The relevant facts are as follows.

On July 25, 1991 the employee, then a 42-year-old management analyst, filed a traumatic injury claim (Form CA-1) alleging that on July 24, 1991 he injured his left leg when he tripped on a piece of carpet and fell in his office. OWCP accepted the claim for a left ankle sprain. It subsequently expanded its acceptance of the claim to include causalgia of the left and right lower limbs, cellulitis of the right and left lower limb, cellulitis of an unspecified part of limb, chronic pain syndrome, complex regional pain syndrome (CRPS) of the bilateral lower limbs, displacement of a lumbar intervertebral disc without myelopathy, dry mouth, other cysts of the oral region, partial loss of teeth due to periodontal diseases, and lumbar spondylolisthesis. The employee stopped work on July 24, 1991 and did not return. OWCP paid him wage-loss compensation on the periodic rolls.

On April 18, 2019 appellant notified OWCP that the employee had passed away on April 12, 2019 and that she believed that his death was due to his accepted employment injury.

By letter dated April 24, 2018, OWCP advised appellant of the type of medical evidence needed to establish that the employee's accepted employment injuries caused or contributed to his death. It provided her with a claim form for compensation by widow, widower, and/or children (Form CA-5) to request survivor's benefits.

On June 10, 2019 appellant filed a Form CA-5 requesting survivor's benefits. A physician assistant completed the medical portion of the CA-5 form and listed the employee's death as CRPS with contributory causes of severe and relapsing cellulitis, atrial fibrillation, Parkinson's disease, multiple injuries to the lumbar vertebrae, Type 2 diabetes mellitus, hypothyroidism, benign paroxysmal position vertigo, restless leg syndrome, cataracts, and severe dry mouth. The physician assistant related that after the employee's last back surgery in 2016 he developed cellulitis, sepsis, and organ failure and was diagnosed with CRPS, which accelerated his health problems.

A certificate of death filed May 9, 2019 provided CRPS as the cause of the employee's death on April 12, 2019 with underlying causes of atrial fibrillation, Parkinson's disease, and type 2 diabetes mellitus.

In a report dated July 17, 2019, Dr. Sailaja Raju, who specializes in family medicine, advised that the employee developed cellulitis in his lower limbs after a 2016 surgery, following

⁴ Docket No. 16-0731 (issued May 11, 2017).

which he was diagnosed to CRPS. She related that CRPS caused the employee's pneumonia and atrial fibrillation which became "unresponsive to treatment and led to [the employee's] subsequent passing."

On November 13, 2019 Dr. Nizar Souayah, a Board-certified neurologist serving as a district medical adviser (DMA), that the employee's condition may have made him vulnerable, but that his death "was related to pneumonia, atrial fibrillation, sepsis, and hypoxic brain injury. These conditions are not directly related to the [employee's] work injury." Dr. Souayah discussed appellant's hospitalization and multiple treatments, and again opined that the direct causes of death were unrelated to the employment injury.

On December 6, 2019 OWCP referred the evidence to Dr. Frank P. Lin, a Board-certified neurologist, for a second opinion regarding the cause of the employee's death.

In a report dated December 6, 2019, Dr. Lin reviewed the employee's history of injury and subsequent surgeries. He opined that the accepted July 24, 1991 employment injury did not cause or accelerate the employee's death. Dr. Lin noted that in April 2019 the employee was hospitalized due to pneumonia, sepsis, and respiratory failure. He related, "The direct cause of death is the cardiac arrest and hypoxic brain injury which are secondary to the sepsis, pneumonia, and atrial fibrillation."

By decision dated January 16, 2020, OWCP denied appellant's claim for survivor's benefits, finding that the medical evidence was insufficient to establish causal relationship between the employee's death and his accepted employment injury.

On February 13, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearing and Review.

By decision dated August 31, 2020, OWCP's hearing representative affirmed the January 16, 2020 decision.

On August 31, 2021 appellant, through counsel, requested reconsideration. She submitted a September 5, 2020 report from Dr. Raju, who related that CRPS accelerated the employee's death.

By decision dated November 29, 2021, OWCP denied modification of its August 31, 2020 decision. The decision contained appeal rights, including the right to reconsideration or review by the Board.

On July 26, 2022 Dr. Francis X. Camillo, a Board-certified orthopedic surgeon, advised that he had treated the employee since 2016. He related that, after the employee's July 19, 2016 back surgery, he had developed cellulitis and causalgia and was diagnosed with CRPS. Dr. Camillo advised that the employee was in a wheelchair due to severe and debilitating CRPS, and developed high blood pressure and atrial fibrillation (A-fib) as a result of Ketamine infusions to treat the CRPS. He indicated that the employee was hospitalized on April 3, 2019 for pulmonary problems and cardiac arrest due to A-fib and ventricular tachycardia, which caused an anoxic brain injury and death. Dr. Camillo related that, while the employee was admitted due to respiratory problems, it did not cause his death. He asserted, "The cardiac arrest was caused and/or accelerated

by the work injury as it was the work injury that increased the blood pressure and caused the A-fib.”

On December 4, 2022 appellant, through counsel, requested reconsideration. Counsel noted that OWCP had failed to respond to the employee’s request to expand the acceptance of his claim to include diabetes and an aggravation of Parkinson’s disease. He argued that Dr. Souayah used an incorrect standard of causation in finding that work was not the direct cause of the employee’s death rather than addressing whether it was a contributing cause. Counsel noted that Dr. Lin attributed the cause of death, in part, to sepsis, a complication from a back surgery that the employee’s physician should be an accepted condition. He maintained that the employee’s CRPS had worsened his diabetes and elevated his blood pressure, because of ketamine injections, resulting in A-fib. Counsel argued that both Dr. Lin and Dr. Souayah found that “these complications led to [the employee’s] death” and that when the correct standard was applied the claim was compensable.

On December 7, 2022 appellant’s counsel contended that OWCP’s November 29, 2021 decision failed to contain appeal rights. In a December 9, 2022 response, OWCP advised that the November 29, 2021 decision did in fact include appeal rights.

By decision dated December 13, 2022, OWCP denied appellant’s request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error. It noted that she had submitted new medical evidence, but found that new medical evidence was not considered in clear evidence of error determinations, and that she had therefore not established 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.⁵ 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.⁶ Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS)).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

When a request for reconsideration is untimely, OWCP undertakes 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

⁵ 5 U.S.C. § 8128(a); *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).

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

⁸ *W.B.*, Docket No. 23-0473 (issued August 29, 2023); *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

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

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). 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 development, is not clear evidence of error.¹⁴ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

The Board finds that OWCP properly found that appellant's request for reconsideration was untimely filed.

OWCP's regulations¹⁶ and procedures¹⁷ 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

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(b); *supra* note 7 at Chapter 2.1602.5 (September 2020).

¹¹ *S.D.*, Docket No. 23-0626 (issued August 24, 2023); *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *J.M.*, Docket No. 22-0630 (issued February 10, 2023); *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

¹³ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 11.

¹⁴ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (September 2020).

¹⁵ *L.J.*, Docket No. 23-0282 (issued May 26, 2023); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁶ 20 C.F.R. § 10.607(a); *see L.T.*, Docket No. 21-0844 (issued April 21, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁷ *Supra* note 7 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁸ The most recent merit decision was OWCP's November 29, 2021 decision. As appellant's December 4, 2022 request for reconsideration was received more than one year after the November 29, 2021 decision, the Board finds that it was untimely filed. Therefore, she must demonstrate clear evidence of error by OWCP in denying her claim for survivor's benefits.¹⁹

The Board further finds that OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.²⁰ As noted, section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.²¹ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the director of OWCP shall contain findings and facts and a statement of reasons.²² As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim, and the kind of evidence which would overcome it.²³

In denying appellant's request for reconsideration, OWCP acknowledged her reconsideration request and receipt of the 2022 reports from Dr. Camillo. It did not address the legal arguments raised by counsel that Dr. Souayah used an incorrect causation standard and that, if the correct standard was applied, Dr. Lin and Dr. Souayah found that complications from CRPS caused the employee's death. The Board will therefore set aside OWCP's December 13, 2022 decision, and remand the case for an appropriate decision on appellant's untimely reconsideration request, which addresses the legal arguments raised by counsel.²⁴

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed. The Board further finds that the case is not in posture for decision regarding whether she has demonstrated clear evidence of error.

¹⁸ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁹ *Id.* at § 10.607(b); see *W.B.*, Docket No. 23-0473 (issued August 29, 2023); *M.W.*, Docket No. 17-0892 (issued May 21, 2018).

²⁰ See *LL.*, Docket No. 23-0329 (issued August 1, 2023); *L.J.*, *supra* note 15; *M.G.*, Docket No. 21-0893 (issued December 27, 2021); see also *id.* at § 10.607(b).

²¹ 5 U.S.C. § 8124(a).

²² 20 C.F.R. § 10.126.

²³ *Supra* note 7 at Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

²⁴ See *L.J.*, *supra* note 15; *VR.*, Docket No. 19-0536 (issued February 22, 2021).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 29, 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