

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 September 12, 2015 appellant, then a 35-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on September 12, 2015 a hatch door gave way causing him to slip and fall. OWCP accepted his claim for concussion with loss of consciousness of 30 minutes or less; lumbar and pelvis sprain; cervical spine ligament sprain; lumbar intervertebral disc displacement; lumbar intervertebral disc disorders with radiculopathy; herniated cervical disc at C4-C5 level with radiculopathy; chondromalacia of the right knee; and right ankle tibiofibular ligament sprain.

By letter dated February 27, 2020, appellant requested OWCP expand the acceptance of his claim to include a partial tear of the anterior talofibular ligament of the right ankle; bilateral shoulder superior labrum, anterior to superior (SLAP) tears, partial thickness tears of supraspinatus, infraspinatus; and subscapularis tendons; right shoulder tear of the subscapularis tendons; and partial tear of the glenohumeral ligament.

Appellant enclosed a letter dated February 26, 2020 from Dr. Robert R. Reppy, an osteopathic physician specializing in family medicine, wherein he asserted that appellant's accepted diagnoses should be expanded to include partial thickness tear of the right talofibular ligament, partial thickness tears of the left and right supraspinatus and infraspinatus tendons and right subscapularis tendon and glenohumeral ligament. Dr. Reppy opined, with reasonable certainty, that appellant's injury which occurred on September 12, 2015, included the force needed to tear the left and right supraspinatus and infraspinatus tendons as well as the right subscapularis tendon and glenohumeral ligament. He also stated that the right talofibular ligament tear, although not a direct result of appellant's injury, was a secondary result to appellant's altered gait.

OWCP received a medical report dated March 4, 2020 from Dr. Daniel Murphy, a Board-certified orthopedic sports medicine specialist. Dr. Murphy related that appellant was injured at work after a fall in 2015 and that he was seen for shoulder pain. He diagnosed appellant with left and right shoulder impingement and bilateral SLAP tears of the shoulders.

In a development letter dated April 2, 2020, OWCP advised appellant that additional factual and medical evidence was necessary to establish his claim. It afforded him 30 days to submit the necessary evidence.

In response, appellant submitted a statement dated April 17, 2020, wherein he reiterated the history of his injury and described the progression of his medical conditions.

By decision dated May 8, 2020, OWCP denied appellant's request for expansion of the acceptance of his claim to include a consequential injury.

In a note dated May 7, 2020, Dr. Reppy related that on September 15, 2015 appellant fell down a flight of stairs at work. He explained that appellant's fall, which involved his entire body

weight impacting against the edges of the stairs and the concrete floor of landing, accelerated by gravity, was more than enough to rupture the ligaments and connective tissues of the rotator cuffs and tendons. Dr. Reppy clarified that although the main focus of appellant's treatment had been the cervical and lumbar spines, appellant complained of bilateral shoulder pain from the start which was due to the same accident that caused his neck and back pain. He further explained that appellant's talofibular ankle injury developed later as a consequence to the altered gait dynamics imposed by the lumbar injury. Dr. Reppy further stated that accepted intervertebral lumbar disc injury with radiculopathy negatively impacted all nerves exiting at the lumbar level and extending down the legs. He explained that appellant's lumbar injury affected the sensory ability of his brain to know where his limbs were located relative to the rest of his body. This resulted in dozens of misplacements in gait, each a micro-trauma stretching and straining the ligaments which could in turn tear the ligament. Dr. Reppy opined that with a reasonable degree of medical certainty, that appellant's diagnoses were pathomechanically related to his employment injury.

OWCP received medical reports dated May 6 and 20, 2020 from Dr. Bruce Kammerman, a Board-certified family and emergency medicine specialist. Dr. Kammerman stated that appellant's shoulder conditions were part of his initial injury and that a tear of ligaments in the right ankle resulted as a secondary injury due to gait alteration.

On May 27, 2020 appellant requested reconsideration of OWCP's May 8, 2020 decision.

In a letter dated June 15, 2020, Dr. Reppy explained appellant's injury using the same language as his report dated May 7, 2020. He again concluded, with a reasonable degree of medical certainty, that appellant's injury on September 12, 2015 was the direct and proximate cause of his diagnoses. In an attending physician's report (Form CA-20) of even date, Dr. Reppy indicated by an affirmative checkmark that appellant's injuries were caused or aggravated by his employment activity.

By decision dated July 23, 2020, OWCP denied modification of its May 8, 2020 decision.

OWCP continued to receive medical evidence. A magnetic resonance imaging (MRI) scan report dated February 4, 2020 from Dr. Brian Butler, a Board-certified diagnostic radiologist, noted an impression of SLAP-type tear of the labrum, prominent linear tear of the posterior labrum, mild increased signal in the anterior labrum, which would be degenerative in nature or represent a small tear, mild thickening of and increased signal with the distal aspect of the supraspinatus tendon consistent with tendinosis, increased signal at the insertion site of the infraspinatus tendon suggesting a partial tear, and arthropathy of the acromioclavicular joint with mild narrowing of the subacromial space suggestive of chronic changes.

OWCP received medical progress reports dated April 20, June 1, July 1 and 29, and August 4, 2020 from Dr. Reppy. In his April 20 and July 29, 2020 reports, Dr. Reppy diagnosed C4-5 and L4-5 herniated discs, with radiculopathy. In his June 1, July 1, and August 4, 2020 reports, he repeated his cervical and lumbar diagnoses. Dr. Reppy also noted that appellant's ankle pain was likely consequential to his employment injury, but would require an MRI scan to adequately diagnose.

OWCP received medical reports dated August 4 and September 17, 2020 from Dr. Mark A. Seldes, a Board-certified family practice specialist. Dr. Seldes recounted appellant's medical history. He noted diagnoses of appellant's accepted conditions, as well as bilateral rotator cuff tears and bilateral SLAP tears of the shoulders, and possible right shoulder partial tear of the supraspinatus, infraspinatus, or subscapularis tendon. Dr. Seldes requested that OWCP accept appellant's bilateral shoulder conditions which he related occurred as a direct result of his fall unto his back and tearing of part of his shoulders.

In an x-ray report dated September 25, 2020, Dr. Darren M. Buono, a Board-certified radiologist, found no abnormality in appellant's right ankle.

Appellant submitted an electromyography report dated October 26, 2020 from Dr. Robert Guirguis, an osteopathic physician Board-certified in pain medicine, which stated that the report showed findings consistent with lumbar radiculopathy affecting the right S1 nerve root.

In progress reports dated November 17 and December 22, 2020, and May 25, 2021, Dr. Seldes restated appellant's prior diagnoses and affirmed they were related to appellant's accepted work-related injury.

On July 28, 2021 appellant requested reconsideration of OWCP's July 23, 2020 decision. He alleged that Dr. Seldes had related that his shoulder injuries should be accepted as part of his claim.

By decision dated August 6, 2021, OWCP denied appellant's request for reconsideration finding that it was untimely and failed to demonstrate clear evidence of error. It noted his allegation regarding Dr. Selde's reports, but found that appellant had 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.³ 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.⁴ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

³ *Id.* at § 8128(a); *see T.J.*, Docket No. 21-0586 (issued September 30, 2021); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

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

⁶ *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).

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.⁷ 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 for reconsideration demonstrates "clear evidence of error" on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹⁰ 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.¹¹

OWCP's 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.¹²

ANALYSIS

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

⁷ 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).

⁸ *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); *supra* note 5 at Chapter 2.1602.5 (September 2020).

⁹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5a (September 2020).

¹¹ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹² *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (September 2020).

OWCP's regulations¹³ and procedures¹⁴ 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 issues.¹⁵ The most recent merit decision pertaining to appellant's request to expand the acceptance of his conditions was dated July 23, 2020. As OWCP received his request for reconsideration on July 28, 2021, more than one year after the July 23, 2020 decision, the Board finds that it was untimely filed. Because appellant's request was untimely filed, he must demonstrate clear evidence of error on the part of OWCP in denying his claim for wage-loss compensation on the claimed date.

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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹

In the August 6, 2021 decision, OWCP acknowledged appellant's reconsideration request and allegation therein, but did not consider or address the medical reports received following the July 23, 2020 merit decision from Drs. Seldes, Reppy, Buono, and Guirguis. It failed to analyze this evidence as to whether it was sufficient to demonstrate clear evidence of error. The Board finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether he had demonstrated clear evidence that OWCP's last merit decision was incorrect.

The case must, therefore, be remanded for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

¹³ 20 C.F.R. § 10.607(a); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁴ *Supra* note 5 at Chapter 2.1602.4 (September 2020); *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

¹⁶ *T.T.*, Docket No. 21-1278 (issued March 29, 2022); *see also* 20 C.F.R. § 10.607(b).

¹⁷ 5 U.S.C. § 8124(a).

¹⁸ 20 C.F.R. § 10.126.

¹⁹ Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, 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).

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 appellant has demonstrated clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2021 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: February 9, 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