United States Department of Labor
Employees' Compensation Appeals Board

G.H., Appellant	)	
and	)	**Docket No. 22-0394**
	)	**Issued: February 6, 2023**
DEPARTMENT OF THE INTERIOR, FISH & WILDLIFE SERVICE, Manistee, MI, Employer	)	

Appearances:
Shelley Coe, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 19, 2022 appellant filed a timely appeal from an August 11, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 25, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

[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.*

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 May 22, 2017 appellant, then a 53-year-old biological science technician, filed an occupational disease claim (Form CA-2) alleging that he developed neck and shoulder pain, limited range of motion, multiple cervical conditions, carpal tunnel syndrome (CTS), and bilateral ulnar neuropathy due to factors of his federal employment, including an incident at work. He noted that he first became aware of his condition and realized its relation to his federal employment on March 10, 2010. Appellant stopped work on April 17, 2017.

In a letter dated May 30, 2017, A.J., an employing establishment supervisor, controverted appellant's claim. He noted that he had supervised appellant since April 2014, and that he was in a nonpay furlough status on March 10, 2010. A.J. further indicated that he was unable to corroborate the claim, because appellant had never formally reported any work-related injuries to his neck or shoulders.

In a June 13, 2017 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

OWCP thereafter received medical evidence, including a July 29, 2010 medical report by Dr. Richard L. Mogerman, an orthopedic surgeon, who noted that appellant related complaints of discomfort and stiffness in the right shoulder, scapula, and paracervical muscles for the past one and one-half years without any specific injury. Dr. Mogerman performed a physical examination and documented discomfort with abduction and external rotation against resistance and positive impingement signs in the shoulder. He obtained x-rays of the right shoulder and cervical spine, which revealed mild degenerative changes in the right acromioclavicular (AC) joint and spondylosis and degenerative disc disease at C5-6 with straightening of cervical lordosis. Dr. Mogerman diagnosed early rotator cuff tendinopathy and impingement syndrome of the right shoulder, chronic myoligamentous strain of the cervical spine, and cervical spondylosis and degenerative disc disease at C5-6.

In a report dated September 13, 2010, Dr. Mogerman reviewed a magnetic resonance imaging (MRI) scan of the right shoulder and cervical and updated his diagnoses to include herniated intervertebral discs at C5-6 and C6-7, with central canal and neural foraminal stenosis affecting multiple levels. In a report dated October 11, 2010, he noted ongoing intermittent symptoms and recommended a neurosurgical consultation.

In a report dated October 29, 2010, Dr. J. Eric Zimmerman, a neurosurgeon, indicated that appellant related complaints of right shoulder and neck pain, which he attributed to lifting at work approximately one year prior. He reviewed an MRI scan of the cervical spine and opined that there were no abnormalities that correlated with right upper extremity pain.

In a report dated January 17, 2011, Dr. Mogerman noted appellant's ongoing, intermittent symptoms. On January 31, 2011 he indicated that he related an increase in his symptoms after playing a boxing-style video game. Dr. Mogerman performed a physical examination and diagnosed acute myoligamentous strain of the cervical spine and herniated intervertebral discs at C5-6 and C6-7 with central canal and neural foraminal stenosis affecting multiple levels.

In a report dated October 27, 2011, Dr. Mogerman noted that appellant had undergone a cervical injection by Dr. Greenslait on August 25, 2011, which provided temporary relief. He further noted that appellant was laid off from work. Thereafter, on November 21, 2011, Dr. Mogerman reviewed an updated cervical MRI scan dated November 14, 2011, which showed slight progression of herniated discs at C3-4, C5-6, and C6-7. In a report dated December 19, 2011, he indicated there were no interval changes on examination.

In a report dated April 16, 2012, Dr. Tim Lenters, a Board-certified orthopedic surgeon, noted that appellant related complaints of chronic right scapula pain into his neck and that his job duties included lifting, pushing, pulling, and carrying a backpack. On examination, he documented medial winging of the scapula with overhead elevation of the right arm with tenderness to palpation along the medial border of the scapula. Dr. Lenters diagnosed scapulothoracic bursitis of the right shoulder.

A report of computerized tomography (CT) scan of the right shoulder dated April 16, 2012 revealed degenerative changes of the right acromioclavicular (AC) joint with narrowing and a bony exostosis projecting from the body of the scapula.

In a report dated July 12, 2012, Dr. Mogerman noted that appellant complained of symptoms of the thoracoscapular joint, but advised that his cervical symptoms were improved and quiescent with no specific associated neurologic symptoms. He performed a physical examination and diagnosed chronic right shoulder pain, thoracoscapular pain syndrome, snapping scapula syndrome, and chronic rotator cuff tendinopathy.

In reports dated December 4 and 11, 2012, Dr. Mogerman noted that appellant related that he was laid off from work until April, and that his cervical symptoms had been stable and generally quiescent, but that his right shoulder remained troublesome. He recommended conservative care and activity modifications.

In a report dated January 8, 2013, Dr. Mogerman noted that appellant related his cervical and right shoulder symptoms were exacerbated by traveling to North Carolina. He ordered an updated cervical MRI scan.

An electromyogram and nerve conduction velocity (EMG/NCV) study dated February 18, 2013 revealed evidence of bilateral mild CTS and predominantly left-sided mild C5-6 radiculopathy.

In a report dated June 25, 2013, Dr. Mogerman noted that appellant continued to complain of right shoulder and cervical pain, but that his examination showed no interval findings. He recommended a cortisone injection to the right shoulder.

In a note dated March 17, 2014, Robin Inknayan, a physician assistant, indicated that appellant related complaints of right shoulder pain since 2010. She performed an examination and diagnosed pain in the shoulder region and scapula.

In a note dated December 9, 2014, Dr. Mogerman noted that he obtained x-rays which revealed advanced spondylosis and degenerative disc disease at C5-6 and straightening of cervical lordosis consistent with paraspinous and myoligamentous strain.

An MRI scan of the cervical spine dated May 19, 2015 noted a history of neck and back pain, right finger paresthesia with neck and hand weakness, and a history of an anterior fusion with laminectomy. The study revealed postsurgical changes consistent with anterior C3-T1 cervical spine fusion with multilevel laminectomy resulting in capacious central canal without large disc bulge or central canal stenosis.

In a report dated June 1, 2015, Dr. Allan Nelson, a family medicine specialist, noted that appellant related a history of tiny spasms in his shoulders and left leg for two weeks and that appellant did not feel that he was capable of returning to work.

On February 21, 2017 Jordan Maccoux, a physician assistant, noted that appellant related complaints of daily back pain and a history of numbness, tingling, weakness, and pain in his hands for three months. He further noted a history of carpal tunnel release and neck surgery by Dr. John Cilluffo, a neurosurgeon. Mr. Maccoux performed a physical examination and diagnosed radicular pain, muscle spasm, and chronic low back pain with bilateral sciatica.

An MRI scan of the cervical spine dated February 23, 2017 revealed increased degenerative changes at C2-3 and C7-T1 with increased kyphosis at C7-T1.

In form reports dated April 13, 2017, Dr. Yousif Hamati, a Board-certified orthopedic surgeon, indicated that appellant was totally disabled due to neck pain, arthrodesis, cervical spondylosis with radiculopathy, CTS, and ulnar neuropathy.

OWCP received a summary of office visit dates and various medical records for unrelated conditions, including from Dr. Nelson regarding gastroesophageal reflux disease, a broken ankle, and low back pain dated February 2010 through November 2016. It also received reports from Dr. Mogerman for right knee and quadriceps pain dated July 2010 through May 2014 and for back pain dated March 28, 2011. Additionally, OWCP diagnostic studies including a report of thoracic spine MRI scan dated February 3, 2010, a report of chest CT scan dated January 15, 2015, and a report of lumbar MRI scan dated February 23, 2017.

By decision dated July 25, 2017, OWCP denied appellant's occupational disease claim, finding that he had not established the factual component of his claim. It noted that he had not responded to its development. Therefore, OWCP concluded that appellant had not met the requirements to establish an injury under FECA.

On May 20, 2021 appellant, through counsel, requested reconsideration of OWCP's July 25, 2017 decision. In support of the request for reconsideration, counsel argued that evidence previously of record, specifically a March 28, 2011 report of Dr. Mogerman; January 28 and February 18, 2010 and October 15, 2014 notes from Dr. Nelson; a February 3, 2010 MRI scan;

and March 17, 2014 progress notes from River Valley Orthopedics had not been reviewed by OWCP.

By decision dated August 11, 2021, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate 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 of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).[5] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[6]

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.[7] If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.[8]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[9] The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.[10] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[11] 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

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

[4] 20 C.F.R. § 10.607(a).

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

[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 id*. at § 10.607(b).

[9] *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).

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

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

whether the new evidence demonstrates clear error on the part of OWCP.[12] 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's procedures note that the term clear evidence of error is intended to represent a difficult standard.[14] The claimant must present evidence which on its face shows that OWCP made an error.[15] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[16]

ANALYSIS

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.

OWCP's last merit decision was dated July 25, 2017. Appellant had one year from OWCP's July 25, 2017 decision to request reconsideration. As OWCP received appellant's request for reconsideration on May 20, 2021, more than one year after the July 25, 2017 merit decision. Appellant's request was therefore untimely filed. Consequently, he must demonstrate clear evidence of error on the part of OWCP in its July 25, 2017 decision.[17]

The Board further finds that appellant has not demonstrated clear evidence of error. In support of reconsideration, counsel argued that OWCP failed to consider various medical reports of record from Drs. Mogerman, and Nelson, an MRI report, and reports from Ms. Inknayan in its initial denial. The Board finds, however, that the argument and evidence referenced by appellant in his untimely request for reconsideration is irrelevant to the underlying issue in this case, *i.e.*, whether the evidence of record is insufficient to establish an injury in the performance of duty, as alleged. As this issue is factual in nature, the argument raised on reconsideration with regard to medical evidence is insufficient to shift the weight of the medical evidence to appellant's favor or raise a substantial question as to the correctness of OWCP's July 25, 2017 decision.[18]

The Board finds that appellant's request for reconsideration did not show on its face that OWCP committed error when, in its July 25, 2017 decision, it determined that appellant did not

[12] *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

[13] *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

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

[15] *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

[16] *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

[17] *Supra* note 7.

[18] *C.D.*, Docket No. 19-1462 (issued June 26, 2020); *see also P.T.*, Docket No. 18-0494 (issued July 9, 2018).

meet his burden of proof to establish that an injury occurred in the performance of duty, as alleged. Thus, the evidence is insufficient to demonstrate clear evidence of error.[19]

Accordingly, 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.

CONCLUSION

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.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[19] *M.M.*, Docket No. 17-0183 (issued June 1, 2017); *see also F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).