

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

_____)	
D.V., Appellant)	
)	
and)	Docket No. 22-1298
)	Issued: January 13, 2023
DEPARTMENT OF AGRICULTURE, APHIS –)	
EMERGENCY PROGRAMS, Worcester, MA,)	
Employer)	
_____)	

Appearances:
Lisa Varughese, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

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

On September 1, 2022 appellant, through counsel, filed a timely appeal from a March 8, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellant Boards docketed the appeal as Docket No. 22-1298.²

On October 19, 2015 appellant, then a 38-year-old tree climber, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2015 he felt pain in his left shoulder when swinging to grab a tree branch while in the performance of duty. He stopped work on October 16, 2015 and returned to work with restrictions on November 30, 2015. OWCP accepted the claim

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 On September 21, 2022 the Board received counsel's September 20, 2022 letter which indicated that her representation of appellant had concluded.

for strain of the rotator cuff of the left shoulder.³ It paid appellant wage-loss compensation on the supplemental rolls as of December 14, 2015 and on the periodic compensation rolls effective May 1, 2017 as the employing establishment could no longer accommodate his limited duty.

In a February 11, 2019 report, Dr. Gregory Gasbarro, a Board-certified orthopedic surgeon, noted the history of the October 14, 2015 work injury. He opined that appellant's left shoulder pain may be due to a superior labrum anterior and posterior tear. Dr. Gasbarro recommended a new magnetic resonance (MR) arthrogram, which appellant underwent on April 19, 2019.⁴

OWCP referred appellant, along with October 31, 2018 statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Stanley Horn, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of his employment-related condition. In an April 1, 2019 report, Dr. Horn reviewed appellant's history, including the October 31, 2018 SOAF, and opined that appellant had no residuals of the original injury.

On April 17, 2019 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Horn's second opinion report that appellant no longer had residuals of the October 14, 2015 work injury.

In response to OWCP's notice of proposed termination, appellant submitted additional evidence, including a May 10, 2019 report from Dr. Guido Guidotti, an occupational medicine specialist, who opined that Dr. Horn's report was insufficient to support termination of benefits as appellant had a diagnosed left shoulder impingement syndrome.

OWCP subsequently found that a conflict in medical evidence existed between Dr. Guidotti and Dr. Horn as to whether there were residuals of the October 14, 2015 work injury. It referred appellant, along with an updated June 20, 2019 SOAF, to Dr. Robert R. Pennell, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence.

In a July 16, 2019 report, Dr. Pennell opined that appellant had no residuals of the October 14, 2015 work injury, and any current disability from work was due to preexisting nonindustrial causes. He concluded that the sole work-related diagnosis was a left shoulder rotator cuff strain, which had resolved and no longer disabled appellant from work.

On August 6, 2019 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits because his October 14, 2015 employment-related injury had resolved. It found that the special weight of the medical evidence rested with the July 16, 2019 report of Dr. Pennell, OWCP's impartial medical examiner (IME), who found that appellant no

³ Under OWCP File No. xxxxxx774, appellant filed a traumatic injury claim (Form CA-1) alleging that on January 6, 2016 he slipped on an icy slope and braced himself from falling on his left arm while in the performance of duty. A decision has not been issued in that claim.

⁴ The findings of the MR arthrogram revealed moderate acromioclavicular degenerative changes, no significant rotator cuff tendinopathy or tear, and no labral tear.

longer had any residuals or disability causally related to his accepted October 14, 2015 work injury.

By decision dated September 20, 2019, OWCP finalized the proposed notice of termination of appellant's wage-loss compensation and medical benefits, effective October 13, 2019. It found that the special weight of the medical evidence rested with Dr. Pennell, the IME, who had determined in a July 16, 2019 report, that appellant did not have residuals or disability due to the October 14, 2015 employment injury.

On September 18, 2020 appellant, through counsel, requested reconsideration and submitted evidence in support of his request.

By decision dated December 2, 2020, OWCP denied modification of the September 20, 2019 decision. It found that the special weight of the medical evidence remained with Dr. Pennell, the IME, who had determined in a July 16, 2019 report, that appellant did not have residuals or disability due to the October 14, 2015 employment injury.

On December 8, 2021 appellant, through counsel, submitted a December 1, 2021 request for reconsideration and submitted evidence in support of his request.

By decision dated March 8, 2022, OWCP denied modification of the December 2, 2020 decision.

The Board, having duly considered this matter, finds that this case is not in posture for decision.

Section 10.607(a) of OWCP's regulations provides that a request for reconsideration must be received within one year of the date of OWCP's last merit decision for which review is sought.⁵ 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).⁶ The Board has duly considered the matter and finds that appellant's request for reconsideration was untimely filed as it was not received until December 8, 2021, which is more than one year from OWCP's last merit decision dated December 2, 2020.

OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error on the part of its most recent decision. The request must establish, on its face, that such decision was erroneous.⁷ The standard utilized by OWCP in its March 8, 2022 decision is appropriate only for timely reconsideration requests. Because appellant filed an untimely reconsideration request, the case will be remanded to OWCP for application of the correct standard

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *Supra* note 5 at § 10.607. *See also* C.B., Docket No. 17-0933 (issued July 17, 2017); A.B., Docket No. 15-0521 (issued June 13, 2016).

for reviewing untimely reconsideration requests, the clear evidence of error standard.⁸ After such further development as OWCP deems necessary, it shall issue an appropriate decision. Accordingly,

IT IS HEREBY ORDERED THAT the March 8, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: January 13, 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

⁸ *Id.* at § 10.606(b); *M.D.*, Docket No. 19-1957 (issued June 22, 2020).