

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

<p>J.A., Appellant</p> <p>and</p> <p>DEPARTMENT OF VETERANS AFFAIRS, MICHAEL J. CRESCENZ VA MEDICAL CENTER, Philadelphia, PA, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 21-0655</p> <p>Issued: July 6, 2023</p>
---	---	---

Appearances:

Case Submitted on the Record

Katherine R. O'Brien, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
 PATRICIA H. FITZGERALD, Deputy Chief Judge
 JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 24, 2021 appellant filed a timely appeal from a September 24, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 14, 2019, 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.

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 September 30, 2015 appellant, then a 46-year-old supervisory diagnostic radiology technologist, filed a traumatic injury claim (Form CA-1) alleging that on September 17, 2015 he injured his lower back, neck, and knees when assisting a patient, who was having a seizure, while in the performance of duty. He explained that he was straddling over and holding down the patient with bent knees and arms for 10 minutes. Appellant stopped work on the date of injury.

A September 29, 2015 incident report documented that appellant was injured on September 17, 2015 while assisting a patient.

OWCP also received medical evidence, including an October 6, 2015 attending physician's report (Form CA-20), where Dr. Nicole Strohl, a family medicine physician, noted that on September 17, 2015 appellant injured his neck, back, and knees while assisting a patient who was having a seizure. Dr. Strohl diagnosed cervicalgia, lumbago, and knee pain. In a medical report of even date, she conducted a physical examination and reiterated her diagnoses, and additionally diagnosed neuropathy.

On October 7, 2015 the employing establishment issued an authorization for examination and/or treatment (Form CA-16). In an October 14, 2015 attending physician's report, Part B of the Form CA-16, Dr. Strohl diagnosed cervicalgia, lumbago, and knee pain and again noted that appellant injured his neck, back, and bilateral knee while assisting a patient.

In a November 2, 2015 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a November 8, 2015 response, appellant further described the alleged employment incident and his history of injuries.

OWCP also received a November 5, 2015 witness statement, wherein J.C., appellant's coworker, noted that he saw appellant on September 17, 2015 on the floor assisting a patient, who was shaking uncontrollably. J.C. related that appellant indicated that he experienced a lot of pain afterward in his neck, shoulders, and knee.

Appellant also continued to submit medical evidence including a November 25, 2015 after-visit summary, which noted that Dr. Strohl diagnosed back pain, chest wall pain, clavicle pain, muscle spasm, and neck pain.

By decision dated December 10, 2015, OWCP accepted that the September 17, 2015 employment incident occurred, as alleged, but denied appellant's claim because the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted

incident. Thus, it concluded that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive medical evidence, including a January 22, 2016 medical report, wherein Dr. Strohl diagnosed headache, cervicgia, shoulder pain, and back pain.

On October 28, 2016 appellant requested reconsideration and submitted additional evidence, including after-visit summaries.

In a March 30, 2016 medical report, Dr. Martin Ross, a Board-certified orthopedic surgeon, noted that appellant was injured on September 17, 2015 while holding down a patient, who was having a seizure. He performed a physical examination and diagnosed left sternoclavicular joint sprain.

In an April 15, 2016 medical report, Dr. Strohl diagnosed anxiety, depression, neck pain, and back pain. OWCP also received a May 18, 2016 medical report, wherein she diagnosed cervicgia, lumbago, and knee pain.

By decision dated January 26, 2017, OWCP modified the December 10, 2015 decision, finding that the medical evidence submitted was sufficient to establish a medical diagnosis in connection with the accepted employment incident. However, the claim remained denied as appellant had not established causal relationship between his diagnosed condition and the accepted September 17, 2015 employment incident.

Appellant subsequently requested reconsideration and submitted additional medical evidence.

By decisions dated April 19, 2018 and June 14, 2019, OWCP denied modification.

On June 26, 2020 appellant requested reconsideration. In a June 12, 2020 statement, he related that on March 30, 2016 Dr. Ross diagnosed sternoclavicular joint separation. Appellant explained that this condition occurred when the collarbone (clavicle) and the breastbone (sternum) were compromised. He further explained that separation occurred when the ligament tore due to a fall onto the shoulder or when hands were outstretched/pulled so much that caused a force along the length of the collarbone. Appellant contended that Dr. Ross' report and the attached clarification on sternoclavicular joint separation established causal relationship. He also attached an information sheet pertaining to sternoclavicular joint separation.

By decision dated September 24, 2020, OWCP denied appellant's request for reconsideration, 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.⁴ OWCP's regulations establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision.⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.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 reconsideration request is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's final merit decision was in error.⁹ Its procedures provide that OWCP 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.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.¹³ 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

³ 5 U.S.C. § 8128(a); *see B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *T.T.*, Docket No. 19-1624 (issued October 28, 2020); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

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

⁸ *A.M.*, Docket No. 20-0143 (issued October 28, 2020); *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *L.N.*, Docket No. 20-0742 (issued October 26, 2020); *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹¹ *V.G.*, *supra* note 5; *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Id.*

as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶

The term clear evidence of error is intended to represent a difficult standard.¹⁷ The claimant must present evidence which on its face shows that OWCP made an error.¹⁸ 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 insufficient to demonstrate clear evidence of error.¹⁹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁰

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.

As noted above, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.²¹ As appellant's request for reconsideration was not received by OWCP until June 26, 2020, more than one year after the issuance of OWCP's June 14, 2019 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error on the part of OWCP.²²

In support of his untimely request for reconsideration, appellant submitted a June 12, 2020 statement and an information sheet pertaining to sternoclavicular joint separation. These documents do not constitute medical evidence addressing the underlying issue of causal

¹⁴ *J.W.*, *supra* note 5.

¹⁵ *J.A.*, Docket No. 20-1595 (issued April 21, 2021).

¹⁶ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹⁷ *Supra* note 7 at Chapter 2.1602.4(b) (September 2020).

¹⁸ *Id.*

¹⁹ *J.J.*, Docket No. 19-0977 (issued December 31, 2020).

²⁰ *Id.*

²¹ *Supra* note 5.

²² 20 C.F.R. § 10.607(b); *J.J.*, *supra* note 19.

relationship. Evidence that is not pertinent to the underlying issue for which the claim was denied is insufficient to demonstrate clear evidence of error.²³

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, finding that it was untimely filed and failed to demonstrate clear evidence of error.²⁴

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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

²³ *D.B.*, Docket No. 20-0466 (issued December 17, 2020); *S.E.*, Docket No. 16-1258 (issued December 5, 2016); *B.F.*, Docket No. 11-1181 (issued December 8, 2011).

²⁴ The Board notes that the employing establishment issued a Form CA-16, dated October 7, 2015. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *V.S.*, Docket No. 20-1034 (issued November 25, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).