

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

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J.D., Appellant)	
)	
and)	Docket No. 23-0210
)	Issued: July 26, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
SAMUEL S. STRATTON DEPARTMENT OF)	
VA MEDICAL CENTER, Albany, NY, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 30, 2022 appellant filed a timely appeal from a September 14, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a decision of the Board, dated January 11, 2019, which became final after 30 days of issuance, and is not subject to further review.¹ As there was no merit decision issued by OWCP within 180 days from 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 20 C.F.R. § 501.6(d); *see M.S.*, Docket No. 18-0222 (issued June 21, 2018); *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

² 5 U.S.C. § 8101 *et seq.*

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.³ The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 24, 2014 appellant, then a 63-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 17, 2014 she sustained a lower back strain when she slipped and twisted her back on gravel/dirt on an elevator floor, while in the performance of duty. She did not stop work.

OWCP accepted the claim on June 10, 2014 for back sprain, lumbar region.

On August 13, 2014 appellant stopped work and did not return. That same date, she filed a notice of recurrence (Form CA-2a) alleging a return/increase of disability. Appellant explained that her symptoms had worsened despite medical treatment, and she experienced an increase in lower back spasms, as well as leg weakness and numbness. Appellant's supervisor indicated that appellant was working in full-time capacity with no restrictions during the time of the alleged recurrence.

On September 3, 2014 appellant filed claim for compensation (Form CA-7) for disability from work commencing August 13, 2014.

In support of her disability claim, appellant submitted medical reports documenting treatment for left L5 radiculopathy, L4-5 disc rupture, and L5 nerve root compression, which she related to the April 17, 2014 employment injury.⁴ She further asserted that her work-related lumbar injury resulted in numbness and weakness in her lower extremities, causing her to fall on July 5, 2014. This resulted in a consequential right ankle injury, which appellant also related to the April 17, 2014 employment injury.

By decisions dated November 7, 2014 and August 6, 2015, OWCP denied appellant's claim for a recurrence, finding that the medical evidence of record was insufficient to establish a

³ Docket No. 18-0616 (issued January 11, 2019), *petition for recon. denied*, Docket No. 18-0616 (issued September 28, 2020); Docket No. 16-0064 (issued June 1, 2016), *petition for recon. denied*, Docket No. 16-0064 (issued December 2, 2016).

⁴ In a July 16, 2014 diagnostic report, Dr. Gary Wood, a Board-certified diagnostic radiologist, reported that a computerized tomography myelogram of the lumbar spine revealed multilevel degenerative changes of the lumbar disc spaces and facet joints. He explained that the combination of findings suggested mild compressive changes related to the L4 and L5 nerve roots between the regions of the lateral recesses and neural foramen at the levels of L3-4 and L4-5.

worsening of her accepted April 17, 2014 employment injury such that she was disabled from her work commencing August 13, 2014.⁵

Appellant, through counsel, appealed to the Board on October 14, 2015. By decision dated June 1, 2016, the Board affirmed OWCP's August 6, 2015 decision, finding that the evidence of record was insufficient to establish a worsening of her accepted April 17, 2014 employment injury commencing on or after August 13, 2014.⁶ The Board explained that the evidence did not establish that the acceptance of the claim should be expanded to include the additional conditions of left L5 radiculopathy, L4-5 disc rupture, L5 nerve root compression, or a consequential right ankle injury. The Board further found that the evidence of record was insufficient to establish total disability as a result of the accepted back strain injury.

On May 24, 2017 appellant, through counsel, requested reconsideration before OWCP.

By decision dated August 16, 2017, OWCP denied modification of its prior decision.

Appellant, through counsel, appealed to the Board on January 30, 2018. By decision dated January 11, 2019, the Board affirmed OWCP's August 16, 2017 decision, finding that the evidence of record was insufficient to establish a worsening of accepted April 17, 2014 employment injury such that she was disabled from her work duties commencing August 13, 2014.⁷

On February 1, 2022 appellant requested reconsideration of OWCP's decision and argued that her April 17, 2014 employment injury continued to worsen since the time of her initial work injury, which now impacted her lower extremities. She explained that her work-related back injury required surgical intervention in May 2015 and a subsequent surgery in June 2021. Appellant further explained that she could not work because of worsening and persistent back pain, which severely limited her daily activities. She requested an independent medical examination to evaluate her ongoing employment injury.

By decision dated September 14, 2022, 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.⁸ 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

⁵ The Board notes that appellant underwent right ankle surgery on February 2, 2015 and a lumbar laminectomy on May 8, 2015. The surgeries were not authorized by OWCP.

⁶ Docket No. 16-0064 (issued June 1, 2016), *petition for recon. denied*, Docket No. 16-0064 (issued December 2, 2016).

⁷ Docket No. 18-0616 (issued January 11, 2019), *petition for recon. denied*, Docket No. 18-0616 (issued September 28, 2020).

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

decision for which review is sought.⁹ 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).¹⁰ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹¹

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.¹² If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁶ 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 whether the new evidence demonstrates clear error on the part of OWCP.¹⁷ 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.¹⁸

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁹ The claimant must present evidence which on its face shows that OWCP made

⁹ 20 C.F.R. § 10.607(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

¹¹ *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).

¹² *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).

¹³ *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).

¹⁴ *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).

¹⁵ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹⁶ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁷ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁸ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

¹⁹ *See supra* note 10 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

an error.²⁰ 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.²¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²²

ANALYSIS

The Board finds that OWCP properly denied appellant's request of reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.²³

OWCP's regulations²⁴ and procedures²⁵ 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 issue(s).²⁶ The most recent merit decision addressing appellant's traumatic injury claim was the January 11, 2019 decision of the Board.²⁷ As her request for reconsideration was not received by OWCP until February 1, 2022, more than one year after the January 11, 2019 decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error.

The Board further finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP properly denied her claim for a recurrence of total disability commencing August 13, 2014 due to a material change/worsening of her accepted April 17, 2014 employment injury. In support of her claim, appellant submitted a request for reconsideration and argued that her April 17, 2014 employment injury continued to worsen since the time of her initial employment injury, requiring surgical intervention in May 2015 and June 2021. She asserted that she could not work because of worsening and persistent back pain, which impacted her lower extremities and severely limited her daily activities. Appellant did not, however, submit evidence in support of her reconsideration request raising a substantial question concerning the correctness of the denial of her claim.

²⁰ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

²¹ *Id.*

²² *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²³ *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

²⁴ 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).

²⁵ *Supra* note 19 at Chapter 2.1602.4.

²⁶ 20 C.F.R. § 10.607(b).

²⁷ *See N.P.*, Docket No. 21-0042 (issued August 18, 2021) (a timely request for reconsideration must be filed within one year of the Board's decision, as it was the most recent merit decision).

Appellant did not submit evidence demonstrating that OWCP committed an error in denying her claim for a recurrence of total disability in its August 16, 2017 decision.²⁸ She has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.²⁹ Thus, appellant has not demonstrated clear evidence of error.³⁰

As appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error, the Board finds that OWCP properly denied her request for reconsideration.³¹

CONCLUSION

The Board finds that 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.

²⁸ *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

²⁹ *T.H.*, Docket No. 19-0887 (issued October 20, 2020).

³⁰ *J.B.*, Docket No. 20-0630 (issued April 21, 2021).

³¹ With respect to findings made in the Board's prior decisions, those matters are *res judicata* absent any further review by OWCP under section 8128 of FECA. See *Robert G. Burns*, *supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board