

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

E.R., Appellant)	
)	
and)	Docket No. 21-0423
)	Issued: June 20, 2023
U.S. POSTAL SERVICE, POST OFFICE, Savannah, GA, Employer)	
)	

Appearances:
Appellant, pro se
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 28, 2021 appellant filed a timely appeal from a November 19, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated February 25, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

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.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested oral argument before the Board. 20C.F.R. § 501.2(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20C.F.R. § 501.5(a). In support of appellant's oral argument request, it was asserted that oral argument should be granted because OWCP had applied an incorrect standard to the evidence submitted. The Board in exercising its discretion, denies appellant's request for oral argument because the Board does not have jurisdiction over the merits and because the arguments on a appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On June 5, 1979 appellant, then a 26-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he slipped on a rubber band, and struck his head on a mail tray while in the performance of duty.⁴ He stopped work on June 5, 1979.

On July 27, 1979 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability from work commencing July 20, 1979.

By decision dated January 31, 1980, OWCP accepted appellant's traumatic injury claim for scalp contusion; however, it denied his Form CA-7 claim from disability from work.

Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated August 7, 1980, OWCP's hearing representative affirmed the January 31, 1980 decision.

On November 11, 1980 appellant filed a claim for recurrence of disability (Form CA-2a) commencing March 29, 1980.

By nonmerit decision dated June 9, 1981, OWCP denied reconsideration of the January 31, 1980 decision.

Appellant appealed to the Board. By decision dated October 13, 1981, the Board affirmed the August 7, 1980 and June 9, 1981 decisions.⁵

Appellant requested reconsideration. By decision dated July 16, 2012, OWCP denied modification.

In a January 22, 2015 letter, appellant asserted that OWCP had not yet formally adjudicated his November 1980 recurrence of disability claim. He resubmitted a copy of the previously-filed Form CA-2a.

³ Docket No. 19-1553 (issued April 22, 2021); Docket No. 19-0538 (issued February 27, 2019); Docket No. 17-0746 (issued October 26, 2017); Docket No. 16-0052 (issued October 6, 2017); Docket No. 13-0719 (issued April 17, 2014); Docket No. 11-1689 (issued May 22, 2012); Docket No. 06-1915 (issued January 22, 2007); Docket No. 89-1581 (issued July 19, 1990); Docket No. 81-1454 (issued October 13, 1981), *petition for recon. denied*, Docket No. 81-1454 (issued December 3, 1981).

⁴ OWCP assigned the present claim OWCP File No. xxxxxx170. On December 10, 1986 appellant filed an occupational disease claim (Form CA-2) for right arm tendinitis. He noted that he first became aware of his condition in December 1978, and realized its relation to his federal employment on August 1986. OWCP assigned that claim OWCP File No. xxxxxx367, but denied the claim, finding that it was untimely filed pursuant to 5 U.S.C. § 8122. By decision dated July 19, 1990, the Board affirmed, Docket No. 89-1591 (issued July 19, 1990). Appellant's claims in OWCP File Nos. Xxxxxx170 and xxxxxx367 have been administratively combined, with the latter serving as the master file.

⁵ *Supra* note 3.

In a February 10, 2015 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of medical evidence necessary and afforded him 30 days to submit the necessary evidence.

By decision dated March 31, 2015, OWCP denied appellant's claim for a recurrence of disability commencing March 29, 1980. It found that the evidence of record was insufficient to establish a worsening of his condition causally related to the accepted employment injury.

Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated February 25, 2016, OWCP's hearing representative affirmed the March 31, 2015 decision.

On July 8, 2016 appellant requested reconsideration of the February 25, 2016 decision. He continued to argue that his carpal tunnel syndrome was employment related. No additional evidence was received.

By decision dated July 20, 2016, OWCP denied appellant's July 8, 2016 request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On September 16, 2016 appellant again requested reconsideration. In subsequent correspondence, he continued to argue that his right upper extremity pain, which dated back to May 1979, was employment related. Appellant explained that his pain was not psychogenic, as previously characterized, but rather due to nerve entrapment/carpal tunnel syndrome. He reiterated that OWCP should not have found his December 1986 upper extremity occupational disease claim untimely filed. No additional evidence was received.

By decision dated October 19, 2016, OWCP denied appellant's September 16, 2016 request for reconsideration. Appellant appealed to the Board. By decision dated October 26, 2017, the Board found that OWCP had properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).⁶

Appellant continued to submit multiple requests for reconsideration, arguing that his right upper extremity pain, which dated back to May 1979, was employment related. He submitted medical evidence in support thereof. OWCP, however, denied appellant's requests for reconsideration of the merits of his claim.

On July 27, 2020 appellant again requested reconsideration. He alleged that his June 9, 2020 electromyogram (EMG) studies would establish bilateral moderate carpal tunnel syndrome related to his employment, and not psychogenic or tendinitis as previously thought. Appellant also alleged errors of due process and discussed previously-submitted evidence.

By decision dated November 19, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁶ *Supra* note 3.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁷ OWCP's regulations⁸ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one-year also accompanies any subsequent merit decision on the issues.⁹ Timeliness is determined by the document receipt date, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).¹⁰ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹¹

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.¹² 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.¹³ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁴

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

⁷ 5 U.S.C. § 8128(a); *L.H.*, Docket No. 19-1174 (issued December 23, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁸ 20 C.F.R. § 10.607(a).

⁹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

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

¹¹ *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).

¹² *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹⁴ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *S.T.*, *supra* note 11; *C.V.*, *supra* note 12; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ *S.T.*, *supra* note 11; *E.P.*, *supra* note 14; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁷ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 14; *C.V.*, *supra* note 12; *Leon J. Modrowski*, *supra* note 12; *Jesus D. Sanchez*, *supra* note 12.

construed so as to produce a contrary conclusion.¹⁸ 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.¹⁹ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but 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.²⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.²¹

ANALYSIS

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

The most recent merit decision addressing either of the underlying issues was the February 25, 2016 OWCP decision. Because OWCP received appellant's request for reconsideration on July 27, 2020, which was more than one year after the February 25, 2016 merit decision, the Board finds that his request was untimely filed. Consequently, appellant must demonstrate clear evidence of error.

The Board further finds that appellant's request for reconsideration failed to demonstrate clear evidence of error. Appellant continued to argue on reconsideration that his extremity conditions were causally related and he submitted medical evidence in support thereof. However, such argument and evidence is irrelevant to the underlying issues at hand; specifically, whether he was disabled from work commencing July 20, 1979 and whether he sustained a recurrence of disability commencing March 29, 1980.²² Thus, the Board finds that appellant's untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of him or to raise a substantial question of error in either the July 16, 2012 or the February 25, 2016 decisions. Accordingly, the Board finds that OWCP properly denied his reconsideration request, as 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.

¹⁸ *V.G.*, *supra* note 14; *E.P.*, *supra* note 16; *Leona N. Travis*, *supra* note 16.

¹⁹ *L.B.*, *supra* note 17.

²⁰ *D.G.*, *supra* note 13; *Leon D. Faidley, Jr.*, *supra* note 11.

²¹ *C.V.*, *supra* note 12; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

²² *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Leona N. Travis*, *supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 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