

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 April 8, 2020 appellant, then a 61-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed degenerative joint disease of the right shoulder region due to factors of his federal employment.³ He noted that he first became aware of his condition on June 26, 2019 and realized its relation to his federal employment on October 25, 2019. Appellant stopped work on July 31, 2019 and returned to work full-duty work on December 2, 2019.

On August 19, 2019 Dr. George H. Canizares, a Board-certified orthopedist, performed a right total shoulder replacement and diagnosed advanced tricompartmental right shoulder degenerative joint disease with a small partial tear of the rotator cuff. On October 25, 2019 he treated appellant in follow up for partial thickness right rotator cuff tear. Dr. Canizares noted that appellant was status post right shoulder replacement and progressing well with physical therapy. He opined that appellant's total shoulder replacement was a result of a preexisting injury. Dr. Canizares explained that appellant sustained a prior work-related right shoulder injury and opined that appellant's work aggravated his condition over the years.

In an undated statement, appellant reported working for the employing establishment since January 1985. He noted an injury of his right shoulder while delivering mail in October 2002, which was accepted by OWCP. Appellant underwent right shoulder surgery on November 18, 2002 and returned to limited-duty work 11 days after surgery. He continued to experience right shoulder pain and on July 31, 2019 stopped work and sought treatment with Dr. Canizares who recommended a right shoulder total joint replacement. Appellant asserted that casing mail, delivering letters, flats, and parcels over the years caused his right shoulder to deteriorate and ultimately the need for a total right shoulder replacement.

In an April 9, 2020 development letter, OWCP advised appellant of the deficiencies of his claim. It requested additional evidence and provided a questionnaire for completion. OWCP afforded appellant 30 days to respond.

OWCP received additional evidence. A magnetic resonance imaging scan of the right shoulder dated September 12, 2002 revealed a full-thickness rotator cuff tendon tear, tendinopathy of the short head of the biceps, and moderate hypertrophy of the acromioclavicular articulation. An x-ray of the right shoulder dated October 30, 2002 was noted as unremarkable.

³ Appellant explained that he had a prior accepted employment injury occurring in 2002 and subsequently returned to full-time work on August 1, 2019. OWCP assigned OWCP File No. xxxxxx254. Appellant underwent surgery on August 19, 2019 due to degeneration of his right shoulder. His claims have not been administratively combined.

On May 14, 2020 Dr. Canizares noted that appellant had preexisting arthritis in the right shoulder and surgery on November 18, 2002. He opined that appellant's work may have aggravated his underlying arthritis.

By decision dated June 1, 2020, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the implicated employment factors. It noted that, as he did not respond to its questionnaire, it was unable to determine the factual component of his claim. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP received additional evidence. In a November 26, 2002 response, to an OWCP inquiry, Dr. Vladimir Alexander, a Board-certified orthopedist, indicated that appellant would be released to light-duty work on November 28, 2002 and regular-duty work in January 2003. In a work capacity evaluation (Form OWCP-5c) dated December 9, 2002, he diagnosed right shoulder sprain/strain and right rotator cuff strain/sprain. Dr. Alexander advised that appellant was disabled from work for four to eight weeks postsurgery.

OWCP received an employing establishment routing slip dated December 11, 2002 detailing appellant's job restrictions and requesting the employing establishment develop a limited-duty job offer. The employing establishment offered him a modified city carrier position subject to restrictions.

On June 8, 2021 appellant, through his representative, requested reconsideration. He asserted that he submitted sufficient evidence to establish his claim and referenced reports from Dr. Canizares who opined that appellant's condition was an aggravation of his preexisting accepted right shoulder injury. Appellant also referenced Dr. Alexander's response to the November 26, 2002 OWCP questionnaire, the Form OWCP-5c, and a modified-duty assignment offer. He noted that this evidence documents a history of right shoulder issues not previously considered by OWCP prior to denying the claim.

By decision dated June 17, 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.⁴ This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ Timeliness is determined by the document receipt date (*i.e.*, the "received date"

⁴ 5 U.S.C. § 8128(a). *See also* *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁸ Its procedures provide that it 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.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that 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 as to produce a contrary conclusion. 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. 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

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.

The most recent merit decision was OWCP's June 1, 2020 decision, which denied appellant's occupational disease claim, finding that the evidence of record was insufficient to

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

⁷ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *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); *supra* note 6 at Chapter 2.1602.5 (September 2020).

¹⁰ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (September 2020).

¹² *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

establish that he sustained an injury in the performance of duty, as alleged. As OWCP received his request for reconsideration on June 8, 2021 more than one year after the June 1, 2020 merit decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.

The Board finds that the evidence of record is insufficient to demonstrate clear evidence of error.

In support of appellant's request for reconsideration he submitted a November 26, 2002 note from Dr. Alexander who indicated that appellant would be released to light-duty work on November 28, 2002 and regular-duty work in January 2003. Similarly, in a Form OWCP-5c dated December 9, 2002, Dr. Alexander diagnosed right shoulder sprain/strain and right rotator cuff strain/sprain and advised that appellant was disabled from work for four to eight weeks postsurgery. Appellant also submitted an employing establishment routing slip dated December 11, 2002 detailing his job restrictions, and a job offer for a modified city carrier position. However, none of these reports addressed the federal employment factors alleged to have caused or aggravated the original injury. This evidence, therefore, does not raise a substantial question as to the correctness of OWCP's June 1, 2020 merit decision.¹³ None of the evidence manifests on its face that OWCP committed an error in denying appellant's claim for an occupational disease. Thus, the Board finds that the evidence submitted is insufficient to demonstrate clear evidence of error on the part of OWCP in its June 1, 2020 decision.¹⁴

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

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.

¹³ *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *B.W.*, Docket No. 19-0626 (issued March 4, 2020).

¹⁴ *J.C.*, Docket No. 20-1250 (issued May 24, 2021); *W.D.*, Docket No. 19-0062 (issued April 15, 2019).

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 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