

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

E.C., Appellant)	
)	
and)	Docket No. 22-0483
)	Issued: March 2, 2023
U.S. POSTAL SERVICE, MEMPHIS)	
PROCESSING & DISTRIBUTION)	
CENTER/FACILITY, Memphis, TN, Employer)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On February 13, 2022 appellant filed a timely appeal from an August 17, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 22-0483.

On January 27, 2019 appellant, then a 48-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a right shoulder sprain after pulling up dock plates while in the performance of duty. He did not stop work.

In a medical report dated December 29, 2016, Dr. Nahum Beard, a Board-certified orthopedist, noted that appellant had preexisting right shoulder osteoarthritis.

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.

A medical report dated October 11, 2018 from Crystal Standard, a physical therapist, indicated that appellant received injections for his ongoing right shoulder impingement.

On an authorization for examination and/or treatment (Form CA-16) dated January 28, 2019, the employing establishment noted that on the alleged date of injury, appellant felt a popping sensation in his right shoulder while lifting a dock plate.

On January 30, 2019 appellant was seen by Dr. Henry Sherman, a Board-certified orthopedist, who related that on January 27, 2019 he pulled a spring-loaded lever causing him to develop a dropped arm and shoulder pain. Dr. Sherman diagnosed right shoulder impingement syndrome.

In an offer of modified assignment (limited duty) dated February 4, 2019, the employing establishment offered appellant modified duties of scanning for eight hours with limited use, extension, and lifting of the left arm and hand. Appellant accepted the offer on the same date.

A diagnostic report dated February 25, 2019 from Dr. John Stanfill, a Board-certified radiologist, noted that a magnetic resonance imaging (MRI) of appellant's right shoulder revealed a rotator cuff tear with full-thickness and tears of the supraspinatus and infraspinatus tendons.

In a medical report dated March 7, 2019, Dr. Anthony Mascioli, a Board-certified orthopedic surgeon, reviewed appellant's MRI and diagnosed a right rotator cuff tear. In a return to work note of even date, he released appellant to work with restricted duties.

In a development letter dated April 11, 2019, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

An undated return to work note from Dr. Mascioli released appellant to work with limited restrictions on April 8, 2019.

In a May 14, 2019 response to OWCP's development questionnaire, an unidentifiable health care provider noted that appellant sustained a right rotator cuff tear and was scheduled for surgery. A return to work note of even date from Dr. Mascioli released appellant to work on the same date with light-duty restrictions.

By decision dated May 29, 2019, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a right shoulder condition causally related to the accepted January 27, 2019 employment incident.

OWCP subsequently received additional evidence. In a medical report dated December 29, 2016, Dr. Beard examined appellant and diagnosed right shoulder impingement syndrome.

On October 24, 2018 appellant was seen by Dr. Beard who noted that he had received physical therapy and a corticosteroid injection for his right shoulder impingement syndrome.

On May 29, 2020 appellant, through counsel, requested reconsideration of OWCP's May 29, 2019 decision.

Appellant submitted medical reports dated August 9, September 9, and October 21, 2019 from Dr. Mascioli, who examined appellant for a post-arthroscopic rotator cuff tear. Dr. Mascioli noted that appellant's progress had been improving with prescribed pain medicine.

By decision dated July 31, 2020, OWCP denied modification of its May 29, 2019 decision.

By correspondence dated and received by OWCP on August 2, 2021, appellant, through counsel, requested reconsideration of OWCP's July 31, 2020 merit decision. In an attached statement, counsel argued that OWCP erred in the July 31, 2020 merit decision as the medical evidence of record was sufficient to establish causal relationship.

By decision dated August 17, 2021, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and that he did not demonstrate clear evidence of error.

The Board, having duly considered the matter, finds that OWCP improperly determined that appellant's request for reconsideration was untimely filed.

Section 10.607(a) of the implementing regulations provides that an application for reconsideration must be received within one year of the date of OWCP decision for which review is sought.² In this case, the last merit decision was dated July 31, 2020 and appellant's request for reconsideration was received by OWCP on Monday, August 2, 2021. In computing the time for requesting reconsideration, the last day of the period shall be included unless it is a Saturday, a Sunday or a legal holiday.³ As July 31, 2021 was a Saturday, appellant had until Monday, August 2, 2021 to request reconsideration. Thus, his request was timely received by OWCP.

As appellant filed a request for reconsideration within one year of OWCP's July 31, 2020 merit decision, the Board finds that OWCP improperly denied his reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).⁴ Since it erroneously reviewed appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review under the proper standard for a timely reconsideration request.⁵ Accordingly,

² 20 C.F.R. § 10.607(a). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

³ Federal (FECA) Procedure Manual, Chapter 2.1602.4 *id.*; *M.A.*, Docket No. 13-1783 (issued January 2, 2014); *Debra McDavid*, 57 ECAB 149 (2005).

⁴ 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provide that a request reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

⁵ *Supra* note 3.

IT IS HEREBY ORDERED THAT the August 17, 2021 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: March 2, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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