

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 18, 1979 appellant then a 24-year-old carpenter, filed a traumatic injury claim (Form CA-1) alleging that on January 4, 1979 he twisted his left knee when he slipped on ice while in the performance of duty. He stopped work on January 16, 1979 and returned to work on August 13, 1979. OWCP accepted the claim, under OWCP File No. xxxxxx392, for left knee strain and internal derangement of the knee.² Appellant then underwent two OWCP-authorized explorations of the left knee.

On June 10, 1980 appellant filed a notice of recurrence (Form CA-2a) alleging that on that date he sustained a recurrence of disability causally related to his January 4, 1979 employment injury. He underwent additional diagnostic left knee surgeries on June 30, 1980, and April 15, 1981. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning on June 28, 1980, and on the periodic rolls beginning October 1, 1981.

On August 11, 2020 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. John L. Stanton, an orthopedic surgeon. In his September 30, 2020 report, Dr. Stanton reviewed the SOAF and the medical records and performed a physical examination. He related that appellant had no residuals of his accepted conditions and required no further treatment. However, Dr. Stanton found that he could not return to his date-of-injury position due to nonemployment-related conditions of adhesive capsulitis, rotator cuff tendinitis, left shoulder bursitis, lumbar facet arthritis and arthritis of the medial and retro patellar joint.

By notice dated November 23, 2020, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits based on Dr. Stanton's September 30, 2020 report. It afforded him 30 days to submit additional evidence or argument challenging the proposed action.

In a December 8, 2020 letter, appellant disagreed with the proposed termination of benefits and contended that Dr. Stanton's report was insufficient to constitute the weight of the medical evidence.

By decision dated December 29, 2020, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that Dr. Stanton's opinion as he represented the weight of the evidence and established that he had no further disability or residuals due to his accepted employment injury.

On March 22, 2022 appellant disagreed with the December 29, 2020 decision. In an October 20, 2022 report, Dr. Robert P. Landsberg, an orthopedic surgeon, related that he underwent a left shoulder arthroscopy on June 24, 2022. He noted that he had previously

² On November 5, 1979 appellant filed a Form CA-1 alleging that on that date he reinjured his left knee and back while descending steps while in the performance of duty. On March 17, 1980 he injured his left deltoid, lumbar back, and left shoulder when his back gave way. OWCP accepted this claim for lumbosacral strain and foreign body left shoulder. It administratively combined OWCP File Nos. xxxxxx392, xxxxxx662 and xxxxxx492 with the latter serving as the master file.

examined appellant due to work-related injuries in 2011 for his right shoulder and in 2012 for a left knee problem with meniscal pathology and chondromalacia. Dr. Landsberg asserted that the accepted conditions were likely to have worsened over the years.

On January 20, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 2, 2023, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing, finding that it was not made within 30 days of the December 29, 2020 decision and, therefore, was untimely filed. It further exercised its discretion and determined that the issue of the case could equally well be addressed by a request for reconsideration before OWCP and along with the submission of new evidence.

On February 27, 2023 appellant requested reconsideration of OWCP's December 29, 2020 decision. In support thereof, he submitted a February 16, 2023 report, wherein Dr. Landsberg recounted appellant's low back symptoms beginning with his 1979 employment injury. Dr. Landsberg diagnosed lumbar degenerative disc disease, low back pain, facet arthritis of the lumbar region and work-related injuries to his low back, left knee, and left shoulder. He opined that appellant's accepted conditions had gradually progressed over the years.

By decision dated May 24, 2023, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."³ Section 10.615 of OWCP's federal regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.⁴ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁵ The date of filing is fixed by postmark or other carrier's date marking.⁶

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *S.T.*, Docket No. 22-1019 (issued April 10, 2023); *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

⁶ *See* 20 C.F.R. § 10.616(a).

whether to grant a hearing.⁷ Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA, which provided the right to a hearing,⁸ when the request is made after the 30-day period for requesting a hearing,⁹ when the request is for a second hearing on the same issue,¹⁰ and when the request is made after a reconsideration request was previously submitted.¹¹ In these instances, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied appellant's request for an oral hearing, pursuant to 5 U.S.C. § 8124(b), as it was untimely filed.

On January 20, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review,¹³ however, this request was made more than 30 days after OWCP's December 29, 2020 decision. Section 8124(b)(1) is unequivocal on the time limitation for filing a request for a hearing.¹⁴ As such, the request was untimely filed, and appellant was not entitled to an oral hearing as a matter of right.

The Board further finds that OWCP, in its February 2, 2023 decision, properly exercised its discretionary authority, as his arguments could be equally-well addressed through a reconsideration request.

The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.¹⁵ The Board finds that the evidence of record does not establish that OWCP

⁷ *S.T.*, *supra* note 5; *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁸ *S.T.*, *id.*; *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁹ *E.R.*, Docket No. 20-1110 (issued December 23, 2020); *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹⁰ *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹¹ *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007).

¹² *See Rudolph Bermann*, *supra* note 8.

¹³ Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request, if available. Federal (FECA) Procedure Manual, Part 2 – Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (October 2011). Otherwise, the date of the letter itself should be used. *See J.H.*, Docket No. 06-1565 (issued February 20, 2007); *James B. Moses*, 52 ECAB 465 (2001), *citing William J. Kapfhammer*, 42 ECAB 271 (1990); *see also Douglas McLean*, 42 ECAB 759 (1991).

¹⁴ *See M.M.*, Docket No. 19-1171 (issued October 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

¹⁵ *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *see Daniel J. Perea*, 42 ECAB 214, 221 (1990).

abused its discretion in denying appellant's request for an oral hearing before an OWCP hearing representative.¹⁶

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹⁷ 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 decision for which review is sought.¹⁸ 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).¹⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.²⁰

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.²¹ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.²²

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.²³ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.²⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.²⁵ 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

¹⁶ *S.N.*, Docket No. 22-1048 (issued April 3, 2023); *J.G.*, Docket No. 19-0555 (issued March 14, 2019).

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

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

²⁰ *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).

²¹ *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).

²² *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b).

²³ *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).

²⁴ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

²⁵ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

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.²⁶

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.²⁷ The claimant must present evidence, which on its face shows that OWCP made an error.²⁸ 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.²⁹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.³⁰

ANALYSIS -- ISSUE 2

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.

OWCP's regulations³¹ and procedures³² 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).³³ The most recent merit decision addressing appellant's continuing disability and medical residuals was OWCP's December 29, 2020 termination decision. As his request for reconsideration was not received by OWCP until February 27, 2023, more than one year after the December 29, 2020 decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error.

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether the medical evidence of record is sufficient to continuing disability and medical residuals causally related to the accepted employment injuries. In support of appellant's request for reconsideration, OWCP received reports from Dr. Landsberg dated October 20, 2022 and February 16, 2023. His opinions, however, do not manifest on their face

²⁶ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

²⁷ *See supra* note 19 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²⁸ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

²⁹ *Id.*

³⁰ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

³¹ 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).

³² *Supra* note 19 at Chapter 2.1602.4.

³³ 20 C.F.R. § 10.607(b).

that OWCP committed an error in OWCP's December 29, 2020 termination decision.³⁴ Thus, these reports are insufficient to demonstrate clear evidence of error.³⁵

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 an oral hearing as it was untimely filed, pursuant to 5 U.S.C. § 8124(b). The Board further finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed, and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 2 and May 24, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 30, 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

³⁴ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

³⁵ See *L.T.*, *supra* note 31; *J.C.*, Docket No. 20-1250 (issued May 24, 2021).