

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

L.J., Appellant	)	
	)	
and	)	<b>Docket No. 23-0744</b>
	)	<b>Issued: October 31, 2023</b>
U.S. POSTAL SERVICE, LOGISTICS & DISTRIBUTION CENTER, Tampa, FL, 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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 22, 2023 appellant filed a timely appeal from a December 8, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from OWCP's last merit decision, dated March 2, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted because it would help to clarify the facts of the case. The Board, in exercising its discretion, denies appellant's request for oral argument because the Board does not have jurisdiction over the merits of this case and, thus, the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would not serve a useful purpose. Therefore, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the December 8, 2022 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## 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 September 15, 2011 appellant, then a 40-year-old building equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right shoulder when his drill became caught in a dock wall while in the performance of duty. OWCP accepted the claim for right shoulder sprain and complete rotator cuff rupture (distal supraspinatus tendon full thickness tear at the origin). On November 16, 2011 appellant underwent OWCP-authorized surgery by Dr. Adam Morse, an orthopedic surgeon, including diagnostic and surgical arthroscopy of the right shoulder with arthroscopic rotator cuff repair, subacromial decompression, and clavicle excision. He stopped work on November 16, 2011, and returned to full-time, modified-duty work effective February 14, 2012.

In a medical report dated January 24, 2013, Dr. Morse noted that appellant had permanent work restrictions, including no over shoulder reaching and no pushing or pulling greater than 35 pounds for eight hours per day. He indicated that appellant should also avoid vibratory tools. Dr. Morse explained that appellant had persistent hyperesthesia in the ulnar nerve distribution with overhead activity, which was exacerbated by vibratory tools.

On April 4, 2013 Dr. Morse recommended a magnetic resonance imaging (MRI) scan of the cervical spine to evaluate the persistent hyperesthesia in the right ulnar nerve distribution.

An MRI scan of the cervical spine dated May 6, 2013 revealed osseous degeneration and disc bulges and/or protrusions from C2-3 through C6-7 resulting in various degrees of canal stenosis without definite spinal cord impingement.

In follow-up reports dated May 21 and August 6, 2013, Dr. Morse diagnosed degenerative disc disease in the cervical spine and recommended anti-inflammatory medication and a referral to a spine specialist.

In a report dated July 8, 2014, Dr. Morse noted appellant's complaints of persistent numbness and tingling into the right hand and sharp stabbing pain in the anterior aspect of the superior edge of the right shoulder. He recommended an updated right shoulder MRI scan.

A July 14, 2014 report of MRI scan of the right shoulder revealed postoperative changes associated with the distal supraspinatus tendon repair and no evidence of recurrent or retracted full-thickness rotator cuff tear. The infraspinatus, subscapularis, and teres minor muscles and tendons were normal, and there was no muscle atrophy.

Dr. Morse, in a July 17, 2014 report, reviewed appellant's recent MRI scan and opined that his symptoms were originated in the cervical spine and that the rotator cuff was intact. He indicated that appellant had achieved maximum medical improvement and had permanent restrictions.

In a work capacity evaluation for musculoskeletal conditions (Form OWCP-5c) dated July 17, 2020, Dr. Morse noted that appellant was able to work eight hours per day, with no repetitive overhead shoulder movement and no pushing or pulling greater than 20 pounds. In a

referral order of even date, he diagnosed calcific tendinitis of the right shoulder and recommended physical therapy.

In a Form OWCP-5c dated August 13, 2020, Dr. Morse released appellant to return to work with no overhead activities, no lifting greater than 10 pounds, and no pushing or pulling greater than 40 pounds.

On August 19, 2020 appellant accepted a modified building equipment mechanic position with no reaching above shoulder height, no repetitive movement of the shoulders, and no pushing or pulling greater than 20 pounds.

On November 20, 2020 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence commencing August 7, 2020 and the need for medical treatment commencing August 13, 2020, causally related to the accepted September 15, 2011 employment injury. He noted that he had been working modified duty with no overhead work and no pushing or pulling greater than 35 pounds, and that he began to experience stiffness and radiating pain in the right shoulder in the same location as the original injury.

In a November 27, 2020 development letter, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of additional factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond. No response was received.

By decision dated March 2, 2021, OWCP denied appellant's recurrence claim, finding that the evidence of record was insufficient to establish a worsening of the accepted work-related conditions requiring further medical treatment.

On March 16, 2022 OWCP received a summary of visits on July 16, 2020 through March 10, 2022, wherein Dr. Morse diagnosed calcific tendinitis of the right shoulder, full thickness tear of the rotator cuff, and enteropathic arthritis. On November 18, 2021 Dr. Morse recommended an updated MRI scan and on December 23, 2021 he administered a repeat subacromial steroid injection. On March 10, 2022 he indicated that appellant's updated MRI scan revealed a questionable five-millimeter full-thickness rotator cuff tear, and that he would seek approval through workers' compensation for additional surgery.

On June 29, 2022 appellant requested reconsideration of OWCP's March 2, 2021 decision.

By decision dated December 8, 2022, 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.<sup>4</sup> 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.<sup>5</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

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<sup>4</sup> 5 U.S.C. § 8128(a); *see also* A.B., Docket No. 19-1539 (issued January 27, 2020); W.C., 59 ECAB 372 (2008).

<sup>5</sup> 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

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.<sup>8</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>10</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>11</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>12</sup> 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.<sup>13</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>14</sup> The claimant must present evidence which on its face shows that OWCP made an error.<sup>15</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>16</sup>

### 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.

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

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *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).

<sup>10</sup> *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).

<sup>11</sup> *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

<sup>12</sup> *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>13</sup> *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

<sup>14</sup> *See supra* note 6 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>15</sup> *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

<sup>16</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

OWCP's regulations<sup>17</sup> and procedures<sup>18</sup> 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).<sup>19</sup> The most recent merit decision addressing appellant's recurrence claim was OWCP's March 2, 2021 decision. As his request for reconsideration was not received by OWCP until June 29, 2022, more than one year after the March 2, 2021 decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error.

In support of his untimely request for reconsideration, OWCP received a summary of visits with Dr. Morse dated July 16, 2020 through March 10, 2022. However, even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. The Board has held that it is not enough to show that evidence could be construed so as to produce a contrary conclusion.<sup>20</sup> Thus, this evidence is insufficient to demonstrate clear evidence of error.

Accordingly, 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.

### **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.

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<sup>17</sup> 20 C.F.R. § 10.607(a); *see J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>18</sup> *See supra* note 6 at Chapter 2.1602.4 (September 2020).

<sup>19</sup> 20 C.F.R. § 10.607(b).

<sup>20</sup> *J.M.*, Docket No. 23-0603 (issued September 27, 2023); *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 December 8, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 31, 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