

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

_____)	
J.M., Appellant)	
)	
and)	Docket No. 23-0603
)	Issued: September 27, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Jacksonville, FL, Employer)	
_____)	

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 20, 2023 appellant, through counsel, filed a timely appeal from a February 27, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated August 23, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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.

² 5 U.S.C. § 8101 *et seq.*

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 November 6, 2020 appellant, then a 44-year-old postal rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 29, 2020 he injured both wrists and his right knee when he tripped on packages and fell while in the performance of duty. He stopped work that day.

By decision dated March 29, 2021, OWCP denied appellant's claim. It found that the evidence was insufficient to establish that a medical condition was causally related to the accepted employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On March 30, 2021 OWCP received March 19, 2021 progress notes from a physician assistant, a March 10, 2021 duty status report (Form CA-17) from a nurse practitioner, appellant's December 16, 2020 magnetic resonance imaging scan results signed by a nurse practitioner, and October 29, 2020 emergency room records from a nurse. It also received October 29, 2020 x-rays of the right and left wrist, interpreted by Dr. Ryan K. Tompkins, a diagnostic radiologist, which indicated no acute findings.

On April 5, 2021 counsel for appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 6, 2021.

By decision dated August 23, 2021, an OWCP hearing representative affirmed as modified the March 29, 2021 decision. The hearing representative explained that the factual evidence of record supported that appellant tripped and fell over packages on October 29, 2020; however, appellant "failed to supply sufficient medical evidence to support his having incurred an injury" under FECA. The hearing representative, therefore, affirmed, but modified, the March 29, 2021 decision to reflect a denial based on fact of injury rather than causal relationship.

An operative report of Dr. Anup Patel, a Board-certified hand surgeon, dated July 21, 2021, indicating that appellant had undergone right carpal tunnel and cubital tunnel releases, and a right anterior submuscular transposition of the ulnar nerve. His preoperative and postoperative diagnoses were right carpal tunnel syndrome and right cubital tunnel syndrome. No opinion regarding causal relationship was provided in this report. On October 21, 2021 OWCP received a progress report from Jeffrey Carameros, a nurse practitioner, dated August 10, 2021. Mr. Carameros related that appellant suffered a fall at work on October 29, 2020 and landed on his hands and wrists. He further related that, "The results of this after surgical evaluation by Orlando hand surgeons identified the fall as the result of the traumatic injury sustained to the bilateral transverse carpal ligaments in both hands as well as a tethered cord in the right wrist."

On February 13, 2023 appellant, through counsel, requested reconsideration of the August 23, 2021 decision.

By decision dated February 27, 2023, OWCP denied appellant's reconsideration request, finding that it was untimely filed and that the evidence submitted 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.³ 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.⁴ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

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.⁷ 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.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ 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. The Board makes an independent

³ *Id.* at § 8128(a). *See also* *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

⁶ *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).

⁷ *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).

⁸ *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 5 at Chapter 2.1602.5 (September 2020).

⁹ *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).

¹⁰ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5(a) (September 2020).

determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹¹

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.

OWCP's regulations¹² and procedures¹³ 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 issues.¹⁴ The most recent merit decision pertaining to the denial of appellant's traumatic injury claim was dated August 23, 2021. As OWCP received his request for reconsideration on February 13, 2023 more than one year after the August 23, 2021 decision, the Board finds that it was untimely filed. Because appellant's request was untimely filed, he must demonstrate clear evidence of error on the part of OWCP in its August 23, 2021 merit decision denying his traumatic injury claim.

The Board further finds that appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its August 23, 2021 merit decision.¹⁵

OWCP denied appellant's claim, finding that the factual evidence of record supported that he tripped and fell over packages on October 29, 2020; however, he "failed to supply sufficient medical evidence to support his having incurred an injury" under FECA. In support of his untimely request for reconsideration, appellant submitted an operative report of Dr. Patel dated July 21, 2021, indicating that he had undergone right carpal tunnel and cubital tunnel releases, and a right anterior submuscular transposition of the ulnar nerve. Dr. Patel's preoperative and postoperative diagnoses were right carpal tunnel syndrome and right cubital tunnel syndrome. OWCP also received a progress report from Mr. Carameros, a nurse practitioner, dated August 10, 2021.

The July 21, 2021 operative note from Dr. Patel did not mention any injury at work and did not offer any opinion as to the cause of appellant's diagnosed conditions of right carpal tunnel syndrome and right cubital tunnel syndrome. As noted, evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear

¹¹ *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

¹² 20 C.F.R. § 10.607(a); *A.P.*, Docket No. 21-1222 (issued February 9, 2023); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

¹³ *Supra* note 5 at Chapter 2.1602.4 (September 2020); *A.P.*, *id.*; *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ 20 C.F.R. § 10.607(b); *A.P.*, *id.*; *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ *D.M.*, Docket No. 22-1152 (issued March 28, 2023); *see G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

evidence of error.¹⁶ The Board finds that the report from Dr. Patel fails to meet appellant's burden to provide clear evidence that OWCP erred in its August 23, 2021 decision.

The Board notes that appellant also submitted the August 10, 2021 progress notes from Mr. Carameros, a nurse practitioner. However, the Board has held that reports from physician assistants and nurse practitioners are of no probative value as they do not constitute competent medical evidence.¹⁷ Consequently, the Board finds that this report is insufficient to demonstrate clear evidence of error by OWCP in its August 23, 2021 decision.

The Board has held that the term clear evidence of error is intended to represent a difficult standard.¹⁸ 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. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Therefore, OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed, and failed to demonstrate clear evidence of error.¹⁹

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.

¹⁶ 20 C.F.R. § 10.607(a); *supra* note 7.

¹⁷ *See Y.B.*, Docket No. 21-0092 (issued October 15, 2021); *see B.R.*, Docket No. 19-0088 (issued August 13, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001). Section 8101(2) of FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2). Furthermore, under section 8101(2) of FECA, the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the Secretary. *See also supra* note 5 at Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (nurse practitioners and physical therapists are not considered physicians under FECA); *D.S.*, Docket No. 09-0860 (issued November 2, 2009).

¹⁸ *M.P.*, Docket No. 19-0200 (issued June 14, 2019).

¹⁹ *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 February 27, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board