

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

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<b>S.U., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 24-0213</b>
	)	<b>Issued: April 19, 2024</b>
<b>U.S. POSTAL SERVICE, NORTH LAS VEGAS</b>	)	
<b>POST OFFICE, Las Vegas, NV, Employer</b>	)	
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*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*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 December 28, 2023 appellant, through counsel, filed a timely appeal from a December 12, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated June 10, 2022, 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.

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<sup>1</sup> 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.

<sup>2</sup> 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 September 27, 2021 appellant, then a 43-year-old window clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 25, 2021 he injured his right upper arm and hand when lifting a box while in the performance of duty. He did not immediately stop work.

On September 25, 2021 Dr. Catalin Buda, a Board-certified family practitioner, treated appellant for neck, chest, and right hand pain. Appellant reported sustaining an acute musculoskeletal injury while lifting a heavy box at work. Dr. Buda diagnosed lateral epicondylitis of the right elbow and right elbow strain. An x-ray of the right elbow of the same date revealed no abnormalities. Dr. Buda diagnosed lateral epicondylitis of the right elbow and strain of the right elbow and returned appellant to modified-duty work. On September 26, 2021 she treated appellant for worsening right elbow pain. Dr. Buda diagnosed strain of the right elbow and lateral epicondylitis of the right elbow and dispensed an elbow sleeve. In a duty status report (Form CA-17) of the same date, she diagnosed strain of unspecified muscle, fascia, or tendon at shoulder and right upper arm and returned appellant to modified duty.

In reports dated September 28 through October 11, 2021, Elsa Cuellar, a nurse practitioner, treated appellant for right arm and neck pain. She diagnosed cervical strain, lateral epicondylitis of the right elbow, and strain of the right elbow, right hand, and right shoulder, and advised that appellant continue with modified duty. In work status reports dated September 28, October 4, and 12, 2021, Ms. Cuellar noted diagnoses and returned appellant to modified duty.

On October 28, 2021 Dr. Bernard Hunwick, a Board-certified family practitioner, treated appellant for a right shoulder strain. Appellant reported minimal improvement in his pain with occupational therapy and noted continued swelling in his right hand. He noted that appellant had significant difficulties performing the physical requirements of his job. Dr. Hunwick diagnosed cervical strain, right shoulder strain, right elbow strain, and strain of the right hand and continued modified duty. In a Form CA-17 of the same date, Dr. Hunwick diagnosed strain of unspecified muscle, fascia, or tendon at neck level and continued modified duty.

In work activity status reports dated October 28 and November 10, 2021, Ms. Cuellar advised that appellant continue with modified duty.

In a November 24, 2021 development letter, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded him 30 days to submit appropriate evidence.

On December 20, 2021 Dr. Hunwick treated appellant for worsening neck, right hand, right shoulder, and right elbow pain. He diagnosed cervical strain, right shoulder strain, right elbow

strain, and strain of the right hand and continued modified duty. In a Form CA-17 of the same date, Dr. Hunwick noted diagnoses and continued modified-duty.

In a work status report dated December 20, 2021, Ms. Cuellar noted diagnoses and returned appellant to modified duty.

By decision dated December 30, 2021, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed conditions and the accepted September 25, 2021 employment incident.

On January 25, 2022 appellant requested reconsideration.

On November 10, 2021 and January 18, 2022 Dr. Hunwick diagnosed cervical strain, right shoulder strain, right elbow strain, and strain of the right hand and continued modified duty. In Form CA-17's dated November 10, 2021 and January 18, 2022, he noted diagnoses and continued modified duty.

In a work status report dated January 18, 2022, Ms. Cuellar noted diagnoses and returned appellant to modified duty.

By decision dated June 10, 2022, OWCP denied modification of the December 30, 2021 decision.

On May 2, 2023 Dr. Suketu Vaishnav, a Board-certified orthopedist, noted treating appellant in November 2022 for bilateral shoulder pain. Appellant reported sustaining an injury at work on September 25, 2021 when he picked up a box and felt a sharp pain across both shoulders with associated clicking and popping sensations. He noted that magnetic resonance imaging (MRI) scans of the shoulders revealed a partial-thickness rotator cuff tear and labral tears. Dr. Vaishnav opined that based on appellant's history, clinical findings, and MRI scans, the shoulder injuries were a consequence of his September 25, 2021 employment incident.<sup>3</sup>

On September 15, 2023 appellant, through counsel, requested reconsideration. By decision dated December 12, 2023, 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

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<sup>3</sup> Appellant submitted a duplicate copy of this report.

<sup>4</sup> *Id.* at § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS)).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which 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.<sup>12</sup>

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<sup>5</sup> 20 C.F.R. § 10.607(a).

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

<sup>7</sup> *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).

<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, 501-02 (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); *supra* note 6 at Chapter 2.1602.5 (September 2020).

<sup>10</sup> *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).

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

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

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>13</sup> The claimant must present evidence which on its face shows that OWCP made an error.<sup>14</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>15</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.

OWCP's last merit decision was dated June 10, 2022. Appellant had one year from OWCP's June 10, 2022 decision to request reconsideration. As OWCP received his request for reconsideration on September 15, 2023, more than one year after the June 10, 2022 decision, the Board finds that it was untimely filed. Consequently, he must demonstrate clear evidence of error on the part of OWCP in its June 10, 2022 decision.

The Board further finds that the evidence of record is insufficient to demonstrate clear evidence of error. In support of his untimely reconsideration request, appellant submitted a report from Dr. Vaishnav who related that on September 25, 2021 appellant picked up a box at work and felt a sharp pain across both shoulders. Dr. Vaishnav noted that MRI scans of the shoulders revealed a partial-thickness rotator cuff tear and labral tears. He opined that based on appellant's history, clinical findings, and MRI scans, the shoulder injuries were a consequence of his work-related accident on September 25, 2021. This evidence does not manifest on its face that OWCP committed an error in denying appellant's claim for compensation. Thus, the evidence is insufficient to demonstrate clear evidence of error.<sup>16</sup>

The Board finds that appellant's request for reconsideration did not show on its face that OWCP committed an error in denying his traumatic injury claim.<sup>17</sup> Thus, the evidence is insufficient to demonstrate clear evidence of error.<sup>18</sup>

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.

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<sup>13</sup> See *supra* note 6 at Chapter 2.1602.5(a) (September 2020); see also *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>14</sup> *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

<sup>15</sup> *D.S.*, Docket No. 17-0417 (issued May 24, 2017).

<sup>16</sup> *J.C.*, Docket No. 20-1250 (issued May 24, 2021); *W.D.*, Docket No. 19-0062 (issued April 15, 2019).

<sup>17</sup> *S.C.*, Docket No. 19-1424 (issued September 15, 2020); *U.C.*, *supra* note 12.

<sup>18</sup> *Id.*

**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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 12, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2024  
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