

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

S.K., Appellant)

and)

**DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, TINKER AIR FORCE
BASE, OK, Employer**)

**Docket No. 25-0101
Issued: December 9, 2024**

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 8, 2024 appellant filed a timely appeal from September 27 and November 6, 2024 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision on this issue, dated August 2, 2023, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a review of the written record by a representative of OWCP's Branch of Hearings and Review as untimely filed, pursuant to 5 U.S.C. § 8124(b); and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim, as it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 31, 2015 appellant, then a 57-year-old electronic document management systems technician, filed an occupational disease claim (Form CA-2) alleging that she sustained conditions of the bilateral upper extremities causally related to factors of her federal employment. She noted that she first became aware of her condition on July 13, 2015 and realized its relationship to her federal employment on July 14, 2015. On March 30, 2016, OWCP accepted the claim for bilateral traumatic arthropathy, bilateral impingement syndrome of the shoulders, right elbow lateral epicondylitis, bilateral post-traumatic osteoarthritis of the first carpometacarpal joints of the hands, and contracture of the right hand. It paid appellant wage-loss compensation on the supplemental rolls as of March 30, 2016, and on the periodic rolls as of May 29, 2016. OWCP also granted her schedule award compensation from May 4, 2021 through August 11, 2023.

In a work capacity evaluation for musculoskeletal conditions (Form OWCP-5c) dated May 12, 2022, Dr. Christopher Jordan, a Board-certified orthopedic surgeon, serving as an OWCP second opinion physician, recommended sedentary work restrictions of pushing, pulling, and lifting up to 10 pounds for up to 1 hour per day; and no reaching, reaching over the shoulder, power grasping, or power pinching.

On January 31, 2023, the employing establishment offered appellant a modified position as an equipment operator based upon the restrictions provided by Dr. Jordan in his May 12, 2022 Form OWCP-5c.

By letter dated February 8, 2023, appellant refused the offered modified position as an equipment operator. She related that she had retired from the employing establishment on April 30, 2018, that she was receiving Federal Employees Retirement System (FERS) retirement benefits, and that she was not on medical disability retirement.

By decision dated August 2, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective that date, as she refused a January 31, 2023 offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

OWCP subsequently received diagnostic studies dated August 9, 2023. A magnetic resonance imaging (MRI) scan of appellant's left shoulder related an impression of supraspinatus and infraspinatus tendinosis and low-grade attenuation with mild interstitial fissuring of the conjoined tendon insertion; no full-thickness tear; mild atrophy of the rotator cuff musculature; minimal glenohumeral joint osteoarthritis; distal clavicular resection and subacromial decompression.

In a report dated August 23, 2023, Dr. James Bond, a Board-certified orthopedic surgeon, related appellant's history of injury, and that he had performed appellant's 2016 left shoulder extensive debridement of the glenohumeral joint, including the anterior labrum, superior labrum, rotator interval, and the underneath surface of the rotator cuff. He noted that she had reported another injury to her left shoulder which occurred in April when she pulled out a chair, with constant pain since that incident. Dr. Bond diagnosed adhesive capsulitis of both shoulders, frozen left shoulder. He performed a left shoulder manipulation under anesthesia (MUA) on October 9, 2023.

Appellant submitted a report dated June 4, 2024 from Dr. John Ellis, a Board-certified family practitioner, concerning her work limitations. Dr. Ellis concluded that she was unable to return to work and that the position offered was unacceptable. The report was received by OWCP on June 25, 2024.

On September 23, 2024, OWCP received *via* the Employees' Compensation and Management Portal (ECOMP), appellant's request for a review of the written record by a representative of OWCP's Branch of Hearings and Review with regard to the August 2, 2023 termination decision.

By decision dated September 27, 2024, OWCP denied appellant's request for a review of the written record, finding that it was untimely filed. It informed her that it had exercised its discretion in relation to the issues involved and determined that the issues could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

On November 4, 2024, appellant requested reconsideration of OWCP's August 2, 2023 termination decision. She noted that she had submitted new medical evidence.

By decision dated November 6, 2024, OWCP summarily denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. Appellant referred OWCP to the previously submitted June 4, 2024 report from Dr. Ellis.

LEGAL PRECEDENT -- ISSUE 1

Section 8124 of FECA, concerning a claimant's entitlement to a hearing before a representative of OWCP's Branch of Hearings and Review, provides that a claimant is entitled to a hearing before an OWCP representative when a request is made 30 days after issuance of an OWCP final decision.²

Sections 10.617 and 10.618 of OWCP's implementing regulations provide that a claimant shall be afforded a choice of an oral hearing, or a review of the written record by a representative of the Secretary.³ A claimant is entitled to an oral hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking, or the date received in ECOMP, and before the claimant has requested reconsideration.⁴ Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.⁵

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. §§ 10.616, 10.617.

⁴ *Id.* at § 10.616(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (February 2024).

⁵ *See P.G.*, Docket No. 24-0447 (issued August 12, 2024); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied appellant's request for a review of the written record by a representative of OWCP's Branch of Hearings and Review as untimely filed, pursuant to 5 U.S.C. § 8124(b).

OWCP's regulations provide that a request for an oral hearing or a review of the written record must be made within 30 days of the date of the decision for which a review is sought. Because appellant's request for a review of the written record was received *via* ECOMP on September 23, 2024, it postdated OWCP's August 2, 2023 decision by more than 30 days, and accordingly, was untimely. She was, therefore, not entitled to a review of the written record as a matter of right.⁶

OWCP, however, has the discretionary authority to grant the request, and it must exercise such discretion.⁷ 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 deductions from established facts.⁸ In this case, the Board finds that OWCP did not abuse its discretion in connection with its denial of appellant's request for a review of the written record.

Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record before a representative of OWCP's Branch of Hearings and Review as untimely filed, pursuant to 5 U.S.C. § 8124(b).

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁹ 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.¹⁰ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

⁶ See *G.W.*, Docket No. 24-0834 (issued October 30, 2024); *K.B.*, Docket No. 21-1038 (issued February 28, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022).

⁷ *Id.*

⁸ *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

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

¹⁰ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).¹¹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

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.¹³ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹⁵ The evidence must be positive, precise, and explicit, and must manifest on its face that OWCP committed an error.¹⁶ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁷ 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.¹⁸

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Even 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.²⁰ The Board makes an independent

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

¹² *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).

¹³ *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).

¹⁴ *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).

¹⁵ *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).

¹⁶ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹⁷ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

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

¹⁹ *See supra* note 4 at Chapter 2.1602.5a (September 2020); *see also K.W.*, Docket No. 19-1808 (issued April 2, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²⁰ *Id.*

determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

OWCP's last merit decision was dated August 2, 2023. As appellant's request for reconsideration was not received by OWCP until November 4, 2024, more than one year after August 2, 2023, the request for reconsideration was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in denying the claim.²²

The Board further finds, however, that OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.²³ Section 8124(a) of FECA (5 U.S.C. § 8124(a)) provides that OWCP shall determine and make findings of fact and make an award for or against payment of compensation. Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons. As well, OWCP's procedures provide that the reasoning behind OWCP's decision should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence, which would overcome it.²⁴

In its November 6, 2024 decision, OWCP did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision.²⁵ It did not make any findings regarding the June 4, 2024 report of Dr. Ellis submitted in support of the reconsideration request.²⁶ OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.²⁷ Its failure to provide factual findings and explain the basis for its conclusion that appellant did not demonstrate clear evidence of error precludes the Board's review of the decision.²⁸

²¹ *W.R.*, Docket No. 24-0244 (issued May 22, 2024); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²² 20 C.F.R. § 10.607(b); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

²³ *See Order Remanding Case, J.B.*, Docket No. 24-0760 (issued August 28, 2024); *Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *see also* 20 C.F.R. § 10.607(b).

²⁴ *See supra* note 7 at Chapter 2.1400.5 (February 2013).

²⁵ 20 C.F.R. § 10.126; *D.W.*, Docket No. 18-0483 (issued March 7, 2019).

²⁶ *See C.R.*, Docket No. 17-0964 (issued September 9, 2019).

²⁷ *Id.*

²⁸ *See Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020).

The Board shall, therefore, set aside OWCP's November 6, 2024 decision and remand the case for an appropriate decision regarding appellant's untimely reconsideration request.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for a review of the written record by a representative of OWCP's Branch of Hearings and Review was untimely filed, pursuant to 5 U.S.C. § 8124. The Board further finds that appellant's reconsideration request was untimely filed; however, the case is not posture for decision with regard to whether it demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2024 decision of the Office of Workers' Compensation Programs is affirmed. The November 6, 2024 decision is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 9, 2024
Washington, DC

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

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

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