

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

_____)	
J.H., Appellant)	
)	
and)	Docket No. 23-0055
)	Issued: January 30, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS & BORDER PROTECTION,)	
Los Angeles, CA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 19, 2022 appellant filed a timely appeal from a July 1, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated January 5, 2022, which became final after 30 days of issuance and is not subject to further review.¹ As there was no merit decision by OWCP issued within 180 days of 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 to review the merits of this case.

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.

¹ 20 C.F.R. § 501.6(d). See also *J.T.*, Docket No. 21-0844 (issued April 21, 2023); *M.D.*, Docket No. 22-0542 (issued August 17, 2022); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 4, 2021 appellant, then a 40-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained an injury to his lower back when performing an inspection of an aircraft while in the performance of duty. He explained that, while slightly bent at the waist, he felt a pain in the lower right area of his back. Appellant stopped work on February 4, 2021.

On February 7, 2021 Dr. Angelique Campen, a Board-certified emergency room physician, treated appellant for back pain, which began on February 4, 2021, while he was inspecting a plane at work. She diagnosed low back pain and discharged him in stable condition with work restrictions. In a February 7, 2021 note, Dr. Campen returned appellant to modified-duty work on February 8, 2021. In an after-visit summary of even date, she diagnosed lumbar sprain/strain initial encounter.

In a report dated February 8, 2021, Dr. James Kwok, a Board-certified physiatrist, treated appellant for lower back pain, which began on February 4, 2021. On a state form report he diagnosed lumbar strain, initial encounter and checked a box marked "Yes" indicating that his findings and diagnosis were consistent with appellant's account of injury. Dr. Kwok returned appellant to modified-duty work on February 8, 2021.

On February 8, 2021 Gabriel Chang, a physician assistant, treated appellant for low back pain that began on February 4, 2021, when appellant was performing an inspection of the underbelly of an aircraft, bent over and turned to look up toward the left, and suddenly felt back pain. He diagnosed lumbar strain, initial encounter and returned appellant to modified-duty work. In work activity status reports dated February 8, 2021, Mr. Chang diagnosed lumbar strain, initial encounter and released appellant to modified-duty work. On February 12, 2021 he treated appellant in follow-up and reported that his back pain had resolved. Mr. Chang diagnosed lumbar strain and opined that he could return to full duty. In a work activity status report dated February 12, 2021, he diagnosed lumbar strain and noted MMI was reached on February 12, 2021. Mr. Chang returned appellant to full duty.

By decision dated March 16, 2021, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed condition and the accepted February 4, 2021 employment incident.

In an appeal request form dated April 26, 2021, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 11, 2021, OWCP denied appellant's April 26, 2021 request for an oral hearing as untimely filed, finding that his request was not made within 30 days of the

³ Docket No. 21-0870 (issued January 5, 2022).

March 16, 2021 OWCP decision. It further exercised discretion and determined that the issue in this case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

Appellant appealed to the Board. By decision dated January 5, 2022, the Board affirmed the March 16 and May 11, 2021 OWCP decisions, finding that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted February 4, 2021 employment incident, and that his request for an oral hearing was untimely filed, pursuant to 5 U.S.C. § 8124(b).⁴

On April 5, 2022 appellant requested reconsideration. He resubmitted Mr. Chang's February 8 and 12, 2021 reports, which were previously of record.

By decision dated July 1, 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.⁵ 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.⁶ 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).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁹ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁰

⁴ *Id.*

⁵ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁸ *R.L.*, Docket No. 18-0496 (issued January 9, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP. 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 to merely 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.¹¹

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence, which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). 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.¹² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration as untimely filed.

Section 10.607(a) of OWCP's implementing regulations provides that a request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁴ "This includes any decision issued by the Branch of Hearings and Review (H&R) after a hearing or review of the written record, any denial of modification following a reconsideration, any merit decision by the ECAB, and any merit decision following a remand H&R or the ECAB...."¹⁵ OWCP's procedures further provide that when determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or legal holiday.¹⁶ One year following the Board's January 5, 2022 merit decision was January 5, 2023. Because OWCP received his reconsideration request on April 5,

¹¹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5a (September 2020).

¹³ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁴ *See supra* note 7. The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4 (September 2020).

¹⁵ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4a.

¹⁶ Federal (FECA) Procedure Manual, *supra* note 14.

2022, the Board finds that it was timely filed.¹⁷ The clear evidence of error standard utilized by OWCP in its July 1, 2022 decision is appropriate only for untimely reconsideration requests.¹⁸ Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will reverse OWCP's July 1, 2022 decision and remand the case to apply the proper standard for timely requests for reconsideration, to be followed by an appropriate decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2022 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 30, 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

¹⁷ See *Order Remanding Case, B.W.*, Docket No. 20-1512 (issued August 24, 2021); *Order Remanding Case, J.H.*, Docket No. 18-1367 (issued July 17, 2019); *Order Remanding Case, C.B.*, Docket No. 13-1732 (issued January 28, 2014); *Steven E. Pratt*, Docket No. 93-443 (issued February 2, 1994).

¹⁸ See 20 C.F.R. § 10.607(b); *see also id.*