

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

V.W., Appellant	)	
	)	
and	)	Docket No. 23-0760
	)	Issued: January 2, 2024
DEPARTMENT OF AGRICULTURE,	)	
U.S. FOREST SERVICE, Albuquerque, NM,	)	
Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On May 2, 2023 appellant filed a timely appeal from November 9, 2022 and April 17, 2023 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated January 4, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly denied appellant's August 13, 2022 request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a); and (2) whether OWCP properly denied appellant's March 29, 2023 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 15, 2021 appellant, then a 47-year-old forestry technician, filed a traumatic injury claim (Form CA-1) alleging that on July 11, 2021 he experienced numbness in the right thumb, pointer finger, and middle finger when he was involved in a vehicle rollover while in the performance of duty. He stopped work on that date and returned to full-duty work on July 13, 2021.

In a report dated July 12, 2021, Dr. Julie Cross, an osteopath and Board-certified in family medicine, noted appellant's complaints of numbness of the fingers in his right hand after a July 11, 2021 motor vehicle accident (MVA). She conducted an examination and diagnosed numbness of fingers.

In an authorization for examination and/or treatment (Form CA-16) dated July 12, 2021, M.D., a human resources assistant at the employing establishment, noted a date of injury of July 11, 2021, and indicated that appellant was involved in a rollover MVA. In an attending physician's report, Part B, of a Form CA-16 dated July 12, 2021, Dr. Cross noted the July 11, 2021 date of injury and checked a box marked "Yes" indicating that appellant's condition was causally related to the described employment activity.

By decision dated August 19, 2021, OWCP accepted that the July 11, 2021 employment incident occurred as alleged, but denied the claim finding that the medical evidence of record did not establish a medical diagnosis in connection with the July 11, 2021 employment incident. Therefore, it found that appellant had not established an injury as defined by FECA.

On October 6, 2021 appellant requested reconsideration. In a report dated September 10, 2021, Dr. Cross noted a diagnosis of peripheral nerve injury. She explained that appellant sustained some small level of peripheral nerve injury since the motor vehicle accident in July, and opined that "[t]his is most definitely a [w]orkmen's [compensation] injury as he had no symptoms like this prior to the MVA."

By decision dated January 4, 2022, OWCP modified the August 19, 2021 decision finding that the medical evidence of record had established a medical condition. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between the diagnosed condition and the accepted July 11, 2021 employment incident.

On August 13, 2022 appellant requested reconsideration.

By decision dated November 9, 2022, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

On March 29, 2023 appellant requested reconsideration. He argued that his doctor's report fulfilled all five elements to establish his claim. Appellant also noted that the other two passengers of the motor vehicle accident who were injured had their FECA claims approved.

Appellant resubmitted Dr. Cross' September 10, 2021 report, a printout of an internet article regarding how an accident can contribute to traumatic carpal tunnel syndrome, and a November 30, 2022 electromyography and nerve conduction velocity (EMG/NCV) study report.

By decision dated April 17, 2023, OWCP denied appellant's March 29, 2023 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his or her own motion or on application.<sup>2</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>3</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>4</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>5</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly denied appellant's August 13, 2022 request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered by OWCP.

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<sup>2</sup> 5 U.S.C. § 8128(a); *see A.N.*, Docket No. 20-1487 (issued March 19, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>3</sup> 20 C.F.R. § 10.606(b)(3); *see S.K.*, Docket No. 22-0248 (issued June 27, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>4</sup> *Id.* at § 10.607(a). 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, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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). *Id.* at Chapter 2.1602.4b.

<sup>5</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>6</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>7</sup>

Furthermore, appellant did not submit any new medical evidence with his August 13, 2022 request for reconsideration. Accordingly, he was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>8</sup>

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied his request for reconsideration without reopening the case for review on the merits.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>10</sup> To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>11</sup> 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).<sup>12</sup> The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>13</sup>

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>14</sup> OWCP's 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 demonstrates clear evidence of error on the part of OWCP.<sup>15</sup> In this regard,

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<sup>7</sup> *Supra* note 3; *see R.M.*, Docket No. 21-0963 (issued April 19, 2023).

<sup>8</sup> *Supra* note 3; *R.S.*, Docket No. 22-1141 (issued April 18, 2023); *P.W.*, Docket No. 20-0380 (issued November 23, 2020).

<sup>9</sup> *See B.S.*, Docket No. 22-0738 (issued April 17, 2023); *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>10</sup> 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).

<sup>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>13</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>14</sup> *See* 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>15</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; FECA Procedure Manual, *supra* note 12 at Chapter 2.1602.5a (September 2020).

OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>16</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>17</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>18</sup> 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 evidence of error on the part of OWCP.<sup>19</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>20</sup>

### ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision.

OWCP properly determined that appellant's March 29, 2023 request for reconsideration was untimely filed. The last merit decision was issued on January 4, 2022. As appellant's request for reconsideration was not received by OWCP until March 29, 2023, more than one year after the most recent merit decision, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the request for reconsideration was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying the claim.<sup>21</sup>

The Board further finds that, in its April 17, 2023 decision, OWCP failed to make findings regarding the arguments and evidence in support of appellant's untimely reconsideration request.<sup>22</sup> In its April 17, 2023 decision, OWCP addressed the arguments that he raised in his reconsideration request. However, it did not provide any discussion regarding the evidence appellant submitted in support of his untimely reconsideration request. Along with his March 29, 2023 reconsideration request, appellant submitted a printout of an internet article regarding traumatic carpal tunnel syndrome and a November 30, 2022 EMG/NCV study report. OWCP provided no discussion or

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<sup>16</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>17</sup> 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>18</sup> See *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>19</sup> *B.W.*, *supra* note 17.

<sup>20</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>21</sup> 20 C.F.R. § 10.607(a).

<sup>22</sup> See *J.D.*, Docket No. 21-0597 (issued February 7, 2022).

explanation regarding why this additional evidence failed to demonstrate clear evidence of error.<sup>23</sup> Thus, the Board finds that OWCP did not comply with the review requirements of FECA and its implementing regulations.<sup>24</sup> Accordingly, appellant could not understand the precise defect of the claim, *i.e.*, whether he had demonstrated clear evidence that the last merit decision was incorrect, and the kind of evidence, which would overcome it.<sup>25</sup>

The Board will therefore set aside OWCP's April 17, 2023 decision and remand the case for an appropriate decision which contains findings of fact and a statement of reasons regarding appellant's untimely reconsideration request.<sup>26</sup>

### CONCLUSION

The Board finds that OWCP properly denied appellant's August 13, 2022 request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a). The Board further finds, however, that this case is not in posture for decision with regard to whether the untimely March 29, 2023 reconsideration request demonstrates clear evidence of error.

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<sup>23</sup> See *K.D.*, Docket No. 20-1186 (issued February 3, 2021); *M.M.*, Docket No. 20-0537 (issued September 24, 2020); see also *R.T.*, Docket No. 19-0604 (issued September 13, 2019).

<sup>24</sup> See *C.M.*, Docket No. 19-1211 (issued August 5, 2020). See also *L.M.*, Docket No. 13-2017 (issued February 21, 2014).

<sup>25</sup> FECA Procedure Manual, *supra* note 12 at Chapter 2.1400.5 (February 2013).

<sup>26</sup> The Board notes that the employing establishment issued a Form CA-16, dated July 12, 2021. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. See 20 C.F.R. § 10.300(c); *V.S.*, Docket No. 20-1034 (issued November 25, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 9, 2022 decision of the Office of Workers' Compensation Programs is affirmed and the April 17, 2023 decision is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 2, 2024  
Washington, DC

Alec J. Koromilas, 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