

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

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S.M., Appellant)	
)	
and)	Docket No. 23-0908
)	Issued: January 10, 2024
U.S. POSTAL SERVICE, BULK MAIL CENTER,)	
Forest Park, IL, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On June 21, 2023 appellant filed a timely appeal from a May 31, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated March 10, 1999, which became final after 30 days of issuance and is not subject to further review.¹ As there is no merit decision by OWCP within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 20 C.F.R. § 501.6(d); *see P.S.*, DocketNo. 18-0718 (issued October 26, 2018); *T.B.*, DocketNo. 15-0001 (issued July 1, 2015); *C.M.*, DocketNo. 15-471 (issued April 27, 2015); *D.A.*, DocketNo. 08-1217 (issued October 6, 2008).

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 decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On September 30, 1987 appellant, then a 28-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained left carpal tunnel syndrome causally related to repetitive duties of his federal employment. OWCP accepted the claim for left carpal tunnel syndrome. Appellant stopped work on October 9, 1987.

On July 6, 1988 the employing establishment offered appellant a position as a modified custodian. The position required intermittent standing and walking, lifting no more than 10 pounds, and occasional reaching above the shoulder level. The duties of the position included cleaning tables and chairs in the lunchroom, and spot sweeping bathroom floors.

On November 16, 1988 Dr. James D. Schlenker, an attending Board-certified surgeon, advised that appellant could return to work full time, effective October 31, 1988. Appellant returned to work on November 4, 1988 as a modified custodian.

In a report dated February 24, 1989, Dr. Schlenker discussed appellant's history of carpal tunnel syndrome treated with a left carpal tunnel release. He observed that a sensory examination of the left hand yielded normal findings with two-point discrimination of five millimeters and that appellant had full range of motion of the fingers, wrist, elbow, and shoulder. Dr. Schlenker related that he had some loss of strength in his left hand. In an addendum, he noted that a nerve conduction velocity study of the median nerve performed using the Nerve pace Neurometer yielded findings within normal limits for each nerve on both sides. Dr. Schlenker opined that appellant had "recovered completely from his carpal tunnel syndrome on the left side."

On March 1, 1989 the employing establishment denied appellant's request for reassignment to a different work schedule.

Appellant stopped work on March 16, 1989, and informed the employing establishment that he would not return unless he was placed back on his original tour schedule and preferably in his craft. On September 14, 1989 the employing establishment removed him from employment, effective June 9, 1989, for unauthorized absence since March 1989.

³ Docket No. 90-0321 (issued April 5, 1990); Docket No. 97-0670 (issued March 10, 1999); *Order Denying Petition for Reconsideration*, Docket No. 97-0670 (issued August 19, 1999); Docket No. 02-1032 (issued October 22, 2002); *Order Remanding Case*, Docket No. 02-1209 (issued October 28, 2002); Docket No. 04-0757 (issued May 2, 2005); Docket No. 09-0151 (issued October 21, 2009); *Order Denying Petition for Reconsideration*, Docket No. 09-0151 (issued April 13, 2010); Docket No. 10-2320 (issued July 19, 2011); *Order Denying Petition for Reconsideration*, Docket No. 10-2320 (issued January 25, 2012); Docket No. 12-0174 (issued July 25, 2012); *Order Remanding Case*, Docket No. 13-1383 (issued December 16, 2013); Docket No. 14-0759 (issued July 1, 2014); Docket No. 15-0426 (issued April 20, 2015); Docket No. 16-0270 (issued April 26, 2016); Docket No. 18-0075 (issued April 11, 2018); Docket No. 19-1961 (issued January 28, 2021); Docket No. 21-1232 (issued April 8, 2022).

On February 17, 1991 Dr. Timothy Norton, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), found that appellant could perform the offered modified custodian position, but that additional duties like washing sinks and toilets would require too much repetitive movement. On May 2, 1991 the employing establishment advised that it had not assigned him additional duties; rather he was only expected to perform the duties provided in the July 6, 1988 offered position. It asserted that appellant had stopped work because he did not like his shift hours.

By decision dated July 6, 1992, OWCP denied appellant's claim for wage-loss compensation for disability from work commencing March 16, 1989. It found that the employing establishment had provided him with work within his medical restrictions, but that he stopped work for reasons unrelated to his employment injury.

Appellant requested reconsideration. By decisions dated August 15, 1994 and October 27, 1995, OWCP denied modification.

In a statement dated May 13, 1996, J.W., an employing establishment manager, advised that appellant had resumed modified employment on November 6, 1988, but had stopped work on March 16, 1989 and requested that he be returned to his original duty tour and original craft. J.W. noted that appellant was now contending that he had stopped work due to his medical condition. J.W. asserted that appellant was not entitled to compensation based on his refusal or neglect of suitable employment.

By decision dated August 10, 1996, OWCP modified the October 27, 1995 decision to reflect that he had performed duties not specifically approved by his physician. It noted, however, that there was no evidence supporting that these duties exceeded the restrictions set forth by Dr. Schlenker. OWCP further found that the medical evidence of record was insufficient to establish that appellant was disabled from his modified employment beginning March 16, 1989.

Appellant requested reconsideration. By decision dated November 13, 1996, OWCP denied his request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

By decision dated March 10, 1999, the Board affirmed the August 10 and November 13, 1996 OWCP decisions.⁴

Appellant continued to request reconsideration. By decisions dated March 14 and November 29, 2001 and March 5, 2002, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board. By decision dated October 22, 2002, the Board affirmed the March 14 and November 29, 2001 and March 5, 2002 OWCP nonmerit decisions.⁵

⁴ Docket No. 97-670 (issued March 10, 1999).

⁵ Docket No. 02-1032 (issued October 22, 2002).

Appellant thereafter filed multiple requests reconsideration. OWCP denied his requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decisions dated May 2, 2005, October 21, 2009, July 19, 2011, January 25, 2012, July 25, 2012, July 1, 2014, April 20, 2015, April 26, 2016, April 11, 2018, January 28, 2021, April 8, 2022, the Board affirmed OWCP's decisions which denied his requests for reconsideration, as they were untimely filed and failed to demonstrate clear evidence of error.⁶

By letter dated February 28, 2023, received by OWCP on March 3, 2023, appellant requested reconsideration of OWCP's August 10, 1996 decision. He argued that new evidence showed that the NervePace Neurometer used by Dr. Schlenker in his February 24, 1989 report, finding that he had recovered from carpal tunnel syndrome was invalid and unreliable. Appellant cited an August 1997 medical journal and argued that the journal findings applied to the specific facts of his case as Dr. Schlenker had erroneously used the instrument to determine his condition. He further asserted that Dr. Schlenker had used only the NervePace Neurometer in determining that he had recovered from his carpal tunnel syndrome, and that OWCP erred in relying upon this finding in its prior decisions.

Appellant submitted the August 1997 article from the Journal of Occupational and Environmental Medicine (JOEM) analyzing portable nerve conduction devices for screening carpal tunnel syndrome in the workplace. The journal found that the devices may be useful for confirming symptomatic cases but that "many false positive and false negatives will occur..." An abstract of the article advised that screening devices including NervePace Neurometer were unlikely to identify individuals with carpal tunnel syndrome or "to detect changes over time that are not accompanied by symptoms and signs."

By decision dated May 31, 2023, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and did not 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.⁷ OWCP's regulations⁸ establish a one-year time limitation for requesting reconsideration which begins on the date of the original OWCP merit decision. A right to reconsideration within one-year also accompanies any subsequent merit decision on the issues.⁹

⁶ Docket No. 04-757 (issued May 2, 2005); Docket No. 09-151 (issued October 21, 2009); Docket No. 10-2320 (issued July 19, 2011); Docket No. 12-714 (issued July 25, 2012).

⁷ 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).

⁸ 20 C.F.R. § 10.607(a).

⁹ *E.R.*, Docket No. 21-0423 (issued June 20, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

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. Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).¹⁰ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹¹

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.¹² 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 for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹³ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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. 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.

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 demonstrates 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

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

¹¹ *S.S.*, Docket No. 23-0086 (issued May 26, 2023); *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *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).

¹³ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 10 at Chapter 2.1602.5 (September 2020).

¹⁴ *L.J.*, Docket No. 23-0282 (issued May 26, 2023); *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

error.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, as it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations¹⁸ and procedures¹⁹ 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.²⁰ The most recent merit decision was the Board's March 10, 1999 decision. As appellant's request for reconsideration was received on March 3, 2023, more than one year after the March 10, 1999 decision, the Board finds that it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for wage-loss compensation beginning March 16, 1989.²¹

In support of his request for reconsideration, appellant argued that new evidence showed that the NervePace Neurometer used by Dr. Schlenker in his February 24, 1989 report was invalid and unreliable. He cited an August 1997 medical journal and argued that the journal findings applied to the specific facts of his case as Dr. Schlenker had erroneously used the instrument to determine his condition. Appellant further asserted that Dr. Schlenker had used only the NervePace Neurometer in determining that he had recovered from his carpal tunnel syndrome, and that OWCP erred in relying upon this finding in its prior decisions. He submitted the August 1997 article from the JOEM, which contended that portable nerve conduction devices, including the NervePace Neurometer, provided false positive and false negative results and were unlikely to identify CTS or changes in the condition without accompanying symptoms. The Board has held, however, that medical texts and excerpts from publications are of no evidentiary value with respect to a given medical matter because such materials are of general application.²² Consequently, this evidence is insufficient to establish clear evidence of error.

¹⁶ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 10 at Chapter 2.1602.5(a) (September 2020).

¹⁷ *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *D.S.*, Docket No. 17-0407 (issued May 24, 2017); *George C. Vernon*, 54 ECAB 319 (2003).

¹⁸ 20 C.F.R. § 10.607(a); *see J.W.*, *supra* note 9; *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁹ *Supra* note 10 at Chapter 2.1602.4 (September 2020); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

²¹ *Id.* at § 10.607(b); *see M.W.*, Docket No. 17-0892 (issued May 21, 2018); *see S.M.*, Docket No. 16-0270 (issued April 26, 2016).

²² *See K.O.*, Docket No. 20-0425 (issued November 12, 2021); *L.C.*, Docket No. 17-1811 (issued March 23, 2018); *R.R.*, Docket No. 17-1210 (issued April 12, 2018).

Appellant has not raised a substantial question as to the correctness of OWCP's decision. Consequently, the Board finds that OWCP properly denied his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board