

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

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**F.P., Appellant**

**and**

**DEPARTMENT OF THE INTERIOR, FISH &  
WILDLIFE SERVICE, Seymour, IN, Employer**

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**Docket No. 24-0038  
Issued: March 19, 2024**

*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 October 20, 2023 appellant filed a timely appeal from a June 28, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated December 29, 2021 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

**ISSUE**

The issue is whether OWCP properly denied appellant's April 10, 2023 request for reconsideration of the merits of his claim, 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 April 21, 2009 appellant, then a 31-year-old law enforcement officer, filed a traumatic injury claim (Form CA-1) alleging that on April 1, 2009 he injured his right shoulder, biceps, and knee when he participated in defensive tactics, ground fighting, and take-down maneuver training while in the performance of duty. He noted that his right shoulder and biceps were still limited due to pain, but that his right knee pain had subsided. Appellant did not stop work.

Appellant did not submit any evidence in support of his claim.

On May 13, 2021 appellant filed a notice of recurrence (Form CA-2a) of his need for medical treatment, commencing March 20, 2021, due to the claimed April 1, 2009 right shoulder injury. He noted that he had experienced chronic discomfort, instability, and pain in the right shoulder since his original injury, which was no longer relieved by rest, ice, and over-the-counter medication. Appellant related that he had not sustained any additional injuries to the right shoulder or biceps since the claimed April 1, 2009 employment incident.

In support of his claim, appellant submitted an April 13, 2021 duty status report (Form CA-17) by Dr. Scott Slivka, a Board-certified orthopedic surgeon, who diagnosed a posterior labral tear of the right shoulder and recommended work restrictions.

In a June 7, 2021 development letter, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of factual and medical evidence needed to establish his claim, including a narrative medical report from a treating physician, containing a detailed description of findings and a diagnosis, explaining how his work activities caused, contributed to, or aggravated his medical conditions. OWCP provided a questionnaire for his completion and afforded appellant 30 days to respond.

OWCP thereafter received appellant's undated response to its questionnaire, where he indicated that on April 1, 2009 he participated in required refresher training focused on control and defensive tactics. Appellant related that his right shoulder hyperextended when he was engaged in ground fighting and take down defense maneuvers. He used ice and medication at home and advised his medical providers of his right shoulder symptoms during his subsequent annual physical examinations. Appellant further related that his symptoms intensified in March 2021, and he sought treatment with an orthopedic specialist.

OWCP also received an undated report of x-ray of the right shoulder, which was normal.

In a March 31, 2021 visit summary, Dr. Slivka diagnosed chronic right shoulder pain and prescribed medications.

An April 8, 2021 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated a tear of the posterior mid-labrum with a large adjacent paralabral cyst, acromioclavicular (AC) arthropathy, and probable calcific tendinitis superimposed on tendinosis of the rotator cuff.

In an April 13, 2021 medical report, Dr. Slivka reviewed the April 8, 2021 MRI scan results and referred appellant for an ultrasound-guided glenohumeral injection of the right shoulder.

In an April 21, 2021 medical report, Dr. Timothy VonFange, a Board-certified family medicine and sports medicine specialist, diagnosed a right shoulder labral tear and administered an injection of lidocaine and Kenalog.

Dr. Slivka, in a follow-up report dated May 20, 2021, indicated that appellant reported 80 percent improvement in his right shoulder after the injection. He noted a date of injury of “2005” and diagnosed labral tear of right shoulder.

On May 25, 2021 Jonathan Hirsch, a physician assistant, referred appellant for physical therapy to the right shoulder.

OWCP also received medical records for an unrelated left knee condition.

By decision dated August 25, 2021, OWCP denied the claim, finding that the medical evidence of record was insufficient to establish that the diagnosed medical conditions were causally related to the accepted April 1, 2009 employment incident.

On September 30, 2021 appellant requested reconsideration of the August 25, 2021 decision. In support of his request, he submitted a September 21, 2021 narrative report by Dr. Slivka who indicated that appellant injured his right shoulder in 2009, but that the current pain started a few years ago and was unrelated to an injury at that time. Dr. Slivka noted that the April 8, 2021 MRI scan results, indicated that he had seen appellant for office visits on March 31, April 13 and 21, and May 20 and 25, 2021, and outlined his May 20, 2021 physical examination findings.

By decision dated December 29, 2021, OWCP denied modification of its August 25, 2021 decision.

On April 10, 2023 appellant requested reconsideration of the December 29, 2021 decision. In support of his request, he submitted a duplicate copy of his undated response to OWCP’s questionnaire and an undated narrative report by Dr. Slivka, who indicated that appellant related an onset of shoulder pain during defense tactics training in April 2009 and outlined his treatment and diagnostic testing results.

By decision dated June 28, 2023, OWCP denied appellant’s request for reconsideration, 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>2</sup> This discretionary authority, however, is subject to certain restrictions. For

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<sup>2</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).

instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>3</sup> Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).<sup>4</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>5</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>6</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>7</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</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.

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>9</sup> 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 error.<sup>10</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>11</sup>

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>5</sup> *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).

<sup>6</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 (1990).

<sup>7</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 4 at Chapter 2.1602.5 (September 2020).

<sup>8</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *id.* at Chapter 2.1602.5a (September 2020).

<sup>9</sup> *G.G.*, *supra* note 5; *see also* 20 C.F.R. § 10.607(b); *id.* at Chapter 2.1602.5 (February 2016).

<sup>10</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *id.* at Chapter 2.1602.5(a) (February 2016).

<sup>11</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

## 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.

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>12</sup> As appellant's request for reconsideration was not received until April 10, 2023, more than one year after the issuance of OWCP's December 29, 2021 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying the claim.<sup>13</sup>

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its December 29, 2021 decision. The underlying issue is whether appellant met his burden of proof to establish a medical condition causally related to the accepted April 1, 2009 employment incident.

In support of his untimely request for reconsideration, appellant submitted a duplicate copy of his response to OWCP's questionnaire and an undated narrative report by Dr. Slivka. However, he did not explain how his statement raised a substantial question as to the correctness of OWCP's decision.<sup>14</sup> Moreover, 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.<sup>15</sup> The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>16</sup> The argument and evidence submitted by appellant in support of his untimely request for reconsideration does not raise a substantial question as to the correctness of the denial of his 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 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>12</sup> 20 C.F.R. § 10.607(a).

<sup>13</sup> *Id.* at. § 10.607(b); *see R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>14</sup> *See G.B.*, Docket No. 18-1629 (issued April 15, 2019); *P.B.*, Docket No. 18-0265 (issued September 5, 2018); *D.E.*, 59 ECAB 438 (2008).

<sup>15</sup> *Supra* note 10.

<sup>16</sup> *Supra* note 9.

<sup>17</sup> *See P.T.*, Docket No. 18-0494 (issued July 9, 2018).

<sup>18</sup> *J.C.*, Docket No. 20-1250 (issued May 24, 2021); *W.D.*, Docket No. 19-0062 (issued April 15, 2019).

**CONCLUSION**

The Board finds that 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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 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