

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

## **FACTUAL HISTORY**

On February 14, 2022 appellant, then a 33-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that on January 21, 2022 he injured his left shoulder when he engaged in physical defense tactics for a graded event while in the performance of duty. He did not stop work.

In a February 25, 2022 medical report, Dr. Jarrod D. Mattei, a Board-certified occupational, public health, and general preventive medicine specialist, noted that appellant related symptoms of left shoulder pain, which he attributed to an injury on January 21, 2022 when engaged in defense movements. On physical examination of the left shoulder, he observed soft tissue swelling of the anterior shoulder, tenderness at the anterior glenohumeral joint through the proximal biceps tendon and posterior glenohumeral joint, reduced tone in the belly of the biceps, and reduced strength and range of motion. Dr. Mattei diagnosed a left shoulder injury and recommended a magnetic resonance imaging (MRI) scan. In a separate note of even date, he released appellant to return to work with restrictions.

An MRI scan of the left shoulder dated March 15, 2022 demonstrated mild tendinopathy of the supraspinatus and subscapularis tendons and a probable anterior to anteroinferior labral tear.

In a March 18, 2022 follow-up report, Dr. Matthei noted appellant's complaints and physical examination findings and reviewed the March 15, 2022 MRI. He diagnosed left shoulder injury with labral tear, recommended an orthopedic consultation and physical therapy, and released appellant to return to full-duty work.

In an April 18, 2022 medical report, Dr. David J. Burnikel, a Board-certified orthopedic surgeon, noted that appellant related complaints of left shoulder pain, which he attributed to an injury while performing "take-down" training. He noted physical examination findings and reviewed the March 15, 2022 MRI scan. Dr. Burnikel diagnosed a superior labrum anterior and posterior (SLAP) tear and impingement of the left shoulder and recommended an MRI arthrogram. He opined that a SLAP tear is "certainly something that could have developed acutely in the line of duty, specifically with the description of his takedown involving forced abduction and external rotation." In a duty status report (Form CA-17) of even date, Dr. Burnikel released appellant to full-duty work.

In a medical report dated April 29, 2022, Dr. Ashley J. Ennedy, a Board-certified occupational medicine specialist, released appellant to full-duty work and recommended additional physical therapy.

In a May 26, 2022 follow-up report, Dr. Burnikel diagnosed SLAP lesion, bicipital tendinitis, and impingement syndrome of the left shoulder.

OWCP also received reports of physical therapy treatment to appellant's left shoulder.

In a June 1, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It provided a questionnaire for his completion and advised him of the type of factual and medical evidence necessary to establish his claim. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP thereafter received additional physical therapy notes and a May 24, 2022 MRI arthrogram of the left shoulder, which revealed meta-acromial os acromiale with mild cystic change across the synchondrosis and possible impingement, but no rotator cuff or labral tear.

By decision dated July 6, 2022, 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 January 21, 2022 employment incident.

OWCP thereafter received an August 15, 2023 narrative report wherein Dr. John W. Ellis, a Board-certified family medicine specialist, reviewed appellant's treatment history and noted that he had undergone left shoulder surgery by Dr. Burnikel on September 13, 2022, including subacromial decompression, glenohumeral debridement, and subpectoral biceps tenodesis. He documented physical examination findings and diagnosed superior glenoid lesion, bicipital tendinitis, and impingement syndrome of the left shoulder. Dr. Ellis opined that it was likely that the sudden movements performed during defensive tactics training led to a tear of the labrum. He further noted that bicipital tendinitis and shoulder impingement were caused by general shoulder pathology rather than a unique mechanism.

On September 11, 2023 appellant requested reconsideration of the July 6, 2022 decision.

By decision dated September 20, 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 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,

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<sup>2</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>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).

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>

### **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 September 11, 2023, more than one year after the issuance of OWCP's July 6, 2022 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying the claim.<sup>13</sup>

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<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 20 C.F.R. § 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); *supra* note 4 at Chapter 2.1602.5a (September 2020).

<sup>9</sup> *G.G.*, *supra* note 5; see also 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (September 2020).

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

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

<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).

Appellant has not demonstrated clear evidence of error on the part of OWCP in its July 6, 2022 decision. The underlying issue is whether appellant met his burden of proof to establish a medical condition causally related to the accepted January 21, 2022 employment incident.

In support of his untimely request for reconsideration, appellant submitted an August 15, 2023 narrative report by Dr. Ellis. However, he did not explain how this evidence 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 required 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 request for reconsideration, finding that 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, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 20, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2024  
Washington, DC

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

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

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