

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

_____)	
T.N., Appellant)	
)	
and)	Docket No. 22-0560
)	Issued: April 24, 2025
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, San Diego, CA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On March 7, 2022 appellant filed a timely appeal from a September 8, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated October 20, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

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 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the September 8, 2021 decision, appellant submitted additional evidence to OWCP and with her appeal to the Board. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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 August 20, 1998 appellant, then a 39-year-old deportation assistant, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral wrist and elbow pain, numbness in fingers, and left shoulder pain due to factors of her federal employment. OWCP accepted her claim for bilateral wrist, elbow, and shoulder sprains and subsequently expanded acceptance of her claim to include bilateral carpal tunnel syndrome and cervical radiculopathy, as resolved.

On April 11 and 12, 2013 appellant filed claims for compensation (Form CA-7) for disability from work during the periods January 1 through December 31, 2011, January 1 through July 31, 2012, October 24 through December 31, 2012, and January 1 through March 31, 2013.⁴ She also filed a claim for reimbursement of travel expenses, which was denied by OWCP in a June 10, 2013 decision.

OWCP subsequently determined that a conflict in the medical opinion evidence existed regarding whether appellant's work-related cervical condition had resolved. On June 13, 2014 it referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Harry Marinow, a Board-certified orthopedic surgeon, for an impartial medical examination.

By decision dated July 29, 2014, OWCP suspended appellant's entitlement to wage-loss compensation and medical benefits, effective that date, under 5 U.S.C. § 8123(d) because she failed to report to the impartial medical examination on July 1, 2014 as directed.

Appellant appealed OWCP's June 10, 2013 decision to the Board. By decision dated September 16, 2014, the Board affirmed OWCP's June 10, 2013 denial of appellant's request for reimbursement of travel expenses.

On July 31, 2015 appellant filed a Form CA-7 claim for a schedule award. She also continued to file Form CA-7 claims for wage-loss compensation for disability from work.

On July 3, 2015 appellant requested reconsideration of OWCP's July 29, 2014 suspension decision. By decision dated September 30, 2015, OWCP denied appellant's July 3, 2015 request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

³ *Order Remanding Case*, Docket No. 05-844 (issued September 1, 2005); *Order Remanding Case*, Docket No. 09-2350 (issued February 4, 2010); *Order Remanding Case*, Docket No. 10-1810 (issued May 25, 2011); Docket No. 12-1056 (issued December 18, 2012); Docket No. 13-2097 (issued September 16, 2014); Docket No. 16-0895 (issued December 16, 2016); Docket No. 18-1613 (issued April 29, 2020); Docket No. 21-0274 (issued July 9, 2021).

By decision dated October 20, 2015, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

Appellant appealed the September 30 and October 20, 2015 decisions to the Board.

By decision dated December 16, 2016,⁵ the Board affirmed OWCP's September 30 and October 20, 2015 decisions.

OWCP subsequently expanded the acceptance of appellant's claim to include cervical disc degeneration at C4-5 level.

On December 15, 2017 appellant requested reconsideration.⁶

In support thereof, appellant submitted a progress report dated January 9, 2018 by Dr. Anna Nikachina, a Board-certified physiatrist and rehabilitation specialist, who indicated that appellant was evaluated for complaints of bilateral shoulder, elbow, wrist, and forearm pain. On examination of appellant's bilateral upper extremities, she observed no focal muscle atrophy and normal muscles. Sensory examination demonstrated intact sensation to light touch. Dr. Nikachina reported that cervical spine examination revealed tenderness to palpation of the paraspinal muscles from C2-7 bilaterally and of the articular pillars of the cervical facet joints. She diagnosed status-post cervical discectomy, 2007, cervical spondylosis with radiculopathy, and depression. Dr. Nikachina reported that appellant was totally disabled from work. She provided additional progress reports dated February 16 and May 7, 2018.

By decisions dated March 15 and July 25, 2018, OWCP denied appellant's December 15, 2017 request for reconsideration, pursuant to 5 U.S.C. § 8128(a).

OWCP subsequently received additional progress reports dated July 2, 2018 through March 26, 2020 by Dr. Nikachina. Dr. Nikachina provided examination findings and diagnosed status-post anterior spondylosis with radiculopathy, bilateral shoulder impingement, depression, spinal fusion and discectomy at C5-6 in 2007, and cervical spondylosis. She reported that appellant was totally disabled.

Appellant also submitted cervical block procedure notes and diagnostic imaging reports dated September 29, 2017 through July 18, 2019.

In a report dated May 1, 2019, Dr. James D. Matiko, a Board-certified orthopedic surgeon, noted appellant's complaints of right shoulder pain due to a work-related injury. He indicated that appellant last worked in 2010. On examination of appellant's right shoulder, Dr. Matiko observed

⁵ Docket No. 16-0895 (issued December 16, 2016).

⁶ Although appellant requested reconsideration from the Board's September 16, 2014 and December 16, 2016 decisions, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Accordingly, OWCP's June 10, 2013 and September 30 and October 20, 2015 decisions are the appropriate subjects of possible modification.

active range of motion with pain and tenderness over the coracoacromial arch. He diagnosed right shoulder rotator cuff tendinopathy and indicated that appellant was totally disabled from work.

Appellant appealed the March 15 and July 25, 2018 nonmerit decisions to the Board. By decision dated April 29, 2020, the Board affirmed the March 15, 2018 decision, in part, finding that OWCP properly denied further merit review of appellant's claim for a schedule award pursuant to 5 U.S.C. § 8128(a). The Board, however, also set aside the March 15, 2018 decision in part, finding that, as more than one year had elapsed from OWCP's July 29, 2014 suspension decision to the filing of appellant's reconsideration request on December 15, 2017, OWCP should have applied the more stringent clear evidence of error standard. The Board remanded the case for OWCP to apply the proper standard of review for an untimely request for reconsideration.⁷ The Board also affirmed the July 25, 2018 decision.

By decision dated June 18, 2020, OWCP denied appellant's December 15, 2017 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. The June 18, 2020, decision noted: "You did not present clear evidence of error.... The basis for this decision is."

Appellant submitted additional progress reports dated July 14, 2020 through March 15, 2021 by Dr. Nikachina, who indicated that appellant was treated for complaints of neck pain and bilateral shoulder, elbow, wrist, and forearm pain. Dr. Nikachina provided examination findings and diagnosed severe spinal canal stenosis, spinal fusion and discectomy at C5-6, cervical facet arthropathy, right shoulder rotator cuff tendinopathy, bilateral wrist osteoarthritis, depression, and bilateral carpal tunnel syndrome, status post bilateral carpal tunnel release and right de Quervain's release. She reported that appellant was totally disabled from work.

On December 18, 2020 appellant appealed the June 18, 2020 decision to the Board.

A May 6, 2021 magnetic resonance imaging (MRI) scan of the cervical spine revealed straightening of the cervical spine, multilevel degenerative disc disease with neural foramina narrowing, and discectomy at C5-6.

By decision dated July 9, 2021, the Board set aside OWCP's June 18, 2020 decision and remanded the case for OWCP to issue an appropriate decision, with findings of fact and a statement of reasons, regarding appellant's untimely December 15, 2017 reconsideration request. The Board noted that in its June 18, 2020 decision, OWCP did not comply with the review requirements of FECA and its implementing regulations when it summarily denied appellant's reconsideration request without analyzing whether it was sufficient to demonstrate clear evidence of error.

By decision dated September 8, 2021, OWCP again denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. It explained that the evidence submitted did not manifest on its face that OWCP erred in its last merit decision.

⁷ Docket No. 18-1613 (issued April 29, 2020).

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

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.¹¹ 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.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ 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

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (September 2020).

¹⁰ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

¹¹ *See* 20 C.F.R. § 10.607(b); *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹² *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 9 at Chapter 2.1602.5 (September 2020).

¹³ *S.D.*, Docket No. 23-0626 (issued August 24, 2023); *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *J.M.*, Docket No. 22-0630 (issued February 10, 2023); *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

error.¹⁵ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations¹⁷ and procedures¹⁸ 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.¹⁹ The most recent merit decision was OWCP's October 20, 2015 decision. As appellant's December 15, 2017 request for reconsideration was received more than one year after the October 20, 2015 merit decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in its October 20, 2015 merit decision.²⁰

In her December 15, 2017 reconsideration request, appellant contended that OWCP erred by not timely accepting her cervical condition and in suspending her wage-loss compensation. Appellant, however, did not submit any evidence to support her contention. In support of her untimely reconsideration request, she submitted new reports dated January 9, 2018 through March 15, 2021 by Dr. Nikachina; diagnostic testing reports dated September 29, 2017 through May 6, 2021; and a May 1, 2019 report by Dr. Matiko. As noted above, clear evidence of error is intended to represent a difficult standard.²¹ The Board has held evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²²

The Board thus finds that appellant has not raised a substantial question as to the correctness of OWCP's decision or submitted any supporting medical evidence. Consequently, OWCP properly denied her December 15, 2017 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁵ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 9 at Chapter 2.1602.5(a) (September 2020).

¹⁶ *L.J.*, Docket No. 23-0282 (issued May 26, 2023); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁷ 20 C.F.R. § 10.607(a); *see L.T.*, Docket No. 21-0844 (issued April 21, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁸ *Supra* note 9 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

²⁰ *Id.* at § 10.607(b); *see M.W.*, Docket No. 17-0892 (issued May 21, 2018).

²¹ *Supra* note 19.

²² *W.R.*, Docket No. 20-1197 (issued February 3, 2021); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

CONCLUSION

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.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2025
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