

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

M.E., Appellant	)	
	)	
and	)	<b>Docket No. 18-1442</b>
	)	<b>Issued: April 22, 2019</b>
<b>DEPARTMENT OF AGRICULTURE, FARM &amp; FOREIGN SERVICE AGENCY, Riverdale, MD,</b>	)	
<b>Employer</b>	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 17, 2018 appellant filed a timely appeal from an April 10, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from OWCP's last merit decision, dated September 14, 2011, to the filing of this appeal, pursuant

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<sup>1</sup> On his application for review (Form AB-1), appellant timely requested an oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated March 6, 2019, the Board exercised its discretion and denied his request finding that the appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1442 (issued March 6, 2019).

to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

### **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.

### **FACTUAL HISTORY**

On January 24, 2011 appellant, then a 59-year-old agriculture adviser, filed a traumatic injury claim (Form CA-1) alleging that on October 5, 2010 he sustained an "undiagnosed bad shoulder" injury when he fell down onto his shoulder when he was traveling back to the embassy in Afghanistan while in the performance of duty. He did not stop work.

In a February 2, 2011 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the factual and medical evidence necessary to establish his claim and also provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the necessary factual information and medical evidence.

OWCP received the second page of its February 2, 2011 development letter with handwritten notations regarding appellant's medical treatment.

In a report dated February 11, 2011, Dr. Di Van Le, a Board-certified family practitioner, related appellant's complaints of shoulder pain. He noted examination findings in the right shoulder of mild tenderness in the right subacromial area and biceps tendon. Dr. Le diagnosed shoulder sprain, shoulder joint pain, and tendinitis. He reported that a right shoulder x-ray scan showed osteoarthritis of the acromioclavicular joint, sprain, and tendinitis most likely secondary to heavy lifting at work.

By decision dated March 17, 2011, OWCP denied appellant's traumatic injury claim. It found that, because he had not responded to its questions regarding how and when the incident occurred and where he was traveling at the time, he had not established that his alleged injury occurred in the performance of duty. OWCP also noted that the factual evidence of record failed to establish that the October 5, 2010 incident occurred at the time, place, and in the manner alleged.

In an appeal request form dated March 23, 2011, appellant requested a hearing before an OWCP hearing representative. A hearing was held on July 14, 2011.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence on appeal. 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.*

No additional evidence was received.

By decision dated September 14, 2011, an OWCP hearing representative affirmed the March 17, 2011 denial decision. He found that appellant had not established the elements of fact of injury, performance of duty, or causal relationship and therefore had not established his claim.

On October 11, 2017 appellant requested reconsideration. In a statement dated October 2, 2017, he indicated that he was providing additional evidence not previously considered. Appellant alleged that he sustained additional injuries, including post-traumatic stress disorder (PTSD). He explained that he was traveling from the United States (U.S.) to a camp in southern Afghanistan when he received an urgent message to gather all his gear and return to the U.S. Embassy in Kabul, Afghanistan (Embassy). Appellant related that the injury happened in the British transient camp when he was traveling with all his gear. He noted that he continued traveling to Kabul, Afghanistan with his injuries, which also included severe weakness and irregular heartbeat. Appellant indicated that, upon arrival at the Embassy, he was ordered to immediately return to the U.S. He related that he was unable to see a physician or receive medical treatment because he was traveling. Appellant explained that when he returned to the U.S., he waited until he could get Medicare at age 65 before he sought medical treatment. He indicated that he also traveled to Saudi Arabia for help in recovering and still suffered from severe weakness and irregular heartbeat.

Appellant submitted a series of e-mails dated from November 22, 2010 through February 20, 2011 explaining how he was discriminated against and forced to resign by the State Department. He alleged that the actions of the State Department caused him physical and emotional injuries. Appellant also requested assistance in filing a complaint against the State Department.

OWCP received various diagnostic testing reports. A January 19, 2013 abdomen and pelvis computerized tomography scan showed complete occlusion of infra renal inferior vena cava (IVC), common iliac and external iliac veins with anterior abdominal collateral dilated veins, infra renal IVC filter with right limb perforating into the aortic lumen, and partial collapse of D12 and L1 vertebrae with degenerative changes. A January 22, 2013 radiology report of the lower extremities showed bilateral old partially recanalized deep venous thrombosis (DVT) of both lower limbs

Appellant underwent additional diagnostic testing on July 29, 2016. An echocardiogram report showed atrial flutter rhythm, mildly dilated left ventricle, mild left ventricular hypertrophy, mildly enlarged right ventricle, and moderately dilated left atrium. A carotid report revealed minimal intimal thickening bilaterally with no evidence for significant carotid artery stenosis bilaterally. A bilateral lower extremity arterial report showed bilateral lower extremity arterial duplex, which suggested bilateral mild atherosclerosis with no significant obstruction, stenosis or occlusions. A July 29, 2016 vascular report of the lower extremities further revealed bilateral femoral proximal, mild and distal thrombophlebitis, and right popliteal partial thrombosis, and left posterior tibial thrombosis calf region.

In an examination note dated October 6, 2016, Dr. Carlos Bechara, a Board-certified vascular surgeon, noted a diagnosis of DVT.

By decision dated January 4, 2018, OWCP denied appellant's reconsideration request finding that it was untimely filed and failed to demonstrate clear evidence of error in OWCP's September 14, 2011 decision.<sup>4</sup>

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>5</sup> does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>6</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>7</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>8</sup> 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).<sup>9</sup> OWCP will consider an untimely request for reconsideration only if the request demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.<sup>10</sup> The request must establish on its face that such decision was erroneous.<sup>11</sup> Where a request is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review of the merits.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in

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<sup>4</sup> On January 29, 2018 OWCP's January 4, 2018 decision was returned to OWCP as undeliverable. On April 10, 2018 it reissued the January 4, 2018 decision to appellant's new address of record.

<sup>5</sup> *Supra* note 2.

<sup>6</sup> This section provides in pertinent part: the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.607.

<sup>8</sup> *Id.* at § 10.607(a). 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 (February 2016).

<sup>9</sup> *Id.* at Chapter 2.1602.4(b).

<sup>10</sup> 20 C.F.R. § 10.607(b).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at § 10.608(b).

<sup>13</sup> *Supra* note 10; *Fidel E. Perez*, 48 ECAB 663 (1997).

<sup>14</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>15</sup> The Board has held that even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.<sup>16</sup> OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.<sup>17</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>18</sup>

### ANALYSIS

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

OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision.<sup>19</sup> OWCP's last merit decision was dated September 14, 2011. It received appellant's request for reconsideration on October 11, 2017. Because OWCP received his request for reconsideration more than one year after its last merit decision, the Board finds that the request was untimely filed and he must demonstrate clear evidence of error on the part of OWCP in its September 14, 2011 decision.<sup>20</sup>

The Board has reviewed the record and finds that appellant's arguments on reconsideration do not raise a substantial question as to the correctness of OWCP's September 14, 2011 merit decision or shift the weight of the evidence of record in his favor.

In its decision of March 17, 2011, OWCP denied appellant's traumatic injury claim finding that he had not established that the alleged October 5, 2010 employment injury occurred while in the performance of duty. On reconsideration appellant alleged that he sustained additional injuries, including PTSD and a heart condition, due to his employment. He described how he travelled from Afghanistan to the U.S. and explained his delay to seek medical treatment. Appellant, however, has not provided any evidence to establish that his alleged injuries occurred while in the performance of duty. He has not responded to OWCP's request to provide official travel documents or, otherwise, show that he was on official duty status. While appellant's arguments

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<sup>15</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>16</sup> *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

<sup>17</sup> *Supra* note 8 at Chapter 2.1602.5a (October 2011).

<sup>18</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>19</sup> *Supra* notes 8 and 9.

<sup>20</sup> *Supra* notes 8 and 10. One year from September 14, 2011 would be September 14, 2012. Therefore, OWCP properly found that appellant's request for reconsideration, received on October 11, 2017 was untimely filed.

on reconsideration address that he was on travel status when the alleged injuries occurred, they do not demonstrate clear evidence of error on the part of OWCP.<sup>21</sup>

OWCP also determined in its last merit decision that the factual evidence of record was insufficient to establish that the employment incident occurred as alleged and that the medical evidence of record was insufficient to establish causal relationship. Along with his reconsideration request, appellant also submitted several diagnostic testing reports dated January 19, 2013 to July 29, 2016, which noted several cardiovascular problems and conditions. An October 6, 2016 report by Dr. Bechara also noted a diagnosis of DVT. Appellant's narrative statement, however, did not mention falling down on his shoulder as he alleged in his original Form CA-1 and the medical evidence failed to address the alleged October 5, 2010 employment incident. He has not provided any corroborating evidence to substantiate that the employment incident occurred at the time, place, and in the manner alleged. Thus, the Board finds that this evidence does not demonstrate error with respect to OWCP's finding that appellant had failed to establish fact of injury.<sup>22</sup> Furthermore, the diagnostic and medical reports are insufficient to demonstrate error with respect to OWCP's September 14, 2011 decision.<sup>23</sup> Appellant has insufficiently explained how the submission of this evidence raises a substantial question concerning the correctness of OWCP's decision.

The term clear evidence of error is intended to represent a difficult standard.<sup>24</sup> Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.<sup>25</sup> It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.<sup>26</sup>

The Board finds that appellant has failed to support his reconsideration request with evidence or argument demonstrating that OWCP's September 14, 2011 decision was clearly erroneous. Appellant's request was insufficient to shift the weight of the evidence in his favor or raise a substantial question that OWCP erred in its September 14, 2011 decision. Thus, OWCP properly denied his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>21</sup> A.W., Docket No. 18-0362 (issued July 26, 2018).

<sup>22</sup> P.B., Docket No. 18-0265 (issued September 5, 2018).

<sup>23</sup> L.C., Docket No. 18-1407 (issued February 14, 2019).

<sup>24</sup> *Supra* note 17.

<sup>25</sup> *Supra* note 16.

<sup>26</sup> *Supra* note 15.

**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 April 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 22, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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