

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

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<b>T.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0056</b>
	)	<b>Issued: July 1, 2019</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS ADMINISTRATION MEDICAL</b>	)	
<b>CENTER, Muskogee, OK, 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  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 11, 2018 appellant filed a timely appeal from an August 28, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated February 8, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**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 December 27, 2016 appellant, then a 40-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on December 22, 2016 he sustained tension in

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

his lower back, shoulders, and neck following a motor vehicle accident that occurred when another motorist ran a red light and struck his vehicle while in the performance of duty. He did not stop work.

By decision dated February 8, 2017, OWCP denied appellant's traumatic injury claim. It found that he had not submitted any medical evidence which provided a diagnosis causally related to the accepted employment incident.

On July 23, 2018 OWCP received a statement from appellant describing the incident and notes from a physician assistant dated January 11 and 18, 2017.

On August 2, 2018 appellant requested reconsideration.

OWCP thereafter received a March 13, 2018 magnetic resonance imaging (MRI) scan of appellant's right shoulder without contrast, a letter from the employing establishment dated March 21, 2018, related to appellant's light-duty assignment, and a copy of the light-duty assignment.

In a March 20, 2018 report, Dr. David E. Nonweiler, a Board-certified orthopedic surgeon, diagnosed impingement syndrome of the right shoulder, complete tear of right rotator cuff, and enchondroma of the right humerus. He opined, "I do feel the sole cause of [appellant's] current shoulder problem is his on-the-job injury as he has described to me." Dr. Nonweiler completed a work restriction form of the same date, indicating that appellant could not drive a shuttle bus.

In an August 6, 2018 report, Dr. Nonweiler diagnosed impingement syndrome of the right shoulder and a complete tear of the right rotator cuff. He noted that appellant's MRI scan clearly showed a rotator cuff tear. Dr. Nonweiler recommended a right shoulder arthroscopy with acromioplasty and rotator cuff repair. He advised that appellant could perform light-duty work with no lifting over 10 to 20 pounds, overhead or away from his body. Dr. Nonweiler also indicated that appellant could not drive a bus. He reiterated his opinion that, "I do feel the sole cause of his current shoulder problem is his on-the-job injury as he has described to me."

By decision dated August 28, 2018, OWCP denied appellant's August 2, 2018 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 of the request for reconsideration as indicated by the received date in the integrated Federal

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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).

Employees' Compensation System (iFECS).<sup>4</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>5</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>6</sup> If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>7</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that 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 to merely 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. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>8</sup>

OWCP 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, shows 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>9</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>10</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's August 2, 2018 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<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, 501-02 (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* 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (February 2016).

<sup>8</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>9</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 4 at Chapter 2.1602.5(a) (February 2016).

<sup>10</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

Appellant had one year from the date of OWCP's February 8, 2017 merit decision to timely request reconsideration.<sup>11</sup> As his request for reconsideration was not received by OWCP until August 2, 2018, more than one year after the February 8, 2017 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his claim.<sup>12</sup>

The Board has reviewed the record and finds that appellant has failed to demonstrate clear evidence of error. Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its February 8, 2017 decision.<sup>13</sup> OWCP denied his claim as he failed to submit medical evidence sufficient to establish that he sustained a diagnosed condition causally related to the accepted December 22, 2016 employment incident. In fact, at the time of the denial, no medical evidence had been submitted.

On reconsideration OWCP received a statement from appellant describing the accepted incident, a March 13, 2018 MRI scan of his right shoulder, a letter from the employing establishment dated March 21, 2018 related to his light-duty assignment, and a copy of the light-duty assignment from his physician. Appellant has not explained how this evidence raises a substantial question regarding the correctness of OWCP's initial decision denying his claim.<sup>14</sup> This evidence does not offer an opinion that OWCP's decision was incorrect and is not of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>15</sup>

OWCP also received reports from Dr. Nonweiler. In his March 20 and August 6, 2018 reports, Dr. Nonweiler provided diagnoses and opined that appellant's condition was caused by the accepted employment incident. However, these reports did not contain the type of positive, precise, and explicit evidence, which manifests on its face, that OWCP committed an error in its February 8, 2017 decision.<sup>16</sup> The Board has previously explained herein that even 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, does not demonstrate clear evidence of error.<sup>17</sup> The Board finds that the March 20 and August 6, 2018 reports from Dr. Nonweiler do not rise to the level of clear evidence of error.<sup>18</sup>

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<sup>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

<sup>13</sup> *See R.M.*, Docket No. 18-1393 (issued February 12, 2019).

<sup>14</sup> *See P.B.*, Docket No. 18-0265 (issued September 5, 2018).

<sup>15</sup> *See supra* note 8.

<sup>16</sup> *R.O.*, Docket No. 18-1687 (issued March 26, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *see Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>17</sup> *L.W.*, *supra* note 2.

<sup>18</sup> *See E.B.*, Docket No. 18-1091 (issued December 28, 2018).

OWCP also received notes from a physician assistant dated January 11 and 18, 2017. However, the reports of nonphysicians, including physician assistants,<sup>19</sup> do not constitute probative medical evidence under FECA. This evidence, therefore, did not raise a substantial question as to the correctness of OWCP's February 8, 2017 decision.

Thus, the Board finds that appellant has failed to demonstrate clear evidence of error in the denial of his claim.

### **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 August 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>19</sup> See *D.F.*, Docket No. 17-0745 (issued March 14, 2018); *R.S.*, Docket No. 16-1303 (issued December 2, 2016); *L.L.*, Docket No. 13-0829 (issued August 20, 2013).