

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

_____)	
J.F., Appellant)	
)	
and)	Docket No. 18-1802
)	Issued: May 20, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Houston, TX, Employer)	
_____)	

Appearances:
Joyce Fuller, for the appellant¹
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 September 27, 2018 appellant, through his representative, filed a timely appeal from an August 29, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed since the last merit decision dated April 22, 2002 to the filing

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3,³ the Board lacks jurisdiction to review the merits of this case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 20, 2000 appellant, then a 47-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2000 he sustained a right shoulder and rotator cuff injury, as well as clavicle strain, when a coworker tapped him on his previously injured shoulder, which caused him such pain that he fell to his knees. OWCP assigned the claim File No. xxxxxx381.⁶ By merit decisions dated November 22, 2000, May 29, 2001, and April 22, 2002, OWCP denied the claim, finding the medical evidence of record was insufficient to establish that the diagnosed conditions were causally related to the August 9, 2000 employment incident.

² 5 U.S.C. § 8101 *et seq.*

³ For final adverse decisions of OWCP issued prior to November 19, 2008, the Board's review authority is limited to appeals which are filed within one year from the date of issuance of OWCP's decision. *See* 20 C.F.R. § 501.3(d)(2). For final adverse decisions issued by OWCP on and after November 19, 2008, the Board's review authority is limited to appeals which are filed within 180 days from the date of issuance of OWCP's decision. *See* 20 C.F.R. § 501.3(e).

⁴ 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.*

⁵ Docket No. 18-0250 (issued July 6, 2018); Docket No. 16-0871 (issued June 10, 2016); Docket No. 14-1589 (issued November 24, 2014); Docket No. 12-1749 (issued February 5, 2013); Docket No. 10-2378 (issued August 16, 2011); Docket No. 09-1027 (issued December 17, 2009); Docket No. 08-0271 (issued June 20, 2008); Docket No. 07-0978 (issued August 17, 2007); Docket No. 04-2283 (issued December 21, 2005).

⁶ The record indicates that under OWCP File No. xxxxxx590 appellant had a May 3, 2000 claim accepted for right shoulder strain. Under OWCP File No. xxxxxx559, he had a September 18, 1991 claim accepted for left elbow lateral epicondylitis, left shoulder adhesive capsulitis, left brachial plexus lesions, left tenosynovitis of the hand/wrist and sprain/strains of the right shoulder, upper arm and acromioclavicular (AC) joint. The September 18, 1991 claim, OWCP File No. xxxxxx559, has been established as a master file with both the May 3, 2000 and the current August 9, 2000 claim on appeal as subsidiary files.

Appellant filed numerous requests for reconsideration to OWCP and appeals to the Board following the last April 22, 2002 merit decision.⁷

In the most recent appeal, by decision dated July 6, 2018, the Board affirmed a September 28, 2017 nonmerit OWCP decision, finding that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.⁸

On July 30, 2018 OWCP received appellant's July 22, 2018 request for reconsideration. In support of the reconsideration request, appellant's representative submitted a letter dated July 22, 2018. She contended that OWCP failed to consider appellant's October 16, 2000 statement and the September 18, 2000 medical narrative of Dr. Gary M. Gartsman, an orthopedic surgeon, which were of record prior to OWCP's April 22, 2002 decision, with regard to how the injury occurred and that appellant had sustained an acromioclavicular (AC) joint strain. Appellant's representative contended that appellant's May 3, 2000 employment injury was aggravated by the incident of August 9, 2000. She contended that fact of injury evidence and medical evidence which diagnosed an acute AC strain and ligament damage as a result of the August 9, 2000 incident were not considered. References to appellant's responses to OWCP's requests for information were noted along with findings from OWCP's April 22, 2002 decision. Copies of the referenced material were submitted along with previously submitted copies of appellant's Form CA-1 and an August 22, 2000 initial assessment from Dr. J.P. Trowbridge, a medical toxicologist.

⁷ In a decision dated December 21, 2005, the Board affirmed an August 27, 2004 OWCP decision, finding that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 04-2283 (issued December 21, 2005). In a decision dated August 17, 2007, the Board dismissed the appeal as there was no final decision issued by OWCP within one year of the filing of the appeal. *Order Dismissing Appeal*, Docket No. 07-0978 (issued August 17, 2007). By decision dated June 20, 2008, the Board affirmed an October 12, 2007 OWCP decision, holding that appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 08-0271 (issued June 20, 2008). In a decision dated December 17, 2009, the Board affirmed OWCP's February 13, 2009 decision finding appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 09-1027 (issued December 17, 2009). On May 6, 2010 the Board issued an order denying petition for reconsideration. Docket No. 09-1027, *petition for recon. denied* (issued May 6, 2010). In a decision dated August 16, 2011, the Board affirmed an August 3, 2010 OWCP decision, finding appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Docket No. 10-2378 (issued August 16, 2011). On February 23, 2012 the Board issued an order denying petition for reconsideration. Docket No. 10-2378, *petition for recon. denied* (issued February 23, 2012). By decision dated February 5, 2013, the Board affirmed a June 21, 2012 OWCP decision, again finding appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error. Docket No. 12-1749 (issued February 5, 2013). On August 2, 2013 the Board issued an order denying petition for reconsideration. Docket No. 12-1749, *petition for recon. denied* (issued August 2, 2013). The Board in a November 24, 2014 decision, affirmed a June 4, 2014 OWCP decision finding that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error. Docket No. 14-1589 (issued November 24, 2014). In a June 10, 2016 decision, the Board affirmed a February 16, 2016 OWCP decision finding that appellant's application for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

⁸ Docket No. 18-0250 (issued July 6, 2018). The Board's decision dated July 6, 2018 became final after 30 days of issuance and is not subject to further review. 20 C.F.R. § 501.6(d); *see C.M.*, Docket No. 18-0341 (issued August 9, 2018); *T.B.*, Docket No. 15-0001 (issued July 1, 2015); *C.M.*, Docket No. 15-0471 (issued April 27, 2015); *D.A.*, Docket No. 08-1217 (issued October 6, 2008).

By decision dated August 29, 2018, 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.⁹ 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.¹⁰ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).¹¹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹³ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁵ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁶ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ 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.¹⁹ To demonstrate clear evidence

⁹ 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹² *See M.E.*, *supra* note 9; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *See* 20 C.F.R. § 10.607(b); *M.E.*, *supra* note 9; *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁴ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 10 at Chapter 2.1602.5 (February 2016).

¹⁵ *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *see Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ *Id.*; *see also Leona N. Travis*, 43 ECAB 227 (1999).

¹⁷ *J.D.*, *supra* note 15; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁸ *Id.*

¹⁹ *Id.*

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.²⁰

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.²¹ The claimant must present evidence which on its face shows that OWCP made an error. 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.²² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²³

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 regulations²⁴ and procedures²⁵ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. The last decision on the merits of this case was OWCP's April 22, 2002 decision, finding that the medical evidence of record was insufficient to establish that the diagnosed conditions were causally related to the August 9, 2000 employment incident. Appellant had one year from the date of that decision to timely request reconsideration. As his reconsideration request was received on July 30, 2018, almost 16 years after the April 22, 2002 merit decision, it was untimely filed. Therefore, appellant must demonstrate clear evidence of error by OWCP.²⁶

The Board finds that appellant failed to demonstrate clear evidence of error on the part of OWCP. On reconsideration, and on appeal, appellant, through his representative, again argued that his employment injury of May 3, 2000 was aggravated by the incident of August 9, 2000. Appellant's representative contended that evidence which diagnosed appellant with an acute AC strain and ligament damage as a result of the August 9, 2000 injury was not properly considered by OWCP. References to appellant's responses to OWCP's requests for information were noted along with findings from OWCP's April 22, 2002 decision. Copies of the referenced material

²⁰ *M.E.*, *supra* note 9; *Robert G. Burns*, 57 ECAB 657 (2006).

²¹ *See G.G.*, *supra* note 14.

²² *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 11 at Chapter 2.1602.5(a) (February 2016).

²³ *See M.E.*, *supra* note 9; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²⁴ 20 C.F.R. § 10.607(a); *see G.G.*, *supra* note 14; *Alberta Dukes*, 56 ECAB 247 (2005).

²⁵ *Supra* note 11 at Chapter 2.1602.4 (February 2016); *see A.F.*, Docket No. 18-0645 (issued October 26, 2018); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²⁶ 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

were submitted along with previously submitted copies of appellant's Form CA-1 and an August 22, 2000 initial assessment from Dr. Trowbridge.

Appellant did not, however, sufficiently explain how duplicative and cumulative evidence or argument raised a substantial question as to the correctness of OWCP's decision.²⁷ Appellant's arguments were previously considered in the Board's prior decisions. With respect to findings made in the Board's prior decision, those matters are *res judicata* absent any further review by OWCP under section 8128 of FECA.²⁸

The Board accordingly finds that the arguments and previously submitted evidence are of insufficient probative value to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP's decision.²⁹ Appellant has not raised an argument or submitted any evidence that shows on its face that OWCP committed an error in denying his claim, nor has he provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's April 22, 2002 decision. Thus, OWCP properly determined that appellant's untimely request for reconsideration fails to demonstrate clear evidence of error.³⁰

CONCLUSION

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

²⁷ See *G.G.*, *supra* note 14; see also *A.M.*, Docket No. 10-0526 (issued November 8, 2010).

²⁸ See *R.C.*, Docket No. 17-0198 (issued January 28, 2019).

²⁹ See *G.G.*, *supra* note 14; *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

³⁰ See *S.M.*, Docket No. 18-0075 (issued April 11, 2018); see also *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 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