

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

|   |   |                                  |
|---|---|----------------------------------|
| _____                                       | ) |                                  |
| <b>J.J., Appellant</b>                      | ) |                                  |
|   | ) |                                  |
| <b>and</b>                                  | ) | <b>Docket No. 19-0977</b>        |
|   | ) | <b>Issued: December 31, 2020</b> |
| <b>DEPARTMENT OF THE NAVY, PUGET</b>        | ) |                                  |
| <b>SOUND NAVAL SHIPYARD, Bremerton, WA,</b> | ) |                                  |
| <b>Employer</b>                             | ) |                                  |
| _____                                       | ) |                                  |

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On April 3, 2019 appellant filed a timely appeal from a February 14, 2019 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 July 11, 1997, to the filing of this appeal,

---

<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, it was asserted that oral argument should be granted because OWCP failed to timely adjudicate his claim and erred in finding that his condition had resolved. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

pursuant 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 of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

On June 9, 1995 appellant, then a 31-year-old safety specialist, filed an occupational disease claim (Form CA-2) alleging that he sustained stress causally related to factors of his federal employment. He noted that he first became aware of his condition and its relation to his federal employment on May 15, 1995, and that he stopped work on that same date.<sup>4</sup>

By decision dated July 11, 1997, OWCP accepted appellant's claim for a depressive reaction which it found had resolved on August 25, 1995. The decision was accompanied by appeal rights.

On December 12, 1997 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. By decision dated June 19, 1998, OWCP denied his request for a review of the written record as untimely under 5 U.S.C. § 8124(b).

On October 27, 1998 appellant requested reconsideration.

By decision dated December 18, 1998, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.<sup>5</sup>

On January 22, 2019 appellant again requested reconsideration. In a statement dated January 9, 2019, he asserted that OWCP had taken 24 months to adjudicate his claim, longer than allowed under its procedures. Appellant advised that OWCP had relied upon evidence that was two years old in finding that he had sustained an injury and that it had resolved. In a January 20,

---

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

<sup>3</sup> The Board notes that following the February 14, 2019 decision, OWCP received additional evidence. 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.*

<sup>4</sup> The employing establishment terminated appellant during his probationary/trial period effective October 2, 1995.

<sup>5</sup> Appellant, on June 15, 2004, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated October 26, 2004, OWCP denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124(b).

2019 statement, he indicated that he had submitted evidence supporting his emotional condition claim.

By decision dated February 14, 2019, 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>6</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>7</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>8</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>9</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>10</sup> 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.<sup>11</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>12</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>13</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

---

<sup>6</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>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>9</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>10</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).

<sup>11</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 8 at Chapter 2.1602.5 (February 2016).

<sup>12</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>13</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

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>14</sup>

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

### ANALYSIS

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.

OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>17</sup> As appellant's request for reconsideration was not received until January 22, 2019, more than one year after the issuance of OWCP's July 11, 1997 decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its July 11, 1997 decision.<sup>18</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.<sup>19</sup> The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error.<sup>20</sup>

On reconsideration, appellant contended that OWCP had taken 24 months to adjudicate his claim, longer than allowed under its procedures. The underlying issue of the case, however, is whether appellant had continued residuals due to his accepted employment injury after August 25, 1995. This question is medical in nature and must be addressed by medical evidence.<sup>21</sup>

---

<sup>14</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>15</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

<sup>16</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>17</sup> 20 C.F.R. § 10.607(a).

<sup>18</sup> *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

<sup>19</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

<sup>20</sup> *Id.*

<sup>21</sup> *See D.V.*, Docket No. 19-0588 (issued August 5, 2019).

In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>22</sup>

Appellant further asserted that OWCP relied upon evidence that was two years old in finding that his injury had resolved. He also indicated that OWCP had misidentified his medical provider and that his providers had been unable to contact OWCP. Appellant did not, however, cite to any specific error by OWCP in determining that his condition had resolved or submit new and relevant evidence. As noted, the term clear evidence is a difficult standard.<sup>23</sup> It is not enough to show that the evidence could be construed to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.<sup>24</sup> None of appellant's arguments demonstrate that OWCP erred in finding that his emotional condition had resolved as of August 25, 1995. He has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.<sup>25</sup>

### **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.

---

<sup>22</sup> See *M.W.*, Docket No. 17-0892 (issued May 21, 2018).

<sup>23</sup> See *T.T.*, Docket No. 19-1624 (issued October 28, 2020); *R.M.*, Docket No. 18-1393 (issued February 12, 2019).

<sup>24</sup> See *A.M.*, Docket No. 20-0143 (issued October 28, 2020); *W.D.*, Docket No. 19-0062 (issued April 15, 2019).

<sup>25</sup> See *N.V.*, Docket No. 20-0781 (issued November 18, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 14, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 31, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board