

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

_____)	
D.C., Appellant)	
)	
and)	Docket No. 19-0570
)	Issued: February 18, 2020
DEPARTMENT OF JUSTICE, FEDERAL)	
CORRECTIONAL INSTITUTION,)	
Seagoville, TX, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 16, 2019 appellant filed a timely appeal from a January 3, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than one year has elapsed from OWCP's most recent merit decision, dated April 21, 2008,² to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated December 6, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0570 (issued December 6, 2019).

² 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) (2008).

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 August 29, 2007 appellant, then a 38-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on August 25, 2007 he was attempting to subdue an inmate to protect himself and others when he sustained an injury to his right shoulder while in the performance of duty. He stopped work on August 25, 2007 and returned on August 30, 2007.

In an August 28, 2007 report, Dr. Cynthia K. Ball, an osteopathic physician specializing in occupational medicine, noted that appellant indicated that he hurt his right shoulder while physically controlling an assaultive inmate. She diagnosed shoulder/upper arm strain and prescribed work restrictions. In a work status report dated August 29, 2007, Dr. Ball related appellant's history of injury, diagnosed shoulder/upper arm strain, and supraspinatus strain, and related his work restrictions.

In a development letter dated March 17, 2008, OWCP informed appellant that the evidence of record was insufficient to establish his traumatic injury claim. It notified him of the deficiencies of his claim and advised him of the type of factual and medical evidence needed. OWCP afforded appellant 30 days to submit the necessary evidence. No response was received.

By decision dated April 21, 2008, OWCP denied appellant's claim. It found that the evidence supported that the alleged incident occurred, however, the medical evidence of record was insufficient to establish a diagnosed condition causally connected to the accepted incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 6, 2018 appellant requested reconsideration. He argued that his claim was denied based upon a lack of documentation, however, his injury was real and it limited his daily activities. Appellant explained that he had received treatment over the years and had informed his physicians that it was a work-related injury. He indicated that recently his right shoulder condition became aggravated and he underwent surgery. Appellant noted that his attending physician indicated that the surgery was required due to the injury sustained in 2007.

OWCP also received an August 25, 2007 treatment note, wherein Dr. Christopher Garrison, Board-certified in physical medicine and rehabilitation, diagnosed sprain of the shoulder. An August 25, 2007 work release form signed by a nurse indicated that appellant was treated in the emergency department on that date and released to work without restrictions.

Appellant submitted an August 25, 2007 x-ray of his right shoulder, read by Dr. J. Mark Fulmer, a Board-certified diagnostic radiologist, which noted that appellant had a history of right shoulder pain after wrestling. Dr. Fulmer diagnosed tendinitis of the right rotator cuff.

OWCP also received a copy of Dr. Ball's August 28, 2007 report and a September 5, 2007 report from a physical therapist.

In a September 21, 2018 progress report, Dr. Sandra Lee, an anesthesiologist, related that appellant had a chronic right shoulder injury and apparent acute right retracted supraspinatus tear. She related that he was to undergo a right shoulder arthroscopy, subacromial decompression, rotator cuff repair, and possible biceps tenodesis, possible labral repair.

Treatment notes dated September 11, 2018, from Dr. Barry Watkins, a Board-certified orthopedic surgeon, revealed that appellant fell off the back of a truck on August 8, 2018 and injured his right shoulder, left wrist, and left radius. He also noted that appellant had related that his right shoulder popped out of place and hurt, then popped in and was ok. Dr. Watkins indicated that appellant worked on rental properties and as a federal prison supervisor. On September 21, 2018 he noted appellant's diagnosis as right rotator cuff tear and that he had performed a right shoulder arthroscopy that day.

A nurse's progress note dated September 24, 2018 related that appellant was seen for postop surgical follow up, following a right shoulder arthroscopic *versus* open rotator cuff repair, possible subacromial decompression, and possible distal clavicle excision.

By decision dated January 3, 2019, OWCP denied appellant's reconsideration request, 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.³ This discretionary authority, however, is subject to certain restrictions.⁴ For instance, OWCP's regulations⁵ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision for which review is sought. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁶ Timeliness is determined by the document receipt date, the received date in OWCP's integrated Federal Employees' Compensation System (iFECS).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely, OWCP must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit

³ 5 U.S.C. § 8128(a); *see R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *see Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

decision was in error.⁹ OWCP's procedures provide that OWCP 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 application for review demonstrates clear evidence of error on the part of OWCP.¹⁰ In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹² Evidence demonstrating clear evidence of error must be relevant to the issue which was decided by OWCP.¹³ Additionally, the evidence must be positive, precise, explicit, and must manifest on its face that OWCP committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but 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.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of

⁹ *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *See D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹¹ *V.G.*, *supra* note 5; *see E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *A.S.*, Docket No. 18-1556 (issued September 17, 2019); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹³ *S.T.*, *supra* note 8; *see C.V.*, *supra* note 9; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ *S.T.*, *supra* note 8; *see E.P.*, *supra* note 11; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *A.S.*, *supra* note 12; *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 5; *see C.V.*, *supra* note 9; *Leon J. Modrowski*, *supra* note 9; *Jesus D. Sanchez*, *supra* note 9.

¹⁶ *V.G.*, *supra* note 5; *see E.P.*, *supra* note 11; *Leona N. Travis*, *supra* note 14.

¹⁷ *A.S.*, *supra* note 12; *L.B.*, *supra* note 15.

¹⁸ *D.G.*, *supra* note 10; *Leon D. Faidley, Jr.*, *supra* note 8.

error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁹

ANALYSIS

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.

OWCP's regulations establish a one-year time limit for requesting reconsideration, which begins on the date of the original merit decision. The most recent merit decision was OWCP's April 21, 2008 decision, which denied appellant's traumatic injury claim. As OWCP received his request for reconsideration on December 6, 2018, more than one year after the April 21, 2008 merit decision, the Board finds that the request was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.²⁰

In support of his reconsideration request, appellant argued that his injury was real and limited his daily activities, that he had advised his physicians that it was a work-related injury, and that his condition had worsened, requiring surgical treatment. The underlying issue on reconsideration, however, was whether he had met his burden of proof to establish causal relationship. Appellant's arguments do not show that OWCP's denial of the claim was erroneous or raise a substantial question as to the correctness of the decision.²¹

In support of appellant's request for reconsideration OWCP received an August 25, 2007 work release form from a nurse and a September 5, 2007 report from a physical therapist. Nurses and physical therapists are not considered "physicians" as defined under FECA and thus these reports do not constitute competent medical evidence.²² Consequently, these reports are insufficient to demonstrate clear error by OWCP with respect to the underlying medical issue.

Appellant also submitted medical evidence in support of his request for reconsideration which included: an x-ray report dated August 25, 2007 of his right shoulder; an August 25, 2007 treatment note from Dr. Garrison, who diagnosed sprain of the shoulder; and a copy of Dr. Ball's August 28, 2007 report. The Board finds that none of this evidence addresses the issue of causal relationship and therefore is insufficient to demonstrate that OWCP's April 21, 2008 decision

¹⁹ See *C.V.*, *supra* note 9; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

²⁰ 20 C.F.R. § 10.607(b).

²¹ *S.D.*, Docket No. 17-1450 (issued January 8, 2018); *see, e.g., D.B.*, Docket No. 17-1197 (issued November 1, 2017).

²² 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *See id.* at § 8101(2); *L.W.*, *id.*; *N.C.*, Docket No. 18-0459 (issued August 2, 2018); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

denying appellant's traumatic injury claim was in error at the time that it was issued.²³ The term "clear evidence of error" is intended to represent a difficult standard, and the evidence provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error in its April 21, 2008 decision.²⁴ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.²⁵ 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.²⁶ The Board finds that these reports are insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's decision denying his request for reconsideration.²⁷

OWCP also received medical evidence from 2018 corroborating that appellant underwent right shoulder arthroscopy on September 21, 2018. This evidence included Dr. Lee's and Dr. Watkins' September 21, 2018 treatment notes. However, Dr. Watkins revealed that appellant fell off the back of a truck and injured his right shoulder, left wrist, and left radius in August 2018. This evidence implicates a new injury and does not raise a fundamental question as to the correctness of OWCP's April 21, 2008 decision.²⁸

As the evidence submitted in support of appellant's untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of his claim or raise a substantial question that OWCP erred in its April 21, 2008 decision, the Board finds that OWCP properly denied his reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

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.

²³ *A.S.*, *supra* note 12; *L.B.*, *supra* note 15.

²⁴ *Supra* note 7 at Chapter 2.1602.5 (February 2016); *see also* 20 C.F.R. § 10.607(b); *id.* at Chapter 2.1602.5(a) (February 2016).

²⁵ *See E.B.*, Docket No. 18-1091 (issued December 28, 2018); *see also D.G.*, *supra* note 10; *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

²⁶ *See M.P.*, Docket No. 19-0674 (issued December 16, 2019); *E.B.*, *id.*; *see also M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²⁷ *C.M.*, Docket No. 19-0585 (issued August 15, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

²⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2020
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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