

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

R.O., Appellant)	
)	
and)	Docket No. 20-1552
)	Issued: March 29, 2021
DEPARTMENT OF AGRICULTURE)	
U.S. FOREST SERVICE, SHOSHONE)	
NATIONAL FOREST, Cody, WY, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 4, 2020 appellant filed a timely appeal from May 21, 2020 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 29, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (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 February 12, 2018 appellant, then a 48-year-old law enforcement officer, filed a traumatic injury claim (Form CA-1) alleging that on February 11, 2018 he injured his left arm,

¹ 5 U.S.C. § 8101 *et seq.*

shoulder, elbow and wrist, as well as his lower back, when he slipped on ice and fell after loading his snowmobile onto a trailer while in the performance of duty. On the reverse side of the claim form D.H., an employing establishment supervisor, acknowledged that appellant was in the performance of duty at the time of the alleged incident. Appellant did not stop work.

OWCP received February 12 and 20, 2018 medical notes signed by physician assistants, which contained diagnoses of left-sided medial epicondylitis at the elbow and left ulnar nerve entrapment. It also received an undated report of work status (Form CA-3) signed by C.B., an injury compensation specialist for the employing establishment, noting that appellant returned to full-time modified-duty work with restrictions on February 20, 2018.

In a February 22, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In the same letter, OWCP informed the employing establishment that if appellant was treated at an employing establishment medical facility for the alleged injury, it must provide treatment notes. In a separate development letter of even date, it notified the employing establishment of the traumatic injury claim and requested additional information surrounding the alleged incident. OWCP afforded both parties 30 days to submit the necessary evidence.

In a February 11, 2018 emergency room note, Dr. Deborah Weems, a family practice specialist, noted a history that appellant fell from a snowmobile trailer that day at work, landing on his left side. She noted her physical examination as normal, and referred appellant for computerized tomography (CT) scans of the cervical, thoracic, and lumbar spine. Dr. Weems diagnosed a strain of the left side, status post fall.

CT scans of the cervical, thoracic, and lumbar areas of the spine dated February 11, 2018 were negative for any acute abnormalities.

OWCP received additional treatment notes dated February 12 and 20, 2018 and a work capacity evaluation (Form OWCP-5c) dated February 26, 2018, all of which were signed by a physician assistant. In a follow-up note dated March 19, 2018, a physician assistant released appellant to return to full-duty work. In a Form CA-3 of even date, C.B. noted that appellant had returned to regular-duty work without restrictions that day.

By decision dated March 29, 2018, OWCP denied appellant's traumatic injury claim, finding that he had not submitted evidence containing a medical diagnosis in connection with the accepted February 11, 2018 employment incident. Consequently, it found that appellant had not met the requirements to establish an injury as defined by FECA.

On May 1, 2018 appellant requested review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP received duplicate copies of the physician assistants' notes previously of record, which had been amended to include an illegible signature and handwritten date of April 30, 2018.

By decision dated May 30, 2018, OWCP's hearing representative denied appellant's request for a review of the written record, finding that the request was untimely filed as it was not postmarked within 30 days of the March 29, 2018 decision. After exercising its discretion, the

hearing representative informed appellant that the merits of his claim could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

OWCP subsequently received duplicate copies of medical evidence previously of record.

On May 13, 2020 appellant requested reconsideration. The request indicated that appellant wished to seek reconsideration “as outlined in the e-mail below.” Attached thereto was an e-mail dated April 6, 2020 summarizing the status of appellant’s claim and noting that he had not filed other appeals following OWCP’s May 30, 2018 decision.

By decision dated May 21, 2020, it denied appellant’s request for reconsideration of its March 29, 2018 decision. In both decisions, OWCP found that appellant’s request for reconsideration 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.² 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 merit review is sought.³ Timeliness is determined by the document date, *i.e.*, the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS).⁴

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.⁵ OWCP’s regulations and 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(a), if claimant’s request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁶

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁷ The Board notes that clear evidence of error is intended to represent a difficult standard.⁸ Evidence that does not raise a substantial question as to the correctness of OWCP’s decision is insufficient to

² *Id.* at § 8128(a); *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

³ 20 C.F.R. § 10.607(a).

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

⁵ 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Supra* note 3; *supra* note 4 at Chapter 2.1602.5(a) (February 2016).

⁷ *W.H.*, Docket No. 20-0395 (issued October 23, 2020); *T.W.*, Docket No. 19-1821 (issued May 15, 2020).

⁸ *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

demonstrate clear evidence of error.⁹ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹ In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹² The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

ANALYSIS

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.

The most recent merit decision was OWCP's March 29, 2018 decision, which found that the evidence of record had not established a diagnosed medical condition from a qualified physician connected to the accepted February 11, 2018 employment incident.¹⁴ As appellant's request for reconsideration was not received by OWCP until May 13, 2020, more than one year after the issuance of its March 29, 2018 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP.

As noted above, 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.¹⁵ The application must establish, on its face, that such decision was erroneous.¹⁶ As appellant did not advance any argument or submit any medical evidence with his request, the Board finds that his reconsideration request failed to demonstrate clear evidence of error on the part of OWCP.¹⁷ The underlying issue in this case is whether the evidence of record establishes a medical diagnosis, from a qualified physician, connected to the accepted employment incident. This question is medical in nature and must be addressed by medical evidence.¹⁸ In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁹ As appellant has not submitted relevant evidence, nor has he raised a

⁹ *U.C.*, *supra* note 2.

¹⁰ *T.C.*, *supra* note 5.

¹¹ *Id.*

¹² *R.K.*, *supra* note 8.

¹³ *Id.*

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Gary D. Hatcher*, Docket No. 97-1334 (issued January 21, 1999).

¹⁸ See *D.V.*, Docket No. 19-0588 (issued August 5, 2019).

¹⁹ See *J.J.*, Docket 19-0977 (issued December 31, 2020); *M.W.*, Docket No. 17-0892 (issued May 21, 2018).

substantial question as to the correctness of OWCP's decision, he has not demonstrated clear evidence of error.²⁰

CONCLUSION

The Board finds that OWCP properly denied appellant's May 13, 2020 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2020 decision of the Office of Workers' Compensation Programs are affirmed.

Issued: March 29, 2021
Washington, DC

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

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

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

²⁰ See *C.D.*, Docket No. 19-1462 (issued June 26, 2020).