

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 30, 2008 appellant, then a 54-year-old retired letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained neck, low back, bilateral lower extremity, and bilateral arm conditions causally related to factors of his repetitive federal employment activities.³

By decision dated September 15, 2008, OWCP denied appellant's occupational disease claim. On April 7, 2009 an OWCP hearing representative affirmed the September 15, 2008 decision.

Appellant appealed to the Board. By decision dated May 21, 2010, the Board set aside the April 7, 2009 OWCP decision.⁴ The Board remanded the case for OWCP to provide proper findings of fact regarding whether appellant established neck, low back, bilateral lower extremity, and bilateral arm conditions causally related to factors of his federal employment.

By decision dated June 21, 2010, an OWCP hearing representative denied appellant's occupational disease claim.

Appellant appealed to the Board. By decision dated October 27, 2011, the Board affirmed the June 21, 2010 decision.⁵ It reviewed the reports from Dr. Steven A. Norris, an attending internist, and found that he had failed to provide a reasoned opinion regarding how appellant sustained a diagnosed condition causally related to factors of his federal employment.

On May 4, 2012 appellant, through then-counsel, requested reconsideration.

By decision dated July 18, 2012, OWCP denied modification of its prior merit decision. It found that the additional medical evidence from Dr. Norris was insufficient to show that appellant had sustained a diagnosed condition due to the identified work factors.

On August 18, 2014 appellant, through then-counsel, requested reconsideration of OWCP's July 18, 2012 decision.

² Docket No. 09-2177 (issued May 21, 2010); Docket No. 11-0488 (issued October 27, 2011); Docket No. 17-0892 (issued May 21, 2018).

³ Appellant initially claimed that he had sustained a recurrence of disability causally related to a January 5, 1984 employment injury, accepted by OWCP for neck strain and right shoulder myositis under OWCP File No. xxxxxx090. By decision dated May 20, 2007, issued under OWCP File No. xxxxxx090, the Board affirmed OWCP's finding that he had not sustained a recurrence of disability. Docket No. 06-2032 (issued May 20, 2007).

⁴ Docket No. 09-2177 (issued May 21, 2010).

⁵ *Id.*

By decision dated July 7, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On January 9, 2017 appellant requested reconsideration of the July 18, 2012 decision.

By decision dated January 26, 2017, OWCP denied appellant's request for reconsideration of its July 18, 2012 decision as it was untimely filed and failed to demonstrate clear evidence of error.

On February 6, 2017 appellant again requested reconsideration of the July 18, 2012 decision.

By decision dated March 2, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated May 21, 2018, the Board affirmed OWCP's January 26 and March 2, 2017 nonmerit decisions. The Board noted that appellant had submitted evidence regarding his Equal Employment Opportunity (EEO) complaint alleging discrimination and reprisal by the employing establishment, but found that this was not relevant to the issue of whether he had established a neck, low back, bilateral leg, or bilateral arm condition causally related to the identified factors of his federal employment.

On May 20, 2021 appellant again requested reconsideration of the July 18, 2012 decision. He discussed his history of a previous injury on January 5, 1984 and provided his review of the medical evidence. Appellant asserted that OWCP had found that he had not established a recurrence of disability on or around September 19, 1998 causally related to his January 5, 1984 employment injury. He maintained that his condition was not a recurrence of disability as Dr. Norris had found that his original injury had not healed. Appellant also referenced his EEO claim awarding him a lump-sum settlement and advised that the employing establishment had been faulted for failing to properly complete OWCP claim forms. He maintained that the reports from Dr. Norris explained how his condition was causally related to employment factors and that Dr. Philip Rubin, who specializes in family medicine, had opined in a deposition dated March 6, 2002 that his condition was causally related to his employment.⁶ Appellant asserted that his claim should be adjudicated as a claim for an occupational disease.

Along with his reconsideration request, appellant submitted an initial physical therapy evaluation dated December 21, 2004, physical therapy reports from 2010, and an October 15, 2018 report from a physical therapist. He further submitted a January 4, 2021 procedure note from Dr. Gennady Gekht, a neurologist, regarding his bilateral greater occipital nerve block.

By decision dated May 26, 2021, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

⁶ In a deposition dated March 6, 2002, Dr. Rubin diagnosed myofascial pain syndrome of the neck and upper back due to a 1984 employment injury. He advised that appellant related that his condition had not resolved and that his symptoms worsened around 1998 or 1999 due to his employment. Dr. Rubin found that the original injury had left him vulnerable to reinjury.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁷ 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.⁸ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

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.¹¹ 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.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ 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 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.¹⁵

⁷ 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).

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

¹⁰ *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).

¹¹ *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).

¹² *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 9 at Chapter 2.1602.5 (September 2020).

¹³ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

¹⁵ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

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 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.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

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's regulations¹⁸ and procedures¹⁹ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issue(s).²⁰ The most recent merit decision addressing appellant's occupational disease claim was OWCP's July 18, 2012 decision. As his request for reconsideration was not received by OWCP until May 20, 2021, more than one year after the July 18, 2012 decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error.

The Board finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP. Appellant has not submitted the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its decision.²¹ Further, the evidence and argument he submitted does not raise a substantial question concerning the correctness of OWCP's decision.²²

In his May 20, 2021 reconsideration request, appellant contended that the medical reports from Dr. Norris and the deposition from Dr. Rubin were sufficient to establish that he had sustained an employment-related diagnosed medical condition. The Board, however, in its October 27, 2011 decision, considered the reports from Dr. Norris and found that they were insufficient to meet his burden of proof to establish his claim. Findings made in prior Board

¹⁶ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (September 2020).

¹⁷ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁸ 20 C.F.R. § 10.607(a); *see J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁹ *Supra* note 9 at Chapter 2.1602.4 (September 2020).

²⁰ 20 C.F.R. § 10.607(b).

²¹ *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

²² *Id.*

decisions are *res judicata* absent further merit review by OWCP.²³ Regarding the reports from Dr. Norris submitted subsequent to the Board's October 27, 2011 decision, and appellant's reference to Dr. Rubin's deposition, he has not identified any specific error by OWCP in evaluating this evidence. It is not enough to merely allege that the evidence could be construed to produce a different conclusion.²⁴ Appellant must submit evidence or raise an argument that manifests on its face that OWCP committed an error in denying his occupational disease claim.²⁵ Consequently, his contention is insufficient to demonstrate clear evidence of error.

Appellant further maintained that an EEO decision established that the employing establishment had failed to properly submit his claim forms to OWCP. The Board, however, previously determined that evidence regarding the EEO complaint was not relevant to determining whether he had submitted medical evidence sufficient to establish a neck, low back, bilateral leg, or bilateral arm condition causally related to the identified employment factors. As noted above, findings made in prior Board decisions are *res judicata* absent further merit review by OWCP.²⁶

Appellant contended that OWCP erred in considering his claim as a recurrence of disability rather than an occupational disease. Contrary to his contention, however, OWCP adjudicated his May 30, 2008 claim for an occupational disease as an occupational disease claim.

Appellant submitted physical therapy reports dated 2004, 2010, and 2018 and a January 4, 2021 procedure note regarding his bilateral greater occipital nerve block. The newly submitted medical evidence does not demonstrate clear evidence of error on the part of OWCP. As discussed, clear evidence of error is intended to represent a difficult standard.²⁷ 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.²⁸ The medical evidence fails to manifest on its face that OWCP committed an error denying appellant's occupational disease claim and thus is insufficient to demonstrate clear evidence of error.

On appeal appellant contends that OWCP did not consider all of the evidence in its decisions and that the employing establishment failed to submit multiple injury claims on his behalf. He requested that the Board review the findings from the EEO claim which, as noted, the Board has previously reviewed on a prior appeal. As discussed, however, the evidence and argument provided on reconsideration fails to demonstrate clear evidence of error. Consequently,

²³ See *S.M.*, Docket No. 19-1961 (issued January 28, 2021); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

²⁴ See *N.C.*, Docket No. 17-0157 (issued April 24, 2017); *Jimmy L. Day*, 48 ECAB 652 (1997).

²⁵ *Robert G. Burns*, *supra* note 21.

²⁶ See *V.G.*, *supra* note 23; *B.W.*, Docket No. 17-0366 (issued June 7, 2017).

²⁷ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

²⁸ *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

OWCP properly found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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.

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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