

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

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<b>O.K., Appellant</b> )	)	
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<b>and</b> )	)	<b>Docket No. 21-0708</b>
)	)	<b>Issued: September 29, 2021</b>
<b>DEPARTMENT OF THE AIR FORCE, AIR</b> )	)	
<b>NATIONAL GUARD, Honolulu, HI, 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 7, 2021 appellant filed a timely appeal from a November 19, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated October 25, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 September 5, 2007 appellant, then a 47-year-old powered support systems mechanic, filed an occupational disease claim (Form CA-2) alleging that he experienced wheezing and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

coughing as a result of his exposure to cleaning materials used by a custodian mopping the floor at work.<sup>2</sup> He stopped work on August 14, 2007. OWCP accepted appellant's claim for aggravation of preexisting asthma, not otherwise specified.

On April 10, 2008 appellant filed a claim for wage-loss compensation (Form CA-7) for disability from work, commencing December 19, 2007, as a result of his accepted employment injury.<sup>3</sup>

By decision dated June 5, 2009, OWCP denied appellant's claim for wage-loss compensation for disability from work commencing December 19, 2007. It found that the weight of the medical evidence of record rested with Dr. Samuel J. Evans, a Board-certified internist specializing in pulmonary disease and critical care medicine and an OWCP referral physician, and Dr. Julie A. Chang, an attending internist and pulmonologist, who opined that appellant could perform full-time, light-duty work subject to restriction. In a January 5, 2010 decision, an OWCP hearing representative affirmed the June 5, 2009 decision, finding that the weight of the medical evidence continued to rest with the opinions of Dr. Evans and Dr. Chang. On February 1, 2010 the hearing representative reissued the January 5, 2010 decision to protect appellant's appeal rights after being informed that appellant did not receive the January 5, 2010 decision.

By subsequent decisions dated February 16, 2011, October 9, 2013, December 24, 2014, March 11, 2016, July 6, 2017, September 26, 2018, and October 25, 2019, OWCP denied modification of its denial of appellant's claim for disability commencing December 19, 2007.

On October 30, 2020 appellant requested reconsideration of the October 25, 2019 decision. In an accompanying letter dated October 4, 2020, he provided a history of the medical treatment received for his respiratory condition in his claims under OWCP File Nos. xxxxxx987,<sup>4</sup> xxxxxx423, and xxxxxx935.

In support of his reconsideration request, appellant submitted evidence previously of record. He also submitted an Office of Personnel Management (OPM) disability retirement application dated March 1, 2008, literature regarding indoor air pollution, a 2007 workweek schedule, a March 18, 2008 letter from the Social Security Administration (SSA) requesting that the employing establishment complete a work activity questionnaire, and the completed work activity questionnaire dated March 20, 2008.

Subsequently, OWCP also received additional evidence previously of record and evidence that predated the alleged period of total disability. Additionally, it received correspondence dated

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<sup>2</sup> Appellant has a prior claim for an occupational disease assigned OWCP File No. xxxxxx423. OWCP accepted the claim for toxic effect of JP-8 jet fuel. It has not administratively combined that claim with the present claim, assigned OWCP File No. xxxxxx935.

<sup>3</sup> Appellant's employment was terminated, effective May 30, 2008, due to his loss of military membership because he failed to meet the physical requirements of his military assignment.

<sup>4</sup> The Board notes that the record does not indicate whether OWCP has accepted appellant's claim under OWCP File No. xxxxxx987.

May 5, August 29, and September 13, 2007 between appellant and the employing establishment regarding him leaving work on May 1, 2007.

A computerized tomography (CT) scan of the maxillofacial sinuses performed on December 16, 2009 by Dr. James E. Yamasaki, a diagnostic radiologist, revealed mild bilateral ethmoid and left maxillary sinus disease. Dr. Yamasaki also reported that there was no change compared to an October 1, 2008 CT scan.

By decision dated November 19, 2020, 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.<sup>5</sup> This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>6</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>7</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>8</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>9</sup> Its 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>10</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>11</sup>

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<sup>5</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>6</sup> 20 C.F.R. § 10.607(a).

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

<sup>8</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</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, 501-02 (1990).

<sup>10</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

<sup>11</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>12</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 the new evidence demonstrates clear error on the part of OWCP. 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>13</sup>

### 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.

OWCP's regulations<sup>14</sup> and procedures<sup>15</sup> 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 issues.<sup>16</sup> The most recent merit decision was OWCP's October 25, 2019 decision, which denied modification of its denial of appellant's claim for disability commencing December 19, 2007. As OWCP received his request for reconsideration on October 30, 2020, more than one year after the October 25, 2019 decision, the Board finds that it was untimely filed. Because appellant's request was untimely filed, he must demonstrate clear evidence of error on the part of OWCP in having denied his claim for disability compensation.

In support of his untimely reconsideration request, appellant submitted evidence, which was previously of record as well as a new report of Dr. Yamasaki that failed to address the causal relationship between appellant's disability from work commencing December 19, 2007 and the accepted employment injury. He did not sufficiently explain how this evidence raised a substantial question as to the correctness of OWCP's October 25, 2019 merit decision.<sup>17</sup>

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<sup>12</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

<sup>13</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

<sup>14</sup> 20 C.F.R. § 10.607(a); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>15</sup> *Supra* note 7 at Chapter 2.1602.4 (February 2016); *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>16</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>17</sup> *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *B.W.*, Docket No. 19-0626 (issued March 4, 2020).

Appellant also submitted an OPM disability retirement application, literature regarding indoor air pollution, a 2007 workweek schedule, a March 18, 2008 letter from the SSA requesting that the employing establishment complete a work activity questionnaire, the completed work activity questionnaire dated March 20, 2008, correspondence dated May 5, August 29, and September 13, 2007 between appellant and the employing establishment regarding him leaving work on May 1, 2007 notification of his profile, and him returning his line badge. None of the evidence manifests on its face that OWCP committed an error in denying appellant's claim for disability commencing December 19, 2007. Thus, the evidence is insufficient to demonstrate clear evidence of error.<sup>18</sup>

The Board, thus, finds that appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying his disability claim.<sup>19</sup> Thus, the Board finds that his untimely request for reconsideration failed to demonstrate clear evidence of error.<sup>20</sup>

### CONCLUSION

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.

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<sup>18</sup> *J.C.*, Docket No. 20-1250 (issued May 24, 2021); *W.D.*, Docket No. 19-0062 (issued April 15, 2019).

<sup>19</sup> *S.C.*, Docket No. 19-1424 (issued September 15, 2020); *U.C.*, *supra* note 13.

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 19, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 29, 2021  
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