

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

_____)	
F.R., Appellant)	
)	
and)	Docket No. 21-0615
)	Issued: April 5, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Corpus Christi, TX, Employer)	
_____)	

Appearances:
C.B. Weiser, Esq., for the appellant¹
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 March 12, 2021 appellant, though counsel, filed a timely appeal from a September 15, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated January 14, 2013, 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 In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

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

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 21, 2012 appellant, then a 44-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he experienced pain and swelling in his left knee, right leg, neck, lower back, shoulders, arms, and wrists due to factors of his federal employment, including casing, lifting, and pulling mail. He asserted that he first became aware of his claimed condition on May 10, 2012 and realized its relation to his federal employment on May 18, 2012. Appellant stopped work on May 20, 2012. On the reverse of the claim form, E.C., appellant's immediate supervisor, indicated that appellant returned to work on May 10, 2012 after being disabled from a previous employment injury and only worked 1.80 units before leaving work.⁴

Appellant submitted a May 10, 2012 report from Dr. Frank H. Gonzales, a family medicine specialist, who related that appellant went back to work under appellant's orthopedic surgeon's restrictions and contended that appellant suffered an aggravation of his existing condition resulting in left wrist swelling and right shoulder pain. Dr. Gonzales conducted a physical examination and diagnosed shoulder and upper arm rotator cuff strain.

In a May 21, 2012 statement, appellant related that on May 19, 2010 he suffered an accident on the job that included multiple injuries to his left knee, left arm and wrist, and right shoulder and arm. He alleged that the job duties of a letter carrier had aggravated these body parts since May 10, 2012. Appellant explained that on May 18, 2012 he performed his letter carrier duties, which aggravated his previous injuries and caused new injuries to his right leg, left shoulder, upper neck, and lower back. He provided a list of his previous employment-related injuries and subsequent medical treatment.

In a May 30, 2012 report, Dr. Daniel C. Valdez, a Board-certified orthopedic surgeon, noted that appellant reported a long history of work injuries relating to his left wrist, shoulder, knee, and back. He noted that, upon physical examination, appellant had lumbar pain with flexion and extension and increased shoulder pain with axial load. Dr. Valdez diagnosed lumbar and cervical strain as new injuries, and exacerbation of back and neck sprain, carpal tunnel syndrome, ganglion of the joint of the left hand, and tear of the medial meniscus of the knee. In a May 30,

³ Docket No. 15-0472 (issued April 23, 2015).

⁴ The record reveals that appellant prior traumatic injury claims (Form CA-1) for injuries sustained on: December 22, 2004, under OWCP File No. xxxxxx741; January 11, 2008, under OWCP File No. xxxxxx673; August 29, 2008, under OWCP File No. xxxxxx282; October 19, 2009, under OWCP File No. xxxxxx552; and May 19, 2010, under OWCP File No. xxxxxx817. Appellant's claims have not been administratively combined.

2012 duty status report (Form CA-17), he noted that appellant worked as a letter carrier, diagnosed lumbar and cervical strain, and indicated that he could not return to work.

In a June 7, 2012 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him as to the type of additional factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In a June 12, 2012 statement, E.S., appellant's employing establishment supervisor, reported that when appellant arrived at work on May 10, 2012 appellant informed everyone that he was still in pain and could not perform his job duties. He explained that, for the week or two that appellant had been on the job, he left work early and only cased approximately 10 letters. E.S. reported that appellant would perform a section of his route and take over four hours even though it would normally take only two hours.

Appellant submitted additional medical evidence, including a July 18, 2012 report from Dr. Valdez who diagnosed displacement of thoracic or lumbar and cervical intervertebral disc, neck strain, lumbar strain, left shoulder strain, carpal tunnel syndrome, ganglion of the joint, and tear of medial meniscus cartilage of knee. In a July 18, 2012 Form CA-17, Dr. Valdez noted that appellant could not return to work.

By decision dated August 6, 2012, OWCP accepted the implicated employment factors, including casing, lifting, and pulling mail. However, it denied appellant's occupational disease claim, finding that he failed to submit sufficient medical evidence to establish causal relationship between his diagnosed conditions and the accepted employment factors. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On October 23, 2012 appellant requested reconsideration of the August 6, 2012 decision. In an accompanying statement, he asserted that he was diagnosed with displacement of lumbar and cervical discs due to his employment, which caused him a lot of pain and limited his major life activities. Appellant also contended that the employing establishment failed to comply with current work restrictions.

Appellant subsequently submitted November 14 and December 14, 2012 reports from Dr. Valdez who reported that appellant continued to have pain in multiple body regions.⁵ Dr. Valdez identified a May 10, 2012 date of injury and noted that appellant had been off work for injuries involving a left knee meniscus tear, left wrist traumatic ganglion cyst, carpal tunnel syndrome, and right shoulder rotator cuff tear. He reported that appellant returned to work based on a physician's second opinion and described appellant's duties as loading and lifting trays into vehicles that weigh approximately 40 pounds each. Dr. Valdez noted that there was a "reasonable correlation that lifting 40[-]pound trays repetitively while not in adequate physical condition is the cause of the muscle strain, ligament strain, and tendon strain with resulting lumbar and cervical dysfunction." He explained that "[t]his causes stress and strain to be passed to and absorbed by the skeletal structure and disc, resulting in the injury of [May 10, 2012]." Dr. Valdez provided findings on examination and diagnosed displacement of lumbar and cervical discs. He opined that appellant's injury was causally related to the reported May 10, 2012 work

⁵ In his November 14, 2012 report, Dr. Valdez noted that a November 6, 2012 electromyography and nerve conduction velocity study showed cervical and lumbar irritability.

event. In a November 14, 2012 Form CA-17, Dr. Valdez noted that on May 10, 2012 appellant sustained injuries to his left wrist and arm, left knee, and right shoulder and arm while lifting 40 to 70-pound trays, loading vehicles, and driving at work. He diagnosed displacement of cervical and lumbar discs and indicated that appellant was permanently disabled.

By decision dated January 14, 2013, OWCP modified the decision accepting the implicated employment factors. However, it denied appellant's claim, finding that he had not submitted sufficient medical evidence to establish a medical condition causally related to the accepted employment factors.

Following the decision, appellant resubmitted Dr. Valdez' Form CA-17 and narrative reports dated July 18 through December 14, 2012. OWCP also received new medical evidence from Dr. Valdez including February 21 and March 27, 2013 Form CA-17 reports, which indicated that appellant should remain off work due to a May 10, 2012 injury, and handwritten progress notes dated January 21 and February 21, 2013.

On January 24, 2014 appellant, through counsel, requested reconsideration of the January 14, 2013 decision. Counsel advised that he was enclosing a medical report from Dr. Valdez, which explained the work factors that caused appellant's injuries after returning to work on May 10, 2012. He further asserted that Dr. John R. Anderson, a Board-certified orthopedic surgeon who served as an impartial medical specialist in appellant's previous claim, OWCP File No. xxxxxx282, also indicated that appellant would be at high risk for another injury.

In a November 25, 2013 narrative report, Dr. Valdez related that appellant returned to work in May 2012 with duties of lifting and moving boxes weighing approximately 40 pounds. He explained that, "with the dysfunction of the shoulder, wrist, and knee, the cervical and lumbar areas of the spine were forced to work with more strain than would normally occur. This placed increased force at the disc levels and created the cervical and lumbar spine disc displacement." Dr. Valdez noted that, although there may be other work factors that contributed to appellant's cervical and lumbar injuries, as well as the aggravation of the shoulder, wrist, and knee, it was the lifting of the 40 pounds that was the direct cause.

By decision dated July 1, 2014, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board and, by decision dated April 23, 2015,⁶ the Board affirmed OWCP's July 1, 2014 decision.

On September 1, 2020 appellant, through counsel, requested reconsideration. In a September 1, 2020 letter, counsel argued that OWCP improperly relied on the opinion of Dr. Anderson to terminate appellant's compensation paid in connection with a claim for a previously accepted employment injury, to which OWCP had assigned OWCP File No. xxxxxx282. Counsel also argued that Dr. Valdez' narrative reports from late-2012 established causal relationship between appellant's diagnosed conditions and the accepted employment factors.

⁶ *Supra* note 3.

By decision dated September 15, 2020, 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.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 of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹¹ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹²

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹³ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁴ Evidence that 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. This entails a limited review by OWCP of how the evidence submitted with the request for reconsideration bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁶ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight

⁷ 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

⁸ 20 C.F.R. § 10.607(a).

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

¹³ *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).

¹⁴ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁷

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁸ The claimant must present evidence which on its face shows that OWCP made an error.¹⁹ 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.²⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²¹

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

A request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.²² As appellant's request for reconsideration was not received by OWCP until September 1, 2020, more than one year after issuance of its January 14, 2013 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its January 14, 2013 decision.

The Board further finds that appellant has not demonstrated clear evidence of error in OWCP's January 14, 2013 decision.

Counsel argued that OWCP improperly relied on the opinion of Dr. Anderson, who served as an impartial medical specialist in a prior claim, to terminate appellant's compensation paid for a previously accepted employment injury associated with that prior claim which OWCP had assigned OWCP File No. xxxxxx282. Counsel also argued that Dr. Valdez' narrative reports from late-2012 established causal relationship between appellant's diagnosed conditions and the accepted employment factors. The Board finds, however, that these arguments do not raise a substantial question as to the correctness of OWCP's January 14, 2013 decision.²³ Dr. Anderson's opinion from a prior claim is irrelevant and does not demonstrate that OWCP improperly determined that Dr. Valdez' reports were insufficient to establish appellant's occupational disease claim. Therefore, the Board finds that these arguments do not demonstrate clear evidence of error in the January 14, 2013 decision.

¹⁷ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

¹⁸ *See supra* note 9 at Chapter 2.1602.5(a) (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁹ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

²⁰ *Id.*

²¹ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²² *See supra* note 8.

²³ *See supra* notes 15 and 17.

As noted, clear evidence of error is intended to represent a difficult standard.²⁴ 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.²⁵ The Board finds that the argument/evidence appellant submitted on reconsideration does not demonstrate on its face that OWCP committed error when it found in its January 14, 2013 decision that he failed to establish an employment-related occupational disease.²⁶ Therefore, OWCP properly denied his untimely request for reconsideration.

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.

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2022
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

²⁴ *See supra* note 18.

²⁵ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

²⁶ *See S.F.*, Docket No. 09-0270 (issued August 26, 2009).