

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

_____)	
D.M., Appellant)	
)	
and)	Docket No. 22-0275
)	Issued: July 1, 2022
DEPARTMENT OF THE ARMY,)	
DIRECTORATE OF EMERGENCY SERVICES,)	
Fort Myer, VA, 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 December 14, 2021 appellant filed a timely appeal from a June 17, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 16, 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 to review the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's April 18, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

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

On March 1, 2018 appellant, then a 59-year-old security officer, filed a traumatic injury claim (Form CA-1) alleging that on February 18, 2018 he twisted his right ankle when he attempted to exit the narrow cage sitting compartment of a police car while in the performance of duty. He stopped work on February 20, 2018.

By decision dated April 16, 2018, OWCP accepted that the employment incident occurred as alleged, but denied appellant's claim, finding that he had not established a diagnosed medical condition in connection with the accepted February 18, 2018 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive medical evidence.

In an attending physician's report (Form CA-20) dated March 8, 2018, Dr. John Miller, a podiatrist, diagnosed right ankle sprain with tibia and Achilles conditions. He checked a box marked "Yes," indicating his belief that the condition was caused or aggravated by the incident of February 18, 2018, noting that it "[o]ccurred while in the line of duty." Dr. Miller recommended light-work restrictions until April 16, 2018.

In a letter dated April 11, 2018, Dr. Tanya Judd, a podiatrist, noted that appellant was being treated for a right ankle fracture and Achilles tendinitis. She observed that his most recent magnetic resonance imaging scan demonstrated interval healing of the right ankle fracture and she recommended work restrictions.

In a disability certificate dated July 10, 2018, Dr. Miller diagnosed lateral ankle pain/instability and recommended work restrictions. In a disability certificate dated August 15, 2018, Dr. Judd noted that appellant had been treated between February 22 and June 10, 2018 for a right foot stable longitudinal split partial tear of the peroneus longus with ankle instability and a two-centimeter calcaneus ganglion cyst, as well as left foot peroneus longus tendinitis, a chronic complete tear of the anterior talofibular ligament, a nondisplaced fracture of the distal tibia, and Achilles tendinitis. She stated that his initial visit was on February 22, 2018 for consultation regarding an injury that occurred on February 18, 2018 when he exited a car at work and his foot twisted inward as it hit the ground.

In a disability certificate dated February 26, 2019, Dr. Judd stated that appellant had been treated for diagnoses of right foot stable longitudinal split partial tear of the peroneus longus with ankle instability and a two-centimeter calcaneus ganglion cyst, as well as left foot peroneus longus tendinitis, a chronic complete tear of the anterior talofibular ligament, a nondisplaced fracture of the distal tibia, and Achilles tendinitis.

² *Order Remanding Case*, Docket No. 20-0099 (issued July 16, 2020).

On April 18, 2019 OWCP received appellant's request for reconsideration of its April 16, 2018 decision. On the same date it received his February 1, 2019 response to OWCP's development questionnaire in which he provided a narrative account of the February 18, 2018 employment incident. On April 18, 2019 OWCP also received non-scannable physical evidence consisting of three compact discs (CDs). On April 26, 2019 it received a digital versatile disc.

By decision dated July 16, 2019, OWCP 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.

Appellant timely appealed OWCP's decision of July 16, 2019 to the Board.

By order dated July 16, 2020, the Board set aside OWCP's July 16, 2019 decision, finding that the case was not in posture for decision. The Board found that OWCP had not considered all evidence properly submitted by appellant and received by OWCP before the July 16, 2019 decision. The Board remanded the case to OWCP for consideration of all the evidence submitted at the time of its July 16, 2019 decision.³

By decision dated June 17, 2021, OWCP reviewed the additional medical evidence received on reconsideration and found that appellant's request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁷

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.⁸ OWCP's

³ *Id.*

⁴ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

⁷ *Id.*

⁸ 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).

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 the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁹

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.¹⁰ The Board notes that clear evidence of error is intended to represent a difficult standard.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant's April 18, 2019 request for reconsideration was untimely filed.

As noted above, 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 initial denial of April 16, 2018. As OWCP received appellant's request for reconsideration on April 18, 2019, more than one year after the April 16, 2018 decision, the Board finds that the request was untimely filed.¹⁷ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁸

⁹ *Id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5a (February 2016).

¹⁰ *T.W.*, Docket No. 19-1821 (issued May 15, 2020).

¹¹ *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

¹² *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

¹³ *T.C.*, *supra* note 8.

¹⁴ *Id.*

¹⁵ *R.K.*, *supra* note 11.

¹⁶ *Id.*

¹⁷ *D.B.*, Docket No. 19-0648 (issued October 21, 2020); *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

¹⁸ *Id.*

The Board further finds that appellant has demonstrated clear evidence of error on the part of OWCP in its April 16, 2018 merit decision.

In its April 16, 2018 decision, OWCP denied appellant's claim finding that he had not established a medical diagnosis causally related to the accepted February 18, 2018 employment incident. This is the underlying issue in this case. The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does raise a substantial question as to the correctness of the denial of his claim.¹⁹

In support of appellant's request for reconsideration, OWCP received March 8 and July 10, 2019 reports from Dr. Miller, as well as April 11 and August 15, 2018, and February 26, 2019 reports from Dr. Judd. This medical evidence contains diagnoses of right ankle sprain, right ankle fracture, Achilles tendinitis, a right foot stable longitudinal split partial tear of the peroneus longus with ankle instability and a two-centimeter calcaneus ganglion cyst, left foot peroneus longus tendinitis, a chronic complete tear of the anterior talofibular ligament, and a nondisplaced fracture of the distal tibia. This evidence addresses the underlying issue in this case and establishes appellant's diagnoses. The Board finds that this evidence is sufficient to shift the weight of the evidence in his favor with regard to the underlying merit issue.

The Board, therefore, finds that appellant has demonstrated clear evidence of error in the April 16, 2018 decision and, thus, OWCP abused its discretion in failing to reopen his claim for further merit review. The Board will reverse OWCP's June 17, 2021 decision and remand the case for an appropriate decision on the merits of his claim.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed. However, the Board further finds that appellant has demonstrated clear evidence of error and, thus, OWCP improperly denied appellant's request for reconsideration.

¹⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: July 1, 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