

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

R.C., Appellant	)	
	)	
and	)	Docket No. 21-0617
	)	Issued: August 25, 2023
U.S. POSTAL SERVICE, POST OFFICE, Baton Rouge, LA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 2, 2021 appellant filed a timely appeal from a February 24, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> The most recent merit decision was a Board decision dated June 4, 2009, which became final after 30 days of issuance and is not subject to further review.<sup>2</sup> As there was no merit decision by OWCP issued within 180

---

<sup>1</sup> Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.2(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted based on his contentions in his request for reconsideration dated December 30, 2020. The Board, in exercising its discretion, denies appellant's request for oral argument because the Board does not have jurisdiction over the merits and because the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

<sup>2</sup> 20 C.F.R. § 501.6(d). See *M.D.*, Docket No. 22-0542 (issued August 17, 2022); *L.T.*, Docket No. 21-0844 (issued April 21, 2023); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>4</sup>

### **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.<sup>5</sup> 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 January 19, 1988 appellant, then a 39-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 17, 1988 he sustained neck, bilateral shoulder, back, and leg injuries in a motor vehicle accident while in the performance of duty. OWCP accepted the claim for cervical and lumbar sprains and aggravation of preexisting degenerative disc disease. It paid appellant wage-loss compensation for intermittent periods of disability due to the accepted conditions.

On June 19, 1991 OWCP terminated appellant's compensation effective February 5, 1991, finding that the medical evidence of record established that he no longer had residuals or disability due to his accepted employment-related conditions. It explained that the impartial medical examiner (IME), Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon, in a report dated February 5, 1991, found that appellant's employment-related conditions had resolved and that the report from the IME was entitled to the weight of the medical evidence.

In an April 27, 1992 decision, an OWCP hearing representative modified the June 19, 1991 decision to reflect that appellant sustained a temporary aggravation of underlying degenerative disc disease due to the accepted employment injury of January 17, 1988, and affirmed that he no longer had residuals or disability due to his accepted employment conditions. The hearing representative reviewed in detail January 16, January 26, November 15, 1989, and June 25, 1990 reports from

---

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>5</sup> Docket No. 18-1441 (issued October 21, 2019); Docket No. 14-1098 (issued July 2, 2015); Docket No. 08-1986 (issued June 4, 2009), *petition for recon. denied*, Docket No. 08-1986 (issued September 25, 2009); Docket No. 06-515 (issued January 12, 2007), *petition for recon. denied*, Docket No. 06-515 (issued June 14, 2007); Docket No. 03-698 (issued August 3, 2004), *petition for recon. denied*, Docket No. 03-698 (issued April 4, 2005); Docket No. 01-1157 (issued July 29, 2002); Docket No. 94-2110 (issued June 2, 1997); Docket No. 92-1353 (issued November 19, 1992).

Dr. Jack Loupe, a Board-certified orthopedic surgeon, who had previously been selected as an IME to resolve a conflict of medical evidence regarding appellant's disability status.

Appellant filed a timely appeal to the Board from the April 27, 1992 decision. By decision dated November 19, 1992,<sup>6</sup> the Board affirmed OWCP's April 27, 1992 decision. The Board reviewed Dr. Loupe's reports of record, as well as the reports from Dr. Nutik, and found that the February 5 and May 2, 1991 reports from Dr. Nutik constituted the weight of the medical evidence.

Appellant continued to request reconsideration, which OWCP denied. He subsequently appealed to the Board. By decision dated June 2, 1997, the Board affirmed OWCP's decisions.<sup>7</sup>

By decision dated January 30, 2001, OWCP found that an August 16, 2000 report from Dr. Loupe did not establish clear evidence of error.

By decision dated July 29, 2002,<sup>8</sup> the Board remanded the case for consideration of a March 16, 1998 report from Dr. Stephen J. Flood, a Board-certified attending physician. By decision dated January 10, 2003, OWCP denied modification.

Appellant filed another appeal to the Board on January 17, 2003. In a decision dated August 3, 2004,<sup>9</sup> the Board, in part, reviewed Dr. Loupe's August 16, 2000 report and found that it failed to establish how appellant's discogram results established that his January 17, 1988 employment injury continued to contribute to his low back condition.

On August 3, 2005 appellant requested reconsideration. By decision dated November 10, 2005, OWCP reviewed reports from Dr. Loupe dated January 4, January 19, and June 20, 2005. By decision dated January 12, 2007,<sup>10</sup> the Board affirmed OWCP's November 10, 2005 decision.

On December 17, 2007 appellant requested reconsideration. In a July 2, 2008 decision, OWCP found that he had not met his burden of proof to establish continuing residuals or disability on or after February 5, 1991, due to his accepted January 17, 1988 employment injury. In this decision, it reviewed a report from Dr. Loupe dated March 29, 2007.

On July 15, 2008 appellant filed a timely appeal to the Board. By decision dated June 4, 2009,<sup>11</sup> the Board affirmed the July 2, 2008 OWCP decision. The Board found that the March 29, 2007 report from Dr. Loupe and the April 23, 2007 report from Dr. James Butler, a Board-certified

---

<sup>6</sup> Docket No. 92-1353 (issued November 19, 1992).

<sup>7</sup> Docket No. 94-2110 (issued June 2, 1997).

<sup>8</sup> Docket No. 01-1157 (issued July 29, 2002).

<sup>9</sup> Docket No. 03-698 (issued August 3, 2004).

<sup>10</sup> Docket No. 06-515 (issued January 12, 2007), *petition for recon. denied*, Docket No. 06-515 (issued June 14, 2007).

<sup>11</sup> Docket No. 08-1986 (issued June 4, 2009), *petition for recon. denied*, Docket No. 08-1986 (issued September 25, 2009).

orthopedic surgeon, were insufficiently rationalized to establish that appellant's condition or disability after February 5, 1991 were causally related to the accepted employment injury.

On November 26, 2013 appellant requested reconsideration. By decision dated March 28, 2014, OWCP denied his request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On April 4, 2014 appellant filed a timely appeal to the Board. By decision dated July 2, 2015,<sup>12</sup> the Board affirmed the March 28, 2014 OWCP decision, finding that OWCP properly determined that his request for reconsideration was untimely filed and failed to present clear evidence of error.

On June 28, 2016 appellant requested reconsideration. He argued that his benefits should be reinstated because OWCP failed to address his August 13, 2014 Privacy Act/FOIA request for information concerning whether Dr. Nutik, or Dr. Robert A. Steiner, a Board-certified orthopedic surgeon, who was in an orthopedic surgery practice with Dr. Nutik, had contracted with his employer for fitness-for-duty examinations from 1989 through 1995.<sup>13</sup>

In e-mail correspondence dated August 30, 2016, the employing establishment indicated that, "we can verify that we DID NOT have contracts with Dr. Nutik or Dr. Steiner."

In a November 1, 2016 decision, OWCP denied appellant's June 28, 2016 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On October 30, 2017 appellant requested reconsideration and argued that he discovered that Dr. Nutik and Dr. Steiner conducted fitness-for-duty examinations and therefore an appearance of impropriety had been created.

OWCP contacted Dr. Nutik on January 25, 2018 regarding whether his firm had performed any fitness-for-duty examinations from 1989 through 1995. On January 30, 2018 Dr. Nutik responded that they had not.

By decision dated February 12, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On March 5, 2018 OWCP received a copy of a January 21, 2018 letter from Dr. Nutik in which he further indicated that he had never performed fitness-for-duty examinations for any employer.

On June 18, 2018 appellant requested reconsideration. He argued that his July 10, 1990 temporary modified limited-duty position did not comply with his physician's restrictions, in contrast to his coworkers, whose temporary modified limited-duty positions complied with the

---

<sup>12</sup> Docket No. 14-1098 (issued July 2, 2015).

<sup>13</sup> Dr. Steiner practices with Dr. Nutik as Drs. Nutik and Steiner, a professional medical corporation, orthopedic surgery, according to their letterhead. Other than being in the same medical practice with Dr. Nutik, appellant did not indicate that Dr. Steiner had any involvement with his claim.

restrictions of their attending physicians. Appellant further argued that the job offer was approved by the referee physician but had not been approved by his physician.

In a separate letter dated June 16, 2018, appellant submitted a copy of a June 2, 1989 letter from OWCP which indicated that Dr. Loupe acted as a consultant on behalf of OWCP and was precluded from “hands on treatment of [appellant].”

OWCP also received copies of a June 14, 1990 temporary limited-duty position offer.

In a letter dated June 23, 2018, appellant enclosed a copy of a news article regarding the employing establishment’s practices and argued that a coworker, B.T., was allowed to have the work restrictions provided by his attending physician.

By decision dated June 29, 2018, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On July 17, 2018 appellant filed an appeal from the February 12 and June 29, 2018 OWCP decisions. By decision dated October 21, 2019,<sup>14</sup> the Board found that OWCP had properly denied appellant’s requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error. The Board reviewed appellant’s arguments that Dr. Nutik and Dr. Steiner conducted fitness-for-duty examination for the employing establishment and found that appellant’s evidence and argument in this regard did not establish clear evidence of error. The Board also found that appellant acknowledged that his job offer was within the restrictions provided by OWCP’s physician, therefore appellant had not established clear evidence of error.

In a letter dated December 30, 2020, and received on January 5, 2021, appellant requested reconsideration. He argued that Dr. Loupe’s reports established that he had disability after February 5, 1991, due to his January 17, 1988 work injury. Appellant quoted extensively from Dr. Loupe’s January 4 and 19, 2005 reports, as well as from his August 16, 2000 report. He also quoted from correspondence between Dr. Loupe and OWCP. Appellant noted that he was sent for an IME with Dr. Nutik on January 31, 1991, and that Dr. Nutik’s report ignored the discogram performed by Dr. Loupe which revealed disruption and/or degeneration of the L5-S1 disc. He also provided copies of a September 29, 1989 letter from OWCP to Dr. Loupe authorizing a discogram; a January 21, 2018 letter from Dr. Nutik which explained that he had never performed fitness-for-duty examinations for any employer; and his December 30, 2020 FOIA request to OWCP.

By decision dated February 24, 2021, 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.<sup>15</sup> To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is

---

<sup>14</sup> Docket No. 18-1441 (issued October 21, 2019).

<sup>15</sup> *Id.* at § 8128(a); *see M.M.*, Docket No. 21-1203 (issued December 22, 2022); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

sought.<sup>16</sup> Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS).<sup>17</sup> The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>18</sup>

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 that OWCP’s most recent merit decision was in error.<sup>19</sup> 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 demonstrates clear evidence of error on the part of OWCP.<sup>20</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>21</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>22</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>23</sup> 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 evidence of error on the part of OWCP.<sup>24</sup> The evidence 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.<sup>25</sup> The Board makes an independent determination of whether

---

<sup>16</sup> 20 C.F.R. § 10.607(a).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>18</sup> *G.G.*, *supra* note 2; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>19</sup> *See* 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>20</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; *supra* note 17 at Chapter 2.1602.5a (September 2020).

<sup>21</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).

<sup>22</sup> 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>23</sup> *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>24</sup> *B.W.*, *supra* note 22.

<sup>25</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 21.

a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>26</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.

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's February 12 and June 29, 2018 nonmerit decisions. The Board considered that evidence in its October 21, 2019 decision, and found that OWCP properly denied those requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>27</sup>

The most recent merit decision addressing appellant's claim for disability was the Board's June 4, 2009 decision. Appellant had one year from the date of that decision to timely request reconsideration.<sup>28</sup> His reconsideration request was received on January 5, 2021, more than one year after the June 4, 2009 merit decision; therefore, it was untimely filed. As appellant's reconsideration request was untimely, appellant had the burden to demonstrate clear evidence of error by OWCP in its July 2, 2008 merit decision.

As noted, the Board has held that the term clear evidence of error is intended to represent a difficult standard.<sup>29</sup> Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. 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.<sup>30</sup>

The record reflects that appellant has filed prior reconsideration requests and appeals which essentially reiterate the same facts and arguments. Appellant's latest reconsideration request quotes extensively from and provides commentary and argument based on reports from Dr. Loupe dated November 15, 1989, August 16, 2000 and January 4 and 19, 2005, as well as correspondence between Dr. Loupe and OWCP. He reiterates his contentions that Dr. Loupe, found that he had continuing residuals or disability on or after February 5, 1991, due to his accepted January 17, 1988 employment injury. The Board has previously held that duplicative and cumulative medical evidence or argument does not raise a substantial question as to the correctness of OWCP's

---

<sup>26</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>27</sup> *A.A.*, Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>28</sup> *G.G.*, *supra* note 2.

<sup>29</sup> *M.P.*, Docket No. 19-0200 (issued June 14, 2019).

<sup>30</sup> *See J.N.*, Docket No. 22-0899 (issued December 19, 2022); *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

decision.<sup>31</sup> Appellant's arguments derived by quoting passages from prior reports from Dr. Loupe that were previously considered, by OWCP and the Board, fail to meet appellant's burden to demonstrate clear evidence of error on the part of OWCP when it found that he had failed to show that he had continuing disability or residuals on or after February 5, 1991, due to his accepted January 17, 1988 employment injury.

The Board also notes that appellant further contended that the report from Dr. Nutik, the IME, was flawed and that the SOAF used by Dr. Nutik failed to mention Dr. Loupe's discogram. Dr. Nutik reviewed the discogram performed by Dr. Loupe. Dr. Nutik also confirmed that neither he nor his medical practice colleague, Dr. Steiner, had performed fitness-for-duty examinations. The Board finds that Dr. Nutik's reports have also been previously reviewed by OWCP and the Board and have been found to constitute the weight of the medical evidence regarding appellant's disability status. Therefore, appellant's continuing arguments in this regard do not establish clear evidence of error.<sup>32</sup>

As his arguments regarding the reports from Dr. Loupe and Dr. Nutik fail to show that appellant had disability after February 5, 1991, caused by his January 17, 1988 work injury, they fail to raise a substantial question concerning the correctness of the last merit decision of OWCP.<sup>33</sup> Furthermore, a lay opinion regarding causal relationship does not constitute probative medical evidence.<sup>34</sup> These arguments are therefore insufficient to raise a substantial question concerning the correctness of OWCP's last merit decision.

The remaining documentation submitted by appellant including correspondence with OWCP and a FOIA request does not manifest on its face that OWCP committed an error in finding that appellant did not meet his burden of proof to establish that he had continuing disability after February 5, 1991, caused by his January 17, 1988 work injury.<sup>35</sup>

Appellant has not submitted evidence sufficient to raise a substantial question as to the correctness of OWCP's July 2, 2008 merit decision. Accordingly, the Board finds that OWCP properly denied his reconsideration request, finding that it was untimely filed, and failed to demonstrate clear evidence of error.

### 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.

---

<sup>31</sup> See also *L.F.*, Docket No. 20-1431 (issued May 3, 2022); *C.C.*, Docket No. 21-0896 (issued December 2, 2021); *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *G.B.*, Docket No. 18-1629 (issued April 15, 2019); *Robert G. Burns*, *supra* note 18.

<sup>32</sup> *Id.*

<sup>33</sup> See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

<sup>34</sup> See *E.H.*, Docket No. 19-0365 (issued March 17, 2021); *James A. Long*, 40 ECAB 538 (1989).

<sup>35</sup> *M.P.*, Docket No. 19-0200 (issued June 14, 2019).



**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 25, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board