

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

_____)	
W.B., Appellant)	
)	
and)	
)	Docket No. 23-0473
DEPARTMENT OF JUSTICE, ALCOHOL,)	Issued: August 29, 2023
TOBACCO, FIREARMS & EXPLOSIVES,)	
FIELD OPERATIONS-CENTRAL, Atlanta, GA)	
Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 17, 2023 appellant filed a timely appeal from a January 6, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from OWCP's last merit decision, dated November 23, 2020, 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 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.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 28, 2020 appellant, then a 39-year-old criminal investigator, filed an occupational disease claim (Form CA-2) alleging numbness in hands after a firearms training.² He further indicated that he first became aware of the condition and the relationship of it to his federal employment on September 24, 2020.

A work status note dated September 29, 2020 by Dr. W. Joseph Absi, a Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome and allowed appellant to return to work on September 30, 2020 with restrictions.

In a development letter dated October 5, 2020, OWCP advised appellant of the deficiencies in his claim and indicated that the evidence provided was insufficient to establish that appellant actually experienced the employment factors alleged to have caused injury. It provided a questionnaire to him for his completion. OWCP afforded appellant 30 days to respond. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding his claim. No response was received.

By decision dated November 23, 2020, OWCP denied appellant's occupational disease claim. It found that the evidence was insufficient to establish the alleged factors of federal employment. OWCP noted that no statement was received from appellant explaining how his federal employment contributed to the alleged condition. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 28, 2022 appellant requested reconsideration. In support of his reconsideration request, he submitted treatment notes from Dr. Absi and Dr. Ramon M. Sanchez, a Board-certified neurologist.

On September 30, 2020 appellant was treated by Dr. Absi who related that he was doing "excessive training" on September 24, 2020 and subsequently started developing numbness in his hands. Dr. Absi noted that appellant now experienced numbness in the median nerve of both hands, especially on the right side. On physical examination he observed moderate edema on the right side and no edema on the left. Dr. Absi noted that appellant had positive Tinel's in both carpal tunnels with a negative Phalen and no thenar atrophy. X-ray reports were negative for any osteoarticular pathology. Dr. Absi assessed bilateral carpal tunnel syndrome with the right worse than the left.

An attending physician's report (Form CA-20) dated October 13, 2020 by Dr. Absi noted that appellant had performed excessive training at the range, and reiterated appellant's diagnosis of bilateral carpal tunnel syndrome with the right worse than the left. Appellant was allowed to return to work with restrictions. A work status note of even date by Dr. Absi reiterated appellant's diagnosis and indicated that he was at maximum medical improvement (MMI).

² OWCP assigned the claim OWCP File No. xxxxxx538. Appellant also had a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx653, which OWCP denied as it was a duplicate of File No. xxxxxx538. His claims have been administratively combined by OWCP with OWCP File No. xxxxxx538 serving as the master file.

On October 29, 2020 appellant was again treated by Dr. Absi. He related improvement in his symptoms. Assessment was improved bilateral carpal tunnel syndrome. Dr. Absi indicated that appellant was at MMI. A work status note of even date from Dr. Absi reiterated his diagnosis and allowed appellant to return to work at full duty as of October 29, 2020.

On June 3, 2022 appellant was treated by Dr. Sanchez. Appellant related that he was in a training program with extensive shooting drills from the right side, and after the eighth day of training he developed bilateral numbness and burning sensations spreading up to his forearms. He indicated a previous diagnosis of bilateral carpal tunnel syndrome but was seeking a second opinion. Dr. Sanchez reviewed Dr. Absi's progress notes. Physical examination indicated a head tilt to the right with atlas malrotation present, as well as positive Phalen test on left but not right unless test duration is prolonged. Dr. Sanchez noted that he would like to rule out central cord syndrome and right brachial plexus lesion. He assessed: (1) bilateral carpal tunnel syndrome; (2) paresthesia of skin; and (3) cervicgia.

On July 5, 2022 appellant was treated in follow up by Dr. Sanchez who related that his right shoulder pain had mostly abated.

By decision dated January 6, 2023, OWCP denied appellant's request for reconsideration finding that it was untimely and failed to demonstrate clear evidence of error. It noted his submission of medical evidence on request for reconsideration did not contain a "statement providing a description of the work[-]related activities that you claim cause[d] your conditions."

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ 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.⁴ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

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.⁷ OWCP's procedures provide that it will reopen a claimant's case for merit

³ *Id.* at § 8128(a); *A.P.*, Docket No. 21-1222 (issued February 9, 2023); *see T.J.*, Docket No. 21-0586 (issued September 30, 2021); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁶ *A.P.*, *id.*; *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).

⁷ *See* 20 C.F.R. § 10.607(b); *A.P.*, *id.*; *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

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.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.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 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.¹³ 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.¹⁴

OWCP's 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.¹⁵

ANALYSIS

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

⁸ *A.P., id.*; *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 6 at Chapter 2.1602.5 (September 2020).

⁹ *A.P., id.*; *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *A.P., id.*; *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5a (September 2020).

¹¹ *G.H.*, Docket No. 22-0394 (issued February 6, 2023); *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹² *G.H., id.*; *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *G.H., id.*; *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁴ *A.P., id.*; *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹⁵ *A.P., id.*; *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5a (September 2020).

OWCP's regulations¹⁶ and procedures¹⁷ 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.¹⁸ The most recent merit decision pertaining to the denial of appellant's occupational disease claim was dated November 23, 2020. As OWCP received his request for reconsideration on December 28, 2022, more than one year after the November 23, 2020 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 denying his occupational disease claim.

The Board further finds that appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its November 23, 2020 decision.¹⁹

OWCP denied appellant's claim on a factual basis, finding that he had failed to establish the implicated factors of his federal employment. In support of his untimely request for reconsideration, appellant submitted no other factual documents to further detail the circumstances of his claim. Therefore, he did not demonstrate that OWCP's denial of the claim was erroneous or raised a substantial question as to the correctness of OWCP's determination that he did not establish fact of injury.²⁰

Appellant also submitted medical reports dated from September 30, 2020 to July 5, 2022 from Dr. Absi and Dr. Sanchez, who noted appellant's medical course of treatment for his diagnosed bilateral carpal tunnel syndrome. The Board notes, however, that the submission of this medical evidence does not demonstrate clear evidence of error in OWCP's November 23, 2020 decision. The underlying issue is factual in nature because appellant's occupational disease claim was denied by OWCP due to his failure to establish factors of his federal employment.

The Board thus finds that appellant's untimely request for reconsideration of OWCP's November 23, 2020 decision failed to demonstrate clear evidence of error.²¹

¹⁶ 20 C.F.R. § 10.607(a); *A.P., id.*; *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁷ *Supra* note 6 at Chapter 2.1602.4 (September 2020); *A.P., id.*; *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁸ 20 C.F.R. § 10.607(b); *A.P., id.*; *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁹ *D.M.*, Docket No. 22-1152 (issued March 28, 2023); *see G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

²⁰ *See F.D.*, Docket No. 19-1663 (issued March 10, 2020); *see also P.O.*, Docket No. 13-0092 (issued April 4, 2013).

²¹ *Id.*

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 January 6, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 29, 2023
Washington, DC

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

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

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