

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

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| R.W., Appellant |) | |
| |) | |
| and |) | Docket No. 24-0235 |
| |) | Issued: April 11, 2024 |
| DEPARTMENT OF ENERGY, NATIONAL |) | |
| NUCLEAR SECURITY ADMINISTRATION, |) | |
| Amarillo, TX, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 6, 2024 appellant filed a timely appeal from a December 29, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated August 9, 2022, 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 February 5, 2021 appellant, then a 34-year-old nuclear material courier, filed a traumatic injury claim (Form CA-1) alleging that on January 28, 2021 he sustained a lumbar injury while in the performance of duty. He explained that he was conducting an inventory of his issued medical bag, while in a seated position in his chair he leaned forward to grab the strap to the medical bag, which weighed approximately 35 to 40 pounds, pulled the bag to bring it closer to him, and felt a “pop” in his lower back (lumbar area just above the sacrum), immediate sharp pain in the lower lumbar area, and a dull aching pain.

OWCP accepted the claim for strain of the lower back muscle, fascia, and tendon. It paid appellant wage-loss compensation on the supplemental rolls as of May 21, 2021, and on the periodic rolls effective September 12, 2021.

By decision dated April 25, 2022, OWCP terminated appellant’s wage-loss compensation and medical benefits, effective that date. It explained that the medical evidence indicated that his accepted conditions of low back strain of muscle fascia and tendon had resolved.

On May 12, 2022 appellant requested reconsideration.

By decision dated August 9, 2022, OWCP denied modification of the April 25, 2022 decision.

OWCP received an October 24, 2023 report from Dr. John W. Ellis, a physician Board-certified in family practice, who indicated that appellant continued to suffer from his lumbar injury. Dr. Ellis diagnosed herniated nucleus pulposus and lumbar radiculitis, and requested that these additional conditions be accepted.

On November 29, 2023 appellant requested reconsideration, contending that his condition had worsened.

In a letter dated November 30, 2023, OWCP requested that appellant clarify which decision or issues he wanted OWCP to reconsider and that no further action would be taken until he specified the decision and issues for which reconsideration was sought.

On December 26, 2023 appellant clarified that he was requesting reconsideration of the August 9, 2022 denial of modification. He noted that he understood that he was not within the one-year time period for reconsideration; however, he argued that due to the inherent complexities of the workers’ compensation process, he had difficulty finding a physician who would see him for purposes of a reconsideration request. Appellant alleged that his personal physician would not see him because his case was work related and the workers’ compensation physicians would not see him because his case was closed. He noted that he sought medical treatment from Dr. Ellis’ clinic; however, due to his backlog, he could not be seen for many months which put him outside the one-year time period for reconsideration. Appellant further noted that he was aware that his claim was accepted for strain of the lower back; however, he argued that the October 24, 2023 report from Dr. Ellis supported that his conditions had not resolved. Furthermore, Dr. Ellis diagnosed two additional conditions, radiculitis of the lumbar region and herniated nucleus pulposus of the lumbar region that should be added to his claim. Appellant noted that he was

unable to return to his duties as a federal agent nuclear materials courier based upon the findings of his onsite occupational medical director, Dr. Henry Sloan. Appellant explained that he used a combination of administrative leave and temporary-duty assignments while attempting to get healed on his own using his personal funds. He noted that he was able to obtain temporary relief of his conditions for short durations; however, Dr. Sloan determined that his condition would not allow him to return to work and he was facing termination from work for failure to maintain the stringent physical requirements of the job.

By decision dated December 29, 2023, 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.² This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of the OWCP decision for which review is sought.³ Timeliness is determined by the document receipt date (*i.e.*, the "received date") in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

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.⁶ 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.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

² *Id.* § 8128(a). *See also* *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁵ *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).

⁶ *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).

⁷ *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 4 at Chapter 2.1602.5 (September 2020).

⁸ *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.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁰

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.

The most recent merit decision was OWCP's August 9, 2022 decision. Appellant, however, requested reconsideration on December 26, 2023, more than one year after the last merit decision.¹¹ As such, the Board finds that his December 26, 2023 request for reconsideration was untimely filed.¹²

Consequently, appellant must demonstrate clear error in OWCP's August 9, 2022 decision that his accepted condition of low back strain of muscle fascia and tendon had resolved.

The Board finds that appellant's untimely reconsideration request did not show that OWCP's April 25, 2022 decision was erroneous, nor did it raise any substantial question as to the correctness of OWCP's decision.¹³ The Board notes that in his untimely reconsideration request appellant argued that his January 28, 2021 work injury had not resolved and additional conditions should be accepted based on the October 24, 2023 report from Dr. Ellis. He also alleged that the employing establishment's occupational medical director, Dr. Henry Sloan, would not allow him to return to work as he remained unfit for duty. The Board, however, has held that the term clear evidence of error is intended to represent a difficult standard.¹⁴ Even a detailed, well-rationalized

⁹ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 4 at Chapter 2.1602.5a (September 2020).

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

¹¹ The Board notes that on August 1, 2023 appellant requested that his claim be reopened so that he could request a schedule award. However, OWCP's regulations and procedures, and Board precedent,¹¹ provide that a request for reconsideration must be in writing, be signed and dated by the claimant or the authorized representative, be accompanied by relevant new evidence or argument not considered previously, and identify the decision and the specific issues for which reconsideration is requested. The Board finds that appellant's August 1, 2023 request to reopen his claim a schedule award did not meet the requirements for a request for reconsideration.

¹² 20 C.F.R. § 10.607(a).

¹³ *See J.M.*, Docket No. 22-0630 (issued February 10, 2023); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *B.W.*, Docket No. 19-0626 (issued March 4, 2020).

¹⁴ *M.P.*, Docket No. 19-0200 (issued June 14, 2019).

medical report which, if submitted before the decision 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.¹⁵ Therefore, this report is insufficient to demonstrate clear evidence of error.¹⁶

The Board thus finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.¹⁷

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 December 29, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁵ See *J.N.*, Docket No. 22-0899 (issued December 19, 2022); *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

¹⁶ 20 C.F.R. § 10.607(a); *supra* note 4 at Chapter 2.1602.5 (September 2020).

¹⁷ *J.C.*, Docket No. 20-1250 (issued May 24, 2021); *W.D.*, Docket No. 19-0062 (issued April 15, 2019).