

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

T.S., Appellant)	
)	
and)	Docket No. 24-0698
)	Issued: August 12, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. COAST GUARD, Norfolk, VA, 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 June 7, 2024 appellant filed a timely appeal from an April 5, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated June 21, 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 over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, 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 April 11, 2011 appellant, then a 41-year-old budget analyst, filed an occupational disease claim (Form CA-2) alleging that she developed left hand, wrist, elbow, shoulder, thumb, and pointer finger conditions due to factors of her federal employment including repetitive daily duties. OWCP accepted the claim for localized left hand primary osteoarthritis and left trigger finger.² On September 6, 2011 appellant underwent authorized trapeziectomy and tendon interpositional arthropathy for the diagnosis of osteoarthritis of the left first carpometacarpal (CMC) joint. OWCP paid her wage-loss compensation on the supplemental rolls commencing July 19, 2011, and on the periodic rolls from August 24, 2014 until May 28, 2016. Appellant also received compensation on the supplemental rolls again from May 29 through June 1, 2016.

On March 11, 2014 appellant filed a traumatic injury claim (Form CA-1) alleging that on March 7, 2014 she sustained a thumb sprain when opening a door while in the performance of duty. OWCP accepted the claim for right thumb strain.³

On January 25, 2016 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. James Schwartz, a Board-certified orthopedic surgeon to determine the status of appellant's accepted conditions. In a February 20, 2016 report, Dr. Schwartz reviewed the SOAF and appellant's medical records. He related her current findings on physical examination. Dr. Schwartz related that appellant had rheumatoid arthritis, which was unrelated to either accepted employment injury; and left lateral epicondylitis, which was unrelated to any work injury. He found that she had no residuals of her accepted injuries and required no further treatment.

By decision dated June 2, 2016, OWCP, based on Dr. Schwartz's opinion, terminated appellant's wage-loss compensation and medical benefits, effective that date.

On June 30, 2016 appellant, through then-counsel, requested an oral hearing before an OWCP hearing representative, which was held on February 6, 2017.

Thereafter OWCP received a December 5, 2016 report from Dr. Sarah B. Clarkson, a Board-certified internist, who diagnosed left-hand primary generalized osteoarthritis. It also received Dr. Clarkson's February 6 and 8, 2017 notes. In her February and 8, 2017 notes, Dr. Clarkson opined that appellant had osteoarthritis and did not have rheumatoid arthritis.

By decision dated March 15, 2017, OWCP's hearing representative affirmed the June 2, 2016 decision as modified. He found that OWCP had met its burden to terminate her wage-loss and compensation benefits effective June 2, 2016 based on Dr. Schwartz' February 20, 2016 opinion. However, the hearing representative found that a conflict in the medical evidence was subsequently created between Dr. Clarkson and Dr. Schwartz regarding whether further medical treatment was necessary for appellant's accepted left-hand osteoarthritis. Thus, he remanded the

² OWCP assigned this claim OWCP File No. xxxxxx484.

³ OWCP assigned this claim OWCP File No. xxxxxx727. On July 21, 2014 OWCP administratively combined OWCP File Nos. xxxxxx727 and xxxxxx484, with the latter designated as the master file.

case to OWCP for resolution of the conflict in the medical opinion evidence on continuing disability and residuals.

On remand OWCP referred appellant to Dr. William K. Fleming, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence.

In a report dated May 11, 2017 report, Dr. Fleming diagnosed resolved left index trigger finger and status post excision of left-hand trapezium and arthroplasty. He explained there was no arthritis in the joint itself as it had been removed by surgery, a resection of the trapezium which appellant underwent in 2011; however, appellant appeared to have some left thumb CMC joint discomfort. Dr. Fleming concluded that no further treatment was required as appellant was stable following the arthroplasty surgery.

By *de novo* decision dated June 16, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 2, 2016. It found Dr. Fleming's opinion was entitled to the special weight of the medical opinion evidence.

On June 26, 2017 appellant, through then-counsel, requested a review of the written record by an OWCP hearing representative.

In progress notes dated July 10, 2017, Dr. Lance B. Davlin, a Board-certified orthopedic surgeon, diagnosed left-hand osteoarthritis, right-hand unspecified osteoarthrosis, left elbow lateral epicondylitis, depression, and anxiety.

By decision dated November 9, 2017, OWCP's hearing representative affirmed the June 16, 2017 decision.

On January 5, 2018 appellant, through then-counsel, requested reconsideration asserting that OWCP erred in terminating her benefits based on Dr. Schwartz' opinion. Counsel further asserted that Dr. Fleming's opinion supported that appellant continued to have residuals and disability due to her osteoarthritis.

Thereafter OWCP received additional reports from Dr. Clarkson including progress notes dated November 7, 2016 and May 8, 2017 diagnosing generalized osteoarthritis.

By decision dated June 21, 2018, OWCP denied modification of the prior decision.

On December 11, 2023 OWCP received an October 15, 2023 notice of recurrence (Form CA-2a) claiming disability beginning May 2018.

In a letter dated December 12, 2023, OWCP informed appellant that her recurrence form received on December 11, 2023 was incomplete. It also noted that her wage-loss compensation and medical benefits had been terminated, and her recurrence claim could not be considered on a denied claim. OWCP referred appellant to the appeal rights accompanying the June 21, 2018 decision.

In a letter dated December 14, 2023, appellant, through then-counsel, asserted that appellant filed a recurrence claim because her osteoarthritis had worsened following the 2016

termination of her wage-loss compensation. Counsel asserted that appellant's recurrence claim alleged that her osteoarthritis worsened as of 2018. He related that it was OWCP's prerogative to deny appellant's recurrence claim; however, the denial should be issued with appeal rights.

On January 15, 2024 appellant, through counsel, requested reconsideration of the June 21, 2018 decision. Counsel asserted that the reconsideration should be accepted even though the request was untimely, because the May 2018 recurrence claim alleged that a recurrence occurred outside the timeframe of the evidence considered in the June 21, 2018 decision.

By decision dated April 5, 2024, 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.⁴ 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.⁵ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

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.⁸ 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 for reconsideration demonstrates "clear evidence of error" on the part of OWCP.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

⁴ 5 U.S.C. § 8128(a); *E.W.*, Docket No. 24-0279 (issued April 24, 2024); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

⁷ *E.W.*, *supra* note 4; *W.B.*, Docket No. 23-0473 (issued August 29, 2023); *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁹ *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).

¹⁰ *S.D.*, Docket No. 23-0626 (issued August 24, 2023); *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *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.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which 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.¹²

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. 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.¹³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

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.

OWCP's regulations¹⁵ and procedures¹⁶ 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 issue(s).¹⁷ The most recent merit decision addressing appellant's continuing disability and medical residuals was OWCP's June 21, 2018 decision. As appellant's request for reconsideration was not received by OWCP until January 15, 2024, more than one year after the June 21, 2018 decision, the Board finds that it was untimely filed. Consequently, he must demonstrate clear evidence of error.

Insofar as appellant's then-counsel argued that a recurrence of disability could be established following a termination of compensation benefits, the Board has previously explained that after termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant, and that an employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of

¹¹ *J.M.*, Docket No. 22-0630 (issued February 10, 2023); *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

¹² *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 10.

¹³ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (September 2020).

¹⁴ *L.J.*, Docket No. 23-0282 (issued May 26, 2023); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁵ 20 C.F.R. § 10.607(a); *see F.D.*, Docket No. 24-0145 (issued April 16, 2024); *L.T.*, Docket No. 21-0844 (issued April 21, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ *Supra* note 6 at Chapter 2.1602.4.

¹⁷ 20 C.F.R. § 10.607(b).

establishing that the disability is causally related to the accepted employment injury.¹⁸ The Board finds, however, that appellant has not demonstrated clear evidence of error in the June 21, 2018 decision. The underlying issue in the June 21, 2018 decision was whether appellant had any continuing disability or residuals causally related to the accepted employment injury. This is a medical issue, and counsel's arguments do not constitute medical evidence. The Board finds that then-counsel's argument that appellant's condition worsened and established her recurrence claim does not manifest on its face that OWCP committed an error in its June 21, 2018 decision.¹⁹

As appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error, the Board finds that OWCP properly denied her 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.

¹⁸ See *Jung S. Sim*, Docket No. 00-1400 (issued May 10, 2001). OWCP issued a letter in this case on December 12, 2023 informing appellant that her recurrence form received on December 11, 2023 was an incomplete form. It also noted that her wage-loss compensation and medical benefits had been terminated and her recurrence claim could not be considered on a denied claim. Insofar as this letter indicated that appellant had submitted an incomplete claim form, it found that the recurrence claim was in an interlocutory posture. As such, this issue is not properly before the Board at this time. See 20 C.F.R. § 501.2(c)(2). If further development of the recurrence claim is pursued, the Board has previously noted that pursuant to Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(a) (June 2013); OWCP should carefully review the recurrence claim to determine if the claimant is requesting reconsideration rather than claiming a recurrence.... [A] request to reopen the case should address some material change in the employee's medical condition or employment status." See *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹⁹ See *Y.J.*, Docket No. 23-0797 (issued December 5, 2023); *L.T.*, *supra* note 15; *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2024
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