

ISSUE

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

FACTUAL HISTORY

On June 1, 2022 appellant, then a 55-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 27, 2022 she sustained a left shoulder injury when a patient grabbed her left shoulder in a hallway while in the performance of duty. On the reverse side of the claim form, the employing establishment controverted the claim, contending that appellant had not filed the claim within 30 days of the date of injury.

OWCP received an April 27, 2022 hospital emergency department discharge note, wherein Rita Davis, a nurse practitioner, diagnosed a left shoulder contusion.

In a June 7, 2022 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and afforded her 30 days to respond.

In a June 16, 2022 report, Dr. Cathy Bryant, a Board-certified family practitioner, recounted that on April 27, 2022, appellant stood between a patient and a visitor to avert an altercation. The patient then grabbed appellant's arm or shoulder. On examination, Dr. Bryant observed tenderness to palpation over the left acromion, and left shoulder pain on passive motion in all planes.³ She diagnosed pain of left shoulder joint with suspicion of left rotator cuff tendinopathy, rule out adhesive capsulitis, osteoarthritis, and fracture. Dr. Bryant prescribed physical therapy.

By decision dated July 11, 2022, OWCP denied appellant's traumatic injury claim, finding that she had not submitted sufficient evidence to establish that the April 27, 2022 employment incident occurred, as alleged. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

On August 11, 2022 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated September 2, 2022, OWCP denied appellant's request for a review of the written record, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP, along with the submission of new evidence.

On March 12, 2024 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

³ June 16, 2022 x-rays of the left shoulder revealed mild acromioclavicular joint disease, without evidence of acute fracture, dislocation, glenohumeral degenerative joint disease, calcific tendinitis, or loss of the acromiohumeral space.

Thereafter, OWCP received a January 19, 2024 statement, wherein appellant asserted that on April 27, 2022, she stood over a visitor who had fallen to the floor to shield them from a disruptive patient. The patient then grabbed appellant by the back of her shoulders and had to be pulled off by appellant's coworkers.

OWCP also received a January 24, 2024 witness statement from a coworker, who recalled that on April 27, 2022, they saw a patient grab appellant's shoulders from behind while she was assisting a visitor on the hallway floor. The patient had to be pulled off appellant.

OWCP also received reports dated August 22, 2022 through December 6, 2023 from Dr. Troy Roberson, a Board-certified orthopedic surgeon, who recounted an occupational April 27, 2022 left shoulder injury related to an assault.⁴ Dr. Roberson diagnosed a left superior labrum, anterior to posterior (SLAP) tear. Dr. Roberson noted that on August 4, 2023 he performed left shoulder arthroscopic biceps tenodesis, subacromial compression, and distal clavicle excision. He recounted that appellant continued to experience left shoulder pain and dysfunction following surgery.

OWCP also received an unsigned medical report dated January 4, 2024.

By decision dated March 25, 2024, OWCP denied appellant's request for an oral hearing, finding that it was untimely filed. It exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

On May 6, 2024 appellant requested reconsideration of OWCP's July 11, 2022 decision. OWCP received an August 4, 2023 operative note by Dr. Roberson wherein he recounted performing left shoulder arthroscopic biceps tenodesis, subacromial compression, and distal clavicle excision.

OWCP also received a November 8, 2023 physical therapy treatment note.

By decision dated May 9, 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.⁵ 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

⁴ An August 29, 2022 magnetic resonance imaging (MRI) scan of the left shoulder demonstrated supraspinatus tendinosis with a tiny partial thickness articular surface tear distally, small glenohumeral joint effusion, subscapularis tendinosis without tear, moderate capsulitis, probable superior labial tear, and acromioclavicular osteoarthritis with evidence of mild supraspinatus impingement.

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

sought.⁶ 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).⁷ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

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.⁹ OWCP’s 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.¹⁰

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

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁸ *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).

⁹ 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).

¹⁰ *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 7 at Chapter 2.1602.5a (September 2020).

¹¹ 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).

¹² *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁴ *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

¹⁵ *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

ANALYSIS

The Board finds that OWCP properly denied appellant's request of reconsideration for reconsideration of the merits of the claim, as it was untimely filed and failed to demonstrate clear evidence of error.

The last merit decision was issued on July 11, 2022. As the most recent request for reconsideration was not received by OWCP until May 6, 2024, more than one year after the July 11, 2022 merit decision, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.¹⁶

In support of her reconsideration request, appellant submitted Dr. Roberson's August 4, 2023 operative note, and a November 8, 2023 physical therapy treatment note. However, the underlying issue of the case is whether appellant provided sufficient factual evidence to establish that the April 27, 2022 employment incident occurred as alleged. The operative note and physical therapy treatment note do not address the underlying factual issue in the claim and are irrelevant.¹⁷ Therefore, the evidence submitted on reconsideration is insufficient to raise a substantial question concerning the correctness of OWCP's last merit decision.¹⁸ As noted, clear evidence of error is intended to represent a difficult standard.¹⁹ The Board finds that appellant's request for reconsideration did not show on its face that OWCP committed an error in denying her traumatic injury claim.²⁰ Thus, the evidence is insufficient to demonstrate clear evidence of error.²¹

Accordingly, the Board finds that OWCP properly denied appellant's request for reconsideration, as it was untimely filed and failed to demonstrate clear evidence of error.²²

CONCLUSION

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

¹⁶ 20 C.F.R. § 10.607(b); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ *See S.B.*, Docket No. 23-1185 (issued September 4, 2024); *D.L.*, Docket No. 23-0117 (issued August 15, 2024); *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Leona N. Travis*, *supra* note 12.

¹⁸ *J.C.*, Docket No. 24-0485 (issued August 26, 2024); *D.M.*, Docket No. 22-1152 (issued March 28, 2023).

¹⁹ *J.C.*, *id.*; *E.L.*, Docket No. 22-0631 (issued October 31, 2022).

²⁰ *Id.*

²¹ *W.R.*, Docket No. 24-0244 (issued May 22, 2024); *B.C.*, Docket No. 24-0022 (issued April 25, 2024); *J.J.*, Docket No. 23-0155 (issued October 5, 2023).

²² *C.M.*, Docket No. 23-0958 (issued May 10, 2024); *J.B.*, Docket No. 20-0630 (issued April 21, 2021).

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 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