

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

A.L., Appellant)	
)	
and)	
)	
DEPARTMENT OF THE ARMY,)	Docket No. 24-0364
INSTALLATION MANAGEMENT AGENCY,)	Issued: July 30, 2024
FOOD SERVICE BRANCH,)	
Wiesbaden, Germany, 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
JANICE B. ASKIN, Judge

JURISDICTION

On February 22, 2024 appellant filed a timely appeal from a January 25, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision dated September 21, 2021 to the filing of this appeal,

¹ Appellant submitted a timely oral argument request before the Board. 20 C.F.R. § 501.5(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 appellant's oral argument request, he/she asserted that oral argument should be granted because OWCP erroneously denied the remainder of his schedule award when it disregarded the paperwork which noted when his total disability began. The Board, in exercising its discretion, denies his request for oral argument because the arguments on appeal can adequately be 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.

pursuant to the Federal Employees' Compensation Act² (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.

FACTUAL HISTORY

This case has been previously before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 10, 2007 appellant, then a 36-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that on April 9, 2007, he slipped on a wet floor and twisted his right knee, aggravating a preexisting injury while in the performance of duty. On October 24, 2008 OWCP accepted his claim for tear of the right knee medial meniscus.⁴ It paid appellant wage-loss compensation on the supplemental rolls from June 10 through July 23, 2007.

On August 23, 2010 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated November 9, 2010, OWCP granted appellant a schedule award for 31 percent permanent impairment of the right lower extremity. It listed the date of maximum medical improvement (MMI) as September 29, 2010, based on a medical examination and permanent impairment rating of that date by Dr. William F. Clayton, an orthopedic surgeon. The award was based on a weekly compensation of \$432.25. In order to not delay appellant's award, OWCP found that a determination would be made later with regard to a clarification on appellant's entitlement to Sunday premium pay. It excluded, pursuant to 5 U.S.C. § 8114(e), from appellant's pay rate all additional pay or allowance, including post allowance pay, authorized outside the United States because of a differential in cost of living and other special circumstances. A separate maintenance allowance authorized under 5 U.S.C. § 5924(3) was also excluded as it is a cost-of-living allowance paid to an employee in a foreign area.

On December 28, 2010 appellant filed an appeal with the Board. By decision dated November 15, 2011, the Board found that the case was not in posture for a decision regarding the

² 5 U.S.C. § 8101 *et seq.*

³ Docket No. 11-0525 (issued November 15, 2011).

⁴ OWCP assigned the present claim OWCP File No. xxxxxx999. On October 16, 2009 appellant filed a notice of recurrence. OWCP converted appellant's recurrence under OWCP File No. xxxxxx999 into a new occupational disease claim and assigned OWCP File No. xxxxxx113. By decision dated December 2, 2010, it accepted that claim for aggravation of right lateral knee compartment degenerative osteoarthritis, aggravation of right medial meniscus tear, and right lateral meniscus subluxation. OWCP paid appellant on the supplemental rolls commencing March 31, 2010 and on the periodic rolls from January 16, 2011 through June 20, 2021. On December 2, 2010 it administratively combined OWCP File Nos. xxxxxx113 and xxxxxx999, with the latter designated as the master file.

percentage of right lower extremity permanent impairment and the date of MMI.⁵ The case was remanded to OWCP for further development.⁶

By decision dated January 27, 2012, OWCP reviewed all the evidence of record and determined that appellant had 31 percent permanent impairment of the right lower extremity based on the September 29, 2010 report of Dr. Clayton and the October 28, 2010 report of Dr. Nabil F. Angley, a Board-certified orthopedic surgeon serving as a district medical advisor (DMA). It further found that September 29, 2010 was the correct date of MMI.

By decision dated September 21, 2021, OWCP reissued its decision granting appellant a schedule award for 31 percent permanent impairment of the right lower extremity. The award was for 89.28 weeks and the period of the award was September 29, 2010 through June 14, 2012.

On January 27, 2023 appellant asserted that he had not received proper payment of his schedule award benefits. On March 1, 2023 OWCP advised him that his schedule award payments had been reviewed by two OWCP senior claims examiners and audited based on the compensation payout report. Appellant was advised that he had been paid what he was owed, and that he could submit new evidence contradicting the amounts paid.

On January 16, 2024 appellant requested reconsideration. He alleged that the date of his second injury was September 24, 2009, not June 22, 2009; therefore, a three-month period of compensation was missing from his schedule award payments.

By decision dated January 25, 2024, 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.⁷ 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 sought.⁸ 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

⁵ *Supra* note 3.

⁶ The Board also found that OWCP properly excluded pay for post differential for overseas employees in its rate of pay calculations.

⁷ 5 U.S.C. § 8128(a); *J.B.*, Docket No. 24-0011 (issued March 19, 2024); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁸ 20 C.F.R. § 10.607(a).

(iFECS).⁹ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

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.¹¹ 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.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

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.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷

In schedule award cases, a distinction is made between a claim for a schedule award and a request for reconsideration of the denial of a schedule award. When a claimant is asserting that

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

¹⁰ *J.B.*, *supra* note 7; *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).

¹¹ *See* 20 C.F.R. § 10.607(b); *J.B.*, *id.*; *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹² *J.B.*, *id.*; *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 11 at Chapter 2.1602.5(a) (September 2020).

¹³ *J.B.*, *id.*; *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).

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

¹⁵ *See J.B.*, *id.*; *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁶ *Id.*

¹⁷ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration.¹⁸

The Board has held that a claimant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.¹⁹ When a claim has requested reconsideration and has submitted new and relevant evidence with respect to a permanent impairment or an increased permanent impairment, then he or she will be entitled to a merit decision on the issue.²⁰

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 finds that OWCP did not receive additional evidence of permanent impairment with appellant's January 16, 2024 request for reconsideration. The Board will, therefore, consider this a reconsideration request as opposed to a claim for an increased schedule award.²¹

OWCP's regulations²² and procedures²³ 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.²⁴ The most recent merit decision pertaining to the denial of appellant's schedule award claim was dated September 21, 2021. OWCP received his request for reconsideration on January 16, 2024. As OWCP received his request for reconsideration more than one year after the September 21, 2021 decision, the Board finds that it was untimely filed. Consequently, appellant must

¹⁸ *J.D.*, Docket No. 22-0379 (issued June 6, 2022); *L.J.*, Docket No. 21-0468 (issued December 1, 2021); *J.H.*, Docket No. 20-1097 (issued December 18, 2020); *L.D.*, Docket No. 17-1946 (issued August 23, 2018); *C.M.*, Docket No. 17-0310 (issued February 15, 2017); *see also B.K.*, 59 ECAB 228 (2007) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate a request for reconsideration).

¹⁹ *J.B.*, *supra* note 7; *R.D.*, Docket No. 18-0579 (issued September 14, 2018); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²⁰ *See J.B.*, *id.*; *C.W.*, Docket No. 18-1110 (issued December 28, 2018); *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994); *see also B.K.*, 59 ECAB 228 (2007).

²¹ *See J.B.*, *id.*; *B.P.*, Docket No. 22-0553 (issued October 21, 2022); *P.D.*, Docket No. 18-0962 (issued September 18, 2019).

²² 20 C.F.R. § 10.607(a); *see also F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Albert Dukes*, 56 ECAB 247 (2005).

²³ *Supra* note 9 at Chapter 2.1602.4 (September 2020); *see also L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²⁴ 20 C.F.R. § 10.607(b); *A.P.*, Docket No. 21-1222 (issued February 9, 2023); *see also Debra McDavid*, 57 ECAB 149 (2005).

demonstrate clear evidence of error on the part of OWCP in payment of the schedule award claim.²⁵

The Board finds that appellant has not demonstrated clear evidence of error. As noted, to establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.²⁶ In his untimely reconsideration request appellant alleged that he had not received full payment of his schedule award for 89.28 weeks of schedule award compensation. However, the case record establishes that appellant had been fully compensated for 89.28 weeks of schedule award compensation.

As appellant's request for reconsideration was untimely filed and did not demonstrate on its face that OWCP committed an error in payment of his schedule award claim, the Board finds that OWCP properly determined that his January 16, 2024 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.²⁷

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.

²⁵ 20 C.F.R. § 10.607(b); *see W.H.*, Docket No. 23-0473 (issued August 29, 2023).

²⁶ *Supra* note 16.

²⁷ *J.B.*, *supra* note 7; *O.K.*, Docket No. 21-0708 (issued September 29, 2021); *S.C.*, Docket No. 19-1424 (issued September 15, 2020).

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 30, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board