

FACTUAL HISTORY

On May 18, 2022 appellant, then a 44-year-old air traffic controller, filed an occupational disease claim (Form CA-2) alleging that he developed severe right cervical root compression at C5, C6, and C7 due to factors of his federal employment. He first became aware of the condition and its relationship to his federal employment on July 1, 2020. On the reverse side of the form, appellant's supervisor noted that appellant had been on extended leave since October 2021.

In support of his claim, appellant submitted medical evidence covering the period January 25, 2021 through February 10, 2022 from Dr. Jonathan Gottlieb, an orthopedic surgeon, diagnosing cervical radiculitis, secondary to disc herniations at C5-7. OWCP also received hospital records documenting that appellant underwent an April 14, 2021 anterior cervical discectomy and fusion at C5-6 and a C6-7 for a diagnosis of C5-6 and C6-7 cervical spondylosis with radiculopathy. A November 12, 2021 computerized tomography (CT) scan documented cervical radiculitis and cervical spine fusion.

In a May 26, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In an October 26, 2021 surgical report, Dr. Gottlieb related diagnoses of C5-6 and C6-7 severe radiculopathy with progressive neurological dysfunction. He removed appellant's C6-7 anterior plate and performed a C6 corpectomy with revision discectomy and removal of structural C5-6 and C6-7 allografts, C5-6 and C6-7 anterior arthrodesis, and anterior reconstruction utilizing an expandable titanium cage.

Appellant thereafter underwent a January 12, 2022 magnetic resonance imaging (MRI) scan which was correlated with a cervical x-ray of even date, and indicated findings of cervical spondylosis, C5-6 canal stenosis and mild kyphosis, and anterior cervical disc fusion (ACDF) C5-7 with susceptibility from artificial C5-6 and C6-7 disc space narrowing. A February 18, 2022 MRI scan demonstrated that appellant was post ACDF C5-7, with right hemilaminectomy site fluid collection.

In reports dated January 10 and 21, 2022, Dr. Joaquin S. Maury, a Board-certified neurologist, noted appellant's medical history and detailed his physical examination findings. He diagnosed chronic cervical radiculopathy, chronic pain syndrome, and chronic sacroiliitis.

A January 25, 2022 hospital report from Dr. Gottlieb noted that on the date appellant underwent right side C5-6 and C6-7 foraminotomy with right-sided hemilaminectomy at C6.

OWCP subsequently received additional progress reports dated through May 19, 2022 from Dr. Gottlieb providing physical examination findings, diagnosing cervical radiculitis and noting appellant's cervical fusion procedure.

In a June 6, 2022 statement, appellant recounted that he had undergone three cervical surgical procedures. He attributed his condition to vision obstruction in the employing establishment control tower as it was an old, inefficient, and outdated facility. Appellant related

that he had to move his head and neck in constant coordination, looking left and right, to inspect surface areas to visually confirm that aircraft were complying with instructions.

On June 7, 2022 OWCP received an undated report from Dr. Gottlieb diagnosing cervical degeneration. Dr. Gottlieb noted that appellant's employment required repetitive neck movements, which he opined was a major contributing factor to his spinal degeneration.

In a June 24, 2022 report, Dr. Darin L. Bush, an osteopathic Board-certified family medicine physician, diagnosed cervical degenerative disc disease, cervical spondylosis, cervical spinal stenosis, cervical radiculopathy, and right-sided neuropathy. He related that for the past 14 years appellant's job duties had required repetitive thoracic and cervical spine and upper extremity motion. These motions included constant awkward positions and repetitive cervical spine motions viewing multiple computer screens, which his position required him to monitor. Dr. Bush opined those 14 years of repetitive motion at work caused cervical spine overuse phenomenon, advanced cervical spine and disc degeneration, and accelerated cervical spondylosis and stenosis.

By decision dated August 15, 2022, OWCP accepted the implicated employment factors; however, it denied his claim, finding that he did not submit sufficient medical evidence to establish a medical condition causally related to the accepted employment factors.

In a letter dated October 3, 2023, appellant requested an extension of time to file an appeal. On October 11, 2023 he requested reconsideration. Appellant submitted a narrative statement dated October 3, 2022 in which he further described his working conditions, including mandatory six-day work weeks, with 10-hour workdays. He also described sitting in a low nonergonomic chair, which required additional neck movements to perform his job duties.

By decision dated October 13, 2023, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Subsequent to the October 13, 2023 decision, OWCP received an October 4, 2023 report from Dr. Daniel Tuckerman, a Board-certified internist. This report recounted in detail appellant's air traffic controller job duties and his medical history. Dr. Tuckerman diagnosed connective tissue stenosis of the neural canal, cervical region; cervical spondylosis, cervical disc disorder at the C4-5 level with radiculopathy, and cervical spine fusion. He attributed appellant's diagnosed conditions to a July 1, 2020 work injury which aggravated his preexisting conditions. Dr. Tuckerman reported that on July 1, 2020 appellant had been working a 10-hour shift when he reported agonizing pain in his right shoulder and arm and the right side of his neck. He further reported that appellant was diagnosed with severe C5-7 cervical nerve compression and had undergone three major surgeries to correct his cervical compression. Dr. Tuckerman opined that the unfavorable ergonomics and repetitive cervical and shoulder region motions required by appellant's job led to connective tissue stenosis, cervical spine fusion, cervical spondylosis, cervical disc disorder with radiculopathy, and muscle spasms. He concluded that appellant's cervical conditions were a direct result of the work injury he sustained on July 1, 2020, which aggravated his preexisting conditions.

On December 19, 2023 appellant requested reconsideration. In a narrative statement, he related that his initial documentation did not take into account that to perform his job duties he had

to sit in a low chair for long periods of time, viewing screens and monitors overhead. Appellant alleged that this caused a load on the cervical discs, and led to rapid degeneration of the cervical discs.

By decision dated January 4, 2024, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.³ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the 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

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.⁶ 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.⁷

The Board notes that clear evidence of error is intended to represent a difficult standard. OWCP's procedures note that the term clear evidence of error represents a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error in the merit decision. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have required further development is not clear evidence of error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to establish

² This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

⁴ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

⁵ *Id.*

⁶ 20 C.F.R. § 10.607(b); *A.S.*, Docket No. 24-0104 (issued March 25, 2024); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.* at § 10.607(b); *supra* note 4 at Chapter 2.1602.5a (September 2020).

⁸ *Id.*; *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016); *id.* at Chapter 2.1602.5a (February 2016).

⁹ *A.S.*, *supra* note 6; *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹ In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹² The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

ANALYSIS

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

OWCP's regulations¹⁴ and procedures¹⁵ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. OWCP's most recent merit decision was issued on August 15, 2022. As appellant's request for reconsideration was not received by OWCP until December 19, 2023, more than one year after the August 15, 2022 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

The Board further finds that appellant has not demonstrated clear evidence of error. In support of his request for reconsideration, appellant submitted Dr. Tuckerman's October 4, 2023 report, as well as his own narrative statement, in which he again related factors of his federal employment. In the October 4, 2023 report, Dr. Tuckerman recounted appellant's employment duties and medical history. He noted the unfavorable ergonomics and repetitive cervical and shoulder region motions required by appellant's job and diagnosed connective tissue stenosis of the neural canal, cervical region; cervical spondylosis, cervical disc disorder at the C4-5 level with radiculopathy, and cervical spine fusion. Dr. Tuckerman concluded that appellant's cervical conditions were a direct result of the work injury he sustained on July 1, 2020, which aggravated his preexisting conditions.

However, as explained above, evidence which does not on its face raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear

¹⁰ *A.S., id.; T.C., supra* note 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 20 C.F.R. § 10.607(a); *see G.V.*, Docket No. 23-1005 (issued February 15, 2024); *L.T.*, Docket No. 21-0844 (issued April 21, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

¹⁵ *Supra* note 4 at Chapter 2.1602.4.

¹⁶ 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 21-1152 (issued July 13, 2023); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *see Debra McDavid*, 57 ECAB 149 (2005).

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

The Board finds that appellant's request for reconsideration did not show on its face that OWCP committed an error in the August 15, 2022 decision, denying his occupational disease claim.¹⁸ Thus, the evidence is insufficient to demonstrate clear evidence of error.¹⁹

Accordingly, 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.

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 4, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁷ *C.M.*, Docket No. 23-0958 (issued May 10, 2024); *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

¹⁸ *C.M.*, *id.*; *S.C.*, Docket No. 19-1424 (issued September 15, 2020).

¹⁹ *C.M.*, *id.*; *J.J.*, Docket No. 23-0155 (issued October 5, 2023).