

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

_____)
K.J., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
LYONS VA MEDICAL CENTER, Lyons, NJ,)
Employer)

_____)

Docket No. 23-0924
Issued: June 7, 2024

Appearances:

*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 26, 2023 appellant, through counsel, filed a timely appeal from a March 10, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated March 5, 2018, which became final after 30 days of issuance, and is not subject to further review.² As there was no merit decision issued by OWCP within 180 days from the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 20 C.F.R. § 501.6(d); *see M.S.*, Docket No. 18-0222 (issued June 21, 2018); *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

³ 5 U.S.C. § 8101 *et seq.*

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.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 30, 2009 appellant, then a 38-year-old library technician, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome due to factors of her federal employment and repetitive employment duties. OWCP accepted the claim for bilateral carpal tunnel syndrome and paid intermittent wage-loss compensation benefits on the supplemental rolls, effective August 6, 2009. Appellant underwent OWCP-authorized left carpal tunnel release on August 6, 2009, and OWCP-authorized right carpal tunnel release on September 4, 2012.

By decision dated October 26, 2012, OWCP accepted a recurrence of disability on September 4, 2012 due to the authorized surgery. Appellant stopped work and received wage-loss compensation benefits on the periodic rolls, effective April 7, 2013.

On July 17, 2013 the employing establishment offered appellant a full-time permanent position as a modified library technician GS-1411-06.⁵

By decision dated November 13, 2013, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective November 17, 2013, as she refused to accept suitable employment. It found that the weight of the medical evidence rested with Dr. Stanley Askin, a Board-certified orthopedic surgeon and OWCP referral physician, who found that she was capable of performing the duties of the offered position.

On November 19, 2013 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated July 8, 2014, the hearing representative affirmed the November 13, 2013 decision.

Appellant appealed to the Board on August 26, 2014. On February 3, 2015 the Board affirmed OWCP's November 13, 2013 decision terminating compensation benefits, as appellant had refused an offer of suitable work.⁶ The Board found that the suitable work position was within

⁴ Docket No. 17-1971 (issued March 5, 2018); Docket No. 16-0846 (issued August 18, 2016); Docket No. 14-1886 (issued February 3, 2015).

⁵ The duties of the position were modified so that appellant would: lift one book at a time and lift no more than 10 pounds at one time; use a telephone headset to answer telephone calls; limit repetitive wrist movements of typing and use of computer mouse to two hours per day; and stock a bookmobile cart with books one at a time, but no pushing/pulling of the cart.

⁶ Docket No. 14-1886 (issued February 3, 2015).

the restrictions provided by Dr. Askin, and appellant's treating physicians had not explained why she could not perform the duties of the suitable work position.

Appellant, through counsel, subsequently requested reconsideration.

By decision dated December 1, 2015, OWCP denied modification of its prior decision. Appellant appealed to the Board. By decision dated August 18, 2016, the Board affirmed OWCP's December 1, 2015 decision, finding that she had not established that her refusal of suitable work was justified, as of the date of the termination.⁷

On February 21, 2017 appellant, through counsel, requested reconsideration.

By decision dated May 22, 2017, OWCP denied modification of its prior decision. On September 22, 2017 appellant appealed to the Board. By decision dated March 5, 2018, the Board affirmed OWCP's May 22, 2017 decision, finding that she had not established that her refusal of suitable work was justified.⁸

In a letter dated January 21, 2020, counsel for appellant noted submission of a December 10, 2019 medical report from Dr. Michael M. Cohen, a Board-certified orthopedic surgeon, in support of a claim for a schedule award.

On March 18, 2020 appellant filed a claim for a schedule award (Form CA-7).

In a letter dated March 27, 2020, OWCP informed appellant that her entitlement to compensation for wage-loss and schedule awards were terminated, effective November 13, 2013. Therefore, no further action would be taken on her request for a schedule award.

In a letter dated January 27, 2022, counsel for appellant requested reconsideration and a merit review of OWCP's November 13, 2013 decision. He noted that in a different OWCP claim with a November 1, 2011 date of injury, assigned OWCP File No. xxxxxx340, it recently issued a December 10, 2021 decision finding appellant disabled, effective November 13, 2013 because of her accepted employment-related anxiety and major depressive disorder. Counsel requested rescission of the November 13, 2013 termination decision under the current claim arguing that appellant was totally disabled as of November 13, 2013.

By decision dated March 10, 2023, 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.⁹ 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

⁷ Docket No. 16-0846 (issued August 18, 2016).

⁸ Docket No. 17-1971 (issued March 5, 2018).

⁹ 5 U.S.C. § 8128(a); *see also* A.B., Docket No. 19-1539 (issued January 27, 2020); W.C., 59 ECAB 372 (2008).

decision for which review is sought.¹⁰ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).¹¹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹³ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁵ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁶ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁷ 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 request for reconsideration bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁸

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁹ The claimant must present evidence which on its face shows that OWCP made an error.²⁰ 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

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

¹² *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹⁴ *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).

¹⁵ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹⁷ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁸ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁹ *See supra* note 11 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²⁰ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

development, is not clear evidence of error.²¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²²

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.²³

OWCP's regulations²⁴ and procedures²⁵ 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).²⁶ The most recent merit decision addressing appellant's termination of wage-loss compensation and schedule award benefits was the March 5, 2018 decision of the Board.²⁷ As her request for reconsideration was not received by OWCP until January 27, 2022, more than one year after the March 5, 2018 decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error.

The Board further finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP met its burden of proof to terminate her wage-loss compensation and entitlement to schedule award benefits, effective November 17, 2013, for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). On reconsideration, counsel for appellant asserted that OWCP's November 13, 2013 termination decision should be rescinded. He noted that under OWCP File No. xxxxxx340 a different OWCP claim with a November 1, 2011 date of injury, it recently issued a December 10, 2021 decision finding appellant disabled, effective November 13, 2013 because of her accepted employment-related anxiety and major depressive disorder.

The term clear evidence of error is intended to represent a difficult standard. The Board finds that the evidence submitted on reconsideration does not show that OWCP committed error in its May 22, 2017 decision.²⁸ There is no evidence to establish that appellant's refusal of suitable work was justified as it related to her bilateral carpal tunnel conditions and surgeries in this claim due to any continued residual and disability stemming from the accepted employment injury, prior

²¹ *Id.*

²² *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²³ *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

²⁴ 20 C.F.R. § 10.607(a); *see 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).

²⁵ *Supra* note 11 at Chapter 2.1602.4 (September 2020).

²⁶ 20 C.F.R. § 10.607(b).

²⁷ *See N.P.*, Docket No. 21-0042 (issued August 18, 2021) (a timely request for reconsideration must be filed within one year of the Board's decision, as it was the most recent merit decision).

²⁸ *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

to the termination of her compensation benefits.²⁹ Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.³⁰ Thus, she has not demonstrated clear evidence of error.³¹

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.³²

CONCLUSION

The Board finds that 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.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

²⁹ *S.P.*, Docket No. 22-1070 (issued December 7, 2023).

³⁰ *T.H.*, Docket No. 19-0887 (issued October 20, 2020).

³¹ *J.B.*, Docket No. 20-0630 (issued April 21, 2021).

³² *J.D.*, Docket No. 23-0210 (issued July 26, 2023).