

FACTUAL HISTORY

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

On December 2, 2013 appellant, then a 48-year-old forklift operator, filed an occupational disease claim (Form CA-2) alleging that he sustained a back injury and a detached retina due to factors of his federal employment including driving over potholes. He indicated that he first became aware of his conditions and realized their relationship to his federal employment on April 11, 2012. Appellant retired from the employing establishment on April 8, 2013.

By decision dated January 31, 2014, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the implicated factors of his federal employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 21, 2014 appellant requested reconsideration. By decision dated March 18, 2014, OWCP denied reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board. By decision dated September 17, 2014,⁴ the Board affirmed OWCP's January 31 and March 18, 2014 decisions.

On December 31, 2014 appellant again requested reconsideration before OWCP. By decision dated February 11, 2015, OWCP denied reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board. By decision dated June 15, 2015,⁵ the Board affirmed OWCP's February 11, 2015 decision.

On January 28, 2016 appellant again appealed OWCP's February 11, 2015 decision. The Board, by order dated April 11, 2016,⁶ dismissed the appeal in Docket No. 16-0534, finding that OWCP had not issued a final adverse decision since the Board affirmed its February 11, 2015 decision. Additionally, the Board dismissed appellant's petition for reconsideration of its February 11, 2015 decision issued under Docket No. 15-0795, as untimely filed.

Appellant requested reconsideration on February 22, 2022. By decision dated June 14, 2022, OWCP denied his request for reconsideration, finding that it was untimely filed, and failed to demonstrate clear evidence of error.

³ Docket No. 14-1028 (issued September 17, 2014); Docket No. 15-795 (issued June 15, 2015); *Order Dismissing Appeal* in Docket No. 16-0534 and *Dismissing Petition for Reconsideration* in 15-0795 (issued April 11, 2016); *Order Remanding Case*, Docket No. 23-1002 (issued November 17, 2023).

⁴ Docket No. 14-1028 (issued September 17, 2014).

⁵ Docket No. 15-795 (issued June 15, 2015).

⁶ *Order Dismissing Appeal* in Docket No. 16-534 and *Dismissing Petition for Reconsideration* in Docket No. 15-0795 (issued April 11, 2016).

On April 5, 2023 appellant requested reconsideration of the June 14, 2022 decision. In support of his reconsideration request, appellant submitted additional evidence.

A December 21, 2014 report by Dr. Roshan Sharma, a Board-certified physiatrist, noted appellant's significant cervical and lumbar spine, eye conditions, and physical restrictions. He opined that appellant was permanently totally disabled from work due to his conditions and restrictions. In a March 25, 2023 prescription note, Dr. Sharma ordered appellant to medically retire from work.

In a June 15, 2018 report, Dr. Solomon C. Mogbo, an internist, provided range of motion measurements for the elbows, shoulders, hands, wrists, knees, hips, ankles, and feet, and findings on testing of deep tendon reflexes. On February 7, 2023 he reported appellant's vital signs and active conditions, including blind left eye, and current medications.

An October 26, 2020 letter by Caitlin McVoy, Au.D., noted a history that appellant first experienced hearing difficulty after a work incident that caused multiple injuries. She diagnosed left ear hearing loss in April 2019, and indicated that a hearing aid was prescribed at that time. Dr. McVoy explained that a hearing aid was prescribed due to a moderate sensorineural hearing loss in appellant's left ear.

In a November 14, 2022 progress note, Dr. Marco H. Ji, an ophthalmologist, provided assessments of suspected open-angle glaucoma; secondary glaucoma due to combination mechanisms, left, indeterminate stage; retinal detachment, old, total/subtotal, left; and neurotrophic keratopathy, left eye.

An unsigned after-visit summary dated January 31, 2023 from an emergency department provided diagnoses of vitreous detachment, right; floater vitreous, right; changes in vision; primary hypertension; and retinal detachment, old, total/subtotal, left.

A notification of personnel action (Standard Form (SF) 50-B) dated April 11, 2013, indicated that appellant resigned from the employing establishment due to medical reasons, effective April 8, 2013.

In letters dated October 28, 2013, the Office of Personnel Management (OPM) approved appellant's application for disability retirement due to thoracic spine degenerative disc disease and total retinal detachment of the left eye.

OWCP, by decision dated June 30, 2023, denied appellant's April 5, 2023 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant filed a timely appeal to the Board on July 21, 2023. By order dated November 17, 2023,⁷ the Board set aside OWCP's June 30, 2023 decision, and remanded the case to OWCP to make findings of fact and provide a clear statement of reasons explaining the basis for the decision.

⁷ Docket No. 23-1002 (issued November 17, 2023).

By decision dated February 29, 2024, OWCP denied appellant's April 5, 2023 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.⁸ OWCP's regulations⁹ establish a one-year time limitation for requesting reconsideration which begins on the date of the original OWCP merit decision. A right to reconsideration within one-year also accompanies any subsequent merit decision on the issues.¹⁰ 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. Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).¹¹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

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.¹³ Its 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.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. 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

⁸ 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).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *E.R.*, Docket No. 21-0423 (issued June 20, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

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

¹² *S.S.*, Docket No. 23-0086 (issued May 26, 2023); *G.G.*, *supra* note 1; *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); *supra* note 11 at Chapter 2.1602.5 (September 2020).

¹⁵ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 11 at Chapter 2.1602.5a (September 2020).

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.¹⁶

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁷ 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.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁹

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 regulations²⁰ and procedures²¹ 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 issues.²² The most recent merit decision was the Board's September 17, 2014 decision. As appellant's request for reconsideration was received on April 5, 2023, more than one year after the September 17, 2014 decision, the Board finds that it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying his occupational disease claim.²³

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue in this case is factual in nature, that is, whether appellant established the implicated factors of his federal employment. In support of his untimely request for reconsideration, appellant submitted the April 11, 2013 SF 50-B and an October 28, 2013 OPM letter which addressed his resignation from the employing establishment and approval of his disability application, respectively, due to medical reasons. The Board notes, however, that

¹⁶ *L.J.*, Docket No. 23-0282 (issued May 26, 2023); *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁷ *G.G.*, *supra* note 1; *see also* 20 C.F.R. § 10.607(b); *supra* note 11 at Chapter 2.1602.5 (September 2020).

¹⁸ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *id.* at Chapter 2.1602.5(a) (September 2020).

¹⁹ *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *D.S.*, Docket No. 17-0407 (issued May 24, 2017); *George C. Vernon*, 54 ECAB 319 (2003).

²⁰ 20 C.F.R. § 10.607(a); *see J.W.*, *supra* note 10; *Alberta Dukes*, 56 ECAB 247 (2005).

²¹ *Supra* note 11 at Chapter 2.1602.4 (September 2020); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²² 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

²³ *Id.* at § 10.607(b); *see C.S.*, Docket No. 22-0142 (issued October 23, 2023); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *Debra McDavid*, 57 ECAB 149 (2005).

neither letter further details the circumstances of his claim. Therefore, the Board finds that this evidence is insufficient to establish clear evidence of error.²⁴

Appellant also submitted medical reports from Drs. Sharma, Mogbo, and Ji who addressed appellant's cervical and lumbar spine and eye conditions, physical restrictions, and disability from work. The Board finds, however, that the submission of this medical evidence does not demonstrate clear evidence of error in the denial of appellant's occupational disease claim. As noted, the underlying issue in this case is factual in nature because appellant's occupational disease claim was denied on September 17, 2014 due to his failure to establish the implicated factors of his federal employment. Thus, the Board finds that the above-noted reports do not raise a substantial question concerning the correctness of the September 17, 2014 decision.²⁵

Additionally, appellant submitted an unsigned January 31, 2023 after-visit summary from an emergency department that revealed diagnoses of vitreous detachment, right; floater vitreous, right; changes in vision; primary hypertension; and retinal detachment, old, total/subtotal, left. The Board has consistently held that a report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence as the author cannot be identified as a physician.²⁶ For this reason, this evidence is also insufficient to demonstrate clear evidence of error.

Lastly, appellant submitted an October 26, 2020 report from Dr. McVoy, an audiologist, who diagnosed moderate sensorineural hearing loss in the left ear, and prescribed a hearing aid. An audiologist is not considered a physician as defined under FECA.²⁷ Thus, her report is of no probative medical value. For these reasons, Dr. McVoy's report is insufficient to demonstrate clear evidence of error.

Accordingly, the Board finds that OWCP properly denied appellant's April 5, 2023 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.

²⁴ See *W.B.*, Docket No. 23-0473 (issued August 29, 2023); *G.H.*, Docket No. 22-0394 (issued February 6, 2023); *F.D.*, Docket No. 19-1663 (issued March 10, 2020).

²⁵ *Id.*

²⁶ *J.F.*, Docket No. 22-0572 (issued September 20, 2022); *I.J.*, Docket No. 20-0812 (issued October 19, 2020); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

²⁷ Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); see also *I.J.*, *supra* note 26 (an audiologist is not considered a physician as defined under FECA).

ORDER

IT IS HEREBY ORDERED THAT the February 29, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 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