

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

C.M., Appellant)	
)	
and)	Docket No. 23-0958
)	Issued: May 10, 2024
DEPARTMENT OF THE ARMY, U.S. ARMY)	
GARRISON, CARLISLE BARRACKS,)	
Carlisle, PA, Employer)	

Appearances:
Randolph Aldon Elliott, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 3, 2023 appellant, through her representative, filed a timely appeal from a January 3, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from the last merit decision, dated December 16, 2021, to the

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 an 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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). The 180th day following OWCP's January 3, 2023 decision was July 2, 2023. As this fell on a Sunday, appellant had until the next business day, which was Monday, July 3, 2023, to file the appeal. *See* 20 C.F.R. § 501.3(f)(3). *See also* *T.T.*, Docket No. 21-1278 (issued March 29, 2022).

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.⁴

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

On October 14, 2021 appellant, then a 41-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that on October 10, 2021 she sustained a lower back and pelvic strain when she bent over to retrieve something while in the performance of duty. She noted that she had been lifting heavy objects during an emergency incident at work the prior day, and then slept on a mattress on the dispatch room. Appellant stopped work on October 11, 2021.

In support of her claim, appellant provided a narrative statement discussing the circumstances surrounding her injury, a notification of personnel action (Standard Form (SF) 50), a position description, work status notes, and progress reports from her treating physicians documenting treatment for left-sided back pain from October 14 through November 15, 2022.

In a November 15, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

OWCP subsequently received additional evidence. In an October 14, 2021 report, Dr. James Shaffer, a Board-certified orthopedic surgeon, related that appellant was seen for left-sided lower back pain after an October 10, 2021 employment incident. He provided examination findings and diagnosed left-sided low back pain, and left S1 joint dysfunction, status post injury at work.

In a November 15, 2021 report, Dr. Daniel P. Hely, a Board-certified orthopedic surgeon, diagnosed "resolving symptoms of back pain following work[-]related event six weeks ago (lumbar strain is the diagnosis requested by the claims examiner)."

By decision dated December 16, 2021, OWCP accepted that the October 10, 2021 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the January 3, 2023 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

connection with the accepted October 10, 2021 employment incident. Consequently, OWCP found that she had not met the requirements to establish an injury as defined by FECA.

On December 21, 2022 appellant requested reconsideration of OWCP's decision, arguing that her October 10, 2021 employment injury continued to worsen following her initial work injury. She further argued that the December 16, 2021 OWCP decision failed to consider her physician's November 15, 2021 report, which provided a medical diagnosis in connection with the accepted employment incident.

Appellant submitted additional evidence, including a magnetic resonance imaging (MRI) scan of the left hip dated October 27, 2021, an MRI scan of the pelvis dated November 2, 2021, and progress reports from her treating physicians dated October 14 and 25, 2021, and July 7, 2022.

Appellant submitted an addendum to Dr. Shaffer's October 14, 2021 report, which further described the circumstances surrounding the October 10, 2021 employment incident.

In an October 25, 2021 report, Dr. Brett Himmelwright, a Board-certified orthopedic surgeon, reported that appellant was evaluated for left-sided lower back pain following an October 10, 2021 employment incident. He discussed appellant's examination findings and diagnosed left-sided low back pain with new onset thoracalgia.

In a July 7, 2022 report, Dr. Tyson Maugle, a Board-certified orthopedic surgeon, related that appellant was seen for left-sided lower back pain after an October 10, 2021 employment incident. He provided examination findings and reviewed the October 27, 2021 and November 2, 2021 MRI studies of the lumbar spine and pelvis. Dr. Maugle diagnosed lumbar strain; left-sided paracentral disc protrusion L5-S1; annular tear L5-S1; mild disc bulge and annular tear L3-L4; and mild bilateral anterior superior quadrant acetabular labral tear. By decision dated January 3, 2023, OWCP 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.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁵ 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.⁶ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal

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

⁶ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).⁷ 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 claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁹ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ 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.¹⁴

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁵ The claimant must present evidence which on its face shows that OWCP made an error.¹⁶ 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

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

⁸ *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).

⁹ *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).

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).

¹¹ *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).

¹² *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹³ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁵ *See supra* note 7 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁶ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

development, is not clear evidence of error.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸

ANALYSIS

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

The last merit decision was issued on December 16, 2021. As appellant's request for reconsideration was not received by OWCP until December 21, 2022, more than one year after the December 16, 2021 merit decision, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the request for reconsideration was untimely filed.¹⁹ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.²⁰

In support of her reconsideration, appellant submitted an addendum to Dr. Shaffer's October 14, 2021 report which further described the circumstances surrounding the October 10, 2021 employment incident. In an October 25, 2021 report, Dr. Himmelwright evaluated appellant and diagnosed left-sided low back pain with new onset thoracalgia. In a July 7, 2022 report, Dr. Maugle treated appellant on and diagnosed lumbar strain; left-sided paracentral disc protrusion L5-S1; annular tear L5-S1; mild disc bulge and annular tear L3-L4; and mild bilateral anterior superior quadrant acetabular labral tear. However, as explained above, 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.²¹ 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.²² Thus, the evidence is insufficient to demonstrate clear evidence of error.²³

On reconsideration, appellant argued that the December 16, 2021 OWCP decision failed to consider her physician's November 15, 2021 report, which provided a medical diagnosis in connection with the accepted employment incident.

The Board finds, however, that the submission of this report does not establish clear evidence of error as it does not raise a substantial question concerning the correctness of OWCP's

¹⁷ *Id.*

¹⁸ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁹ *Supra* notes 6 and 7.

²⁰ 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).

²¹ *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

²² *S.C.*, Docket No. 19-1424 (issued September 15, 2020).

²³ *J.J.*, Docket No. 23-0155 (issued October 5, 2023).

December 16, 2021 merit decision.²⁴ Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. It is not enough to show that evidence could be construed so as to produce a contrary conclusion.²⁵

Accordingly, 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.²⁶

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 January 3, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2024
Washington, DC

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

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

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

²⁴ *M.H.*, Docket No. 21-1152 (issued July 13, 2023).

²⁵ *Id.*; *T.G.*, Docket No. 22-0828 (issued December 28, 2022); *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

²⁶ *J.B.*, Docket No. 20-0630 (issued April 21, 2021).