

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

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<b>W.R., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0244</b>
	)	<b>Issued: May 22, 2024</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>TEXARKANA VA OUTPATIENT CLINIC,</b>	)	
<b>Texarkana, AR, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*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 January 11, 2024 appellant filed a timely appeal from a November 29, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 8, 2010, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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**

On June 30, 2010 appellant, then a 42-year-old retired patient services assistant, filed an occupational disease claim (Form CA-2) alleging that he developed neck and shoulder conditions

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

due to factors of his federal employment involving his daily clerical work duties. He explained that these conditions were severely aggravated by his bilateral carpal tunnel and bilateral cubital tunnel syndrome. Appellant noted that he first became aware of his condition on January 31, 2002, and realized its relation to his federal employment on January 31, 2010.<sup>2</sup> On the reverse side of the form, T.D., the employing establishment's OWCP program coordinator, indicated that appellant was diagnosed with cubital tunnel syndrome in 2002 and had since retired on disability. Appellant stopped work and retired, effective January 4, 2006.

In an August 23, 2010 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

Following OWCP's development letter, appellant submitted an undated statement, received by OWCP on September 21, 2010, wherein he related that from 1997 through 2006 he worked for the employing establishment as a medical records clerk and patient services assistant, which entailed constant typing and data entry while resting a telephone on his neck and shoulder. He described his employment duties and indicated that he worked five days per week, which caused him an increase in symptoms. Appellant reported complaints for his neck condition in conjunction with his shoulders, arms, and wrists pain while at work from 2002 through 2010. He related that his physician noted these complaints in her medical report and explained that he spent all day working at a computer terminal typing, which resulted in a daily stiffening of the neck and shoulders in conjunction with his carpal tunnel and cubital tunnel syndrome. Appellant explained that his physician and supervisor related his symptoms to carpal tunnel and cubital tunnel syndrome and despite his ongoing complaints of neck and shoulder pain, these conditions were omitted from his diagnoses. As such, he was only treated for the accepted conditions of carpal tunnel syndrome and cubital tunnel syndrome under OWCP File No. xxxxxx313.

In a statement dated October 22, 2010, S.H. reported that she was the administrative officer at the time appellant was employed at the employing establishment. She explained that she was aware of his disability claim for carpal tunnel syndrome, which resulted in the employing establishment providing him assistive equipment and light-duty work.

In a November 1, 2010 statement, the employing establishment reported that appellant was employed as a patient services assistant whose duties involved some typing and telephone work.

By decision dated November 8, 2010, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record did not contain a medical diagnosis in connection with the accepted employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 23, 2010 appellant requested reconsideration. In an accompanying narrative statement that same date, he requested that OWCP reconsider his claim for neck and shoulder conditions and referenced medical reports dated January 31, 2002 through October 1, 2010 in

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<sup>2</sup> The record reflects that appellant previously filed an occupational disease claim on September 9, 2003 for injuries sustained to his hands, wrists, and elbows under OWCP File No. xxxxxx313. By decision dated June 9, 2004, OWCP accepted that claim for bilateral cubital tunnel syndrome. It subsequently expanded the acceptance of that claim to include bilateral carpal tunnel syndrome. OWCP has not administratively combined appellant's claims.

support of his occupational disease claim, which he asserted documented his ongoing complaints of neck and shoulder pain.

In a February 28, 2011 letter, the employing establishment reported that appellant was employed as a patient services assistant and had retired from the employing establishment on disability retirement, effective January 4, 2006, due to the exact same medical conditions stated in this claim.

By decision dated March 16, 2011, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Following the March 16, 2011 OWCP decision, appellant submitted additional evidence in support of his claim, including a February 19, 2006 report from Dr. E.J. Toubia, a Board-certified internist, documenting his service-connected disability. Dr. Toubia determined that appellant sustained 20 percent service-connected disability for his condition of the skeletal system and chondromalacia of the knees. He discussed the various conditions resulting in his disability from employment including restless leg syndrome, bilateral chondromalacia of the knees, hypertensive vascular disease, bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, degenerative arthritis, bilateral pes planus, depressive disorder, and Tietze syndrome. Dr. Toubia reported that appellant was still seeking treatment for his bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome through his accepted employment injury. He opined that given appellant's conditions, he was not employable.

Appellant also resubmitted evidence previously of record.

In an undated statement received by OWCP on September 27, 2012, appellant reported that his claim under OWCP File No. xxxxxx313 was accepted for bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome but should have also been accepted for neck strain/sprain, sprain to the musculoskeletal condition, and inflammatory disease including bursitis tendinitis related to the neck. He argued that his neck and shoulder conditions were a consequence of the accepted conditions under OWCP File No. xxxxxx313.

On November 19, 2012 appellant requested reconsideration.

By decision dated October 2, 2013, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On November 14, 2023 appellant requested reconsideration and submitted a statement dated September 3, 2023 arguing that the medical evidence of record established that he sustained an injury causally related to the accepted factors of his federal employment. He discussed his conditions that he believed were related to the accepted factors of his federal employment.

Appellant resubmitted evidence previously of record.

Appellant also submitted a May 17, 2023 report from Dr. Mary A. Fitzgerald, an internist, who discussed findings from a magnetic resonance imaging (MRI) study of the cervical spine, which revealed an impression of moderate-to-severe degenerative disc disease. Dr. Fitzgerald reported that an MRI scan of the lumbar spine revealed an impression of mild-to-moderate

degenerative disc disease. She recommended physical therapy and medication management for treatment of his cervical and lumbar conditions.

By decision dated November 29, 2023, 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.<sup>3</sup> 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.<sup>4</sup> 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).<sup>5</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>6</sup>

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.<sup>7</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>8</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>11</sup> 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

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<sup>3</sup> 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *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).

<sup>10</sup> *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

<sup>11</sup> *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

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.<sup>12</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>13</sup> The claimant must present evidence, which on its face shows that OWCP made an error.<sup>14</sup> 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.<sup>15</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>16</sup>

### 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.<sup>17</sup>

The last merit decision was issued on November 8, 2010. As the most recent request for reconsideration was not received by OWCP until November 14, 2023, more than one year after the November 8, 2010 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.<sup>18</sup>

The Board further finds that appellant has not demonstrated clear evidence of error. In support of his untimely request for reconsideration, appellant argued that the medical evidence of record established that he sustained an injury causally related to the accepted factors of his federal employment. He discussed his conditions that he believed were related to the accepted factors of his federal employment. The Board finds that his arguments merely reiterate the arguments previously of record and do not demonstrate that OWCP erred in the issuance of its November 8, 2010 merit decision.<sup>19</sup>

In support of his most recent request for reconsideration, appellant submitted Dr. Fitzgerald's May 17, 2023 report discussing MRI scan findings of the cervical and lumbar spine, which revealed an impression of moderate-to-severe degenerative disc disease. He also submitted statements from the employing establishment confirming his employment as a patient services assistant whose duties involved typing and telephone work resulting in his accepted

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<sup>12</sup> *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

<sup>13</sup> *See supra* note 6 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>14</sup> *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

<sup>15</sup> *Id.*

<sup>16</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>17</sup> *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

<sup>18</sup> 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).

<sup>19</sup> *See M.M.*, Docket No. 20-0961 (issued December 9, 2020).

OWCP claim. 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.<sup>20</sup>

The Board finds that appellant's request for reconsideration did not show on its face that OWCP committed an error in denying his occupational disease claim.<sup>21</sup> Thus, the evidence is insufficient to demonstrate clear evidence of error.<sup>22</sup>

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 of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 29, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 22, 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

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<sup>20</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

<sup>21</sup> *S.C.*, Docket No. 19-1424 (issued September 15, 2020).

<sup>22</sup> *J.J.*, Docket No. 23-0155 (issued October 5, 2023).