

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

E.R., Appellant	)	
	)	
and	)	Docket No. 24-0910
	)	Issued: November 26, 2024
U.S. POSTAL SERVICE, POST OFFICE,	)	
San Jose, CA, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*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 September 9, 2024 appellant filed a timely appeal from an August 21, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated July 21, 2021, 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 to review the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 6, 2000 appellant, then a 53-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that he injured his left ribs, right arm, and back when he was struck by a mail container while in the performance of duty. OWCP accepted the claim for left rib contusion/left chest wall contusion and a right shoulder sprain. It paid appellant wage-loss compensation on the supplemental rolls for the period October 24, 2002 to February 24, 2003.<sup>3</sup>

On January 21, 2021 appellant filed a notice of recurrence (Form CA-2a) of the need for medical treatment only. He noted that January 1, 2020 was the date of recurrence, and he first received medical treatment following the recurrence on December 10, 2020. Appellant indicated that he was limited in performing his usual duties following the original injury of September 6, 2000. He noted that when he retired on October 31, 2003, he had limited range of motion in his right shoulder and left shoulder pain and that he took anti-inflammatory drugs. Appellant indicated that on January 1, 2020 he had increased pain and decreased range of motion in both shoulders.

In a development letter dated February 1, 2021, OWCP informed appellant of the deficiencies of his recurrence claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond. No response was received.

By decision dated March 4, 2021, OWCP denied appellant's recurrence claim, finding that he had not established that he required additional medical treatment due to a worsening of his accepted work-related conditions without an intervening cause.

On April 7, 2021 appellant requested reconsideration. He provided a February 9, 2021 response to OWCP's development questionnaire and a March 4, 2021 statement in which he indicated that he was diagnosed with adhesive capsulitis in both shoulders.

OWCP also received an August 28, 2003 report from Dr. Richard D. Heater, a Board-certified orthopedic surgeon, who provided an impression of bilateral adhesive capsulitis. In an undated attending physician's report (Form CA-20), Dr. Satish K. Sharma, an anesthesiologist, opined, with an affirmative checkmark, that appellant's bilateral adhesive capsulitis was caused or aggravated by an employment activity.

By decision dated July 1, 2021, OWCP denied modification of its March 4, 2021 decision, finding that the medical evidence of record was insufficient to establish that appellant's recurrence

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<sup>2</sup> Docket No. 05-892 (issued September 19, 2005); Docket No. 07-1769 (issued April 28, 2008), *petition for recon. denied*, Docket No. 07-1769 (issued November 21, 2008); Docket No. 22-1279 (issued January 10, 2023), *petition for recon. denied*, Docket No. 22-1279 (issued September 15, 2023); Docket No. 24-0681 (issued July 29, 2024).

<sup>3</sup> Appellant retired from the employing establishment on October 31, 2003.

of the need for medical treatment was causally related to the September 5, 2000 work injury without an intervening cause.

On July 19, 2021 appellant requested reconsideration. He requested that his claim be amended to include a recurrence of medical treatment for “consequential and intervening injury for adhesive capsulitis.” Appellant also addressed the medical treatment he received in 2002 through 2019 for adhesive capsulitis.

By decision dated July 21, 2021, OWCP denied modification of its July 1, 2021 decision, as he had not established a consequential injury/condition which stemmed from his accepted September 6, 2000 work-related injury.

On February 28, 2022 appellant requested reconsideration. He reargued that his claim was for a “consequential injury and intervening injury for adhesive capsulitis.” Evidence previously of record was resubmitted.

By decision dated May 26, 2022, OWCP denied appellant’s request for reconsideration of the merits of appellant’s claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board. By decision dated January 10, 2023, the Board affirmed OWCP’s May 26, 2022 nonmerit decision.<sup>4</sup>

On January 30, 2024 appellant requested reconsideration of OWCP’s July 21, 2021 decision. He reargued that his intent to amend his claim for recurrence was to have “consequential injury and intervening injuries” considered for adhesive capsulitis, not a recurrent disability. Appellant submitted a duplicate copy of the August 28, 2003 report wherein Dr. Heater diagnosed bilateral adhesive capsulitis and suggested treatment for appellant’s shoulders.

By decision dated May 21, 2024, OWCP denied appellant’s request for reconsideration of OWCP’s July 21, 2021 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated July 29, 2024, the Board affirmed OWCP’s May 21, 2024 nonmerit decision.<sup>5</sup>

On August 12, 2024 appellant requested reconsideration of the Board’s July 29, 2024 decision. He alleged that OWCP used fictitious medical documents and documents from non-medical personnel when processing his recurrence claim. Appellant questioned why he continued to receive medical benefits for the period October 24, 2002 through February 24, 2003 if his claim was closed on January 15, 2003. He also noted that he was allowed medical treatment past January 15, 2003.

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<sup>4</sup> Docket No. 22-1279 (issued January 10, 2023), *petition for recon. denied*, Docket No. 22-1279 (issued September 15, 2023).

<sup>5</sup> Docket No. 24-0681 (issued July 29, 2024). The Board’s decisions and orders are “final upon the expiration of 30 days from the date of their issuance.” *Id.* at § 501.6(d).

By decision dated August 21, 2024, OWCP denied appellant's request for reconsideration, pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>6</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>7</sup>

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoumpment hearing decisions.<sup>8</sup> Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees' Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.<sup>9</sup>

OWCP will consider an untimely application only if the application demonstrates clear evidence of error in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>10</sup>

The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2020).

<sup>9</sup> *Id.*

<sup>10</sup> 20 C.F.R. § 10.607.

<sup>11</sup> *Supra* note 8 at Chapter 2.1602.5.a (October 2011).

### ANALYSIS

The Board finds that the case is not in posture for decision.

On prior appeal, the Board affirmed OWCP's May 21, 2024 nonmerit decision that appellant's request for reconsideration was untimely and there was no clear evidence of error.<sup>12</sup> Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>13</sup> Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying the claim.

The proper standard of review for an untimely reconsideration request is the clear evidence of error standard. In denying appellant's reconsideration request, however, OWCP did not determine whether his reconsideration request was untimely filed and did not review the request under the clear evidence of error standard. Rather, it applied the standard of review for timely requests for reconsideration. As OWCP applied the incorrect standard of review to the untimely request for reconsideration, the Board will set aside OWCP's August 21, 2024 decision and remand the case for proper review under the clear evidence of error standard.<sup>14</sup>

### CONCLUSION

The Board finds that the case is not in posture for decision.

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<sup>12</sup> Docket No. 24-0681 (issued July 29, 2024). The Board's decisions and orders are "final upon the expiration of 30 days from the date of their issuance." *Id.* at § 501.6(d).

<sup>13</sup> *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *A.A.*, Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

<sup>14</sup> *See* 20 C.F.R. § 10.607(b). *S.C.*, *Order Remanding Case*, Docket No. 21-0340 (issued July 28, 2021); *D.G.*, Docket No. 17-1323 (issued January 2, 2018); *W.L.*, Docket No. 15-1842 (issued January 14, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 21, 2024 is set aside and the case is remanded for further action consistent with this decision.

Issued: November 26, 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