

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

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C.L., Appellant )

and )

U.S. POSTAL SERVICE, JOHN F. KENNEDY )  
AIRPORT POST OFFICE, Jamaica, NY, )  
Employer )  
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**Docket No. 25-0056**  
**Issued: November 22, 2024**

*Appearances:*

*James D. Muirhead, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 22, 2024 appellant, through counsel, filed a timely appeal from a May 1, 2024 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 18, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the May 1, 2024 decision, OWCP received additional evidence. 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.*

## 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 January 25, 2022 appellant, then a 58-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on April 8, 2021 she developed COVID-19 symptoms while in the performance of duty, and tested positive for the condition on April 16, 2021. She stopped work on April 10, 2021.

In a letter dated March 1, 2022, Dr. Charmaine S. Johnson, an attending osteopath Board-certified in family practice, requested that appellant be excused through June 2, 2022. She noted that appellant was seen in her clinic due to her recent COVID-19 infection.

On May 3, 2022 OWCP accepted appellant's claim for COVID-19. It paid her wage-loss compensation on the supplemental rolls from September 11, 2021 until February 28, 2022.

OWCP subsequently received additional medical evidence, including progress notes dated March 1 and May 25, 2022 from Dr. Johnson. Dr. Johnson diagnosed essential hypertension; Type 2 diabetes mellitus without complication or long-time current use of insulin, proteinuria, unspecified type; hypercalcemia; abnormal electrocardiogram (EKG); screening mammogram for breast cancer; chronic respiratory failure with hypoxia (hepatocellular carcinoma), and sarcoidosis of the skin.

OWCP also received a progress note dated March 10, 2022 from Dr. Padmakshi Singh, a Board-certified internist, who diagnosed essential hypertension, bronchiectasis without complication, sarcoidosis of the skin, and mixed hyperlipidemia.

On July 7, 2022 appellant filed a claim for compensation (Form CA-7) for disability from work for the period April 23 through July 1, 2022.

In a development letter dated October 4, 2022, OWCP informed appellant of the deficiencies of her claim for compensation for the period March 1 through July 1, 2022. It advised her of the type of medical evidence required and afforded her 30 days to respond.

By decision dated November 18, 2022, OWCP denied appellant's claim for disability from work during the period March 1 through July 1, 2022. It found that the medical evidence of record was insufficient to establish disability from work during the claimed period causally related to her accepted April 8, 2021 employment injury.

OWCP thereafter continued to receive medical evidence. In an October 28, 2022 report, Dr. Steven A. Mermelstein, a pulmonologist, provided assessments of oxygen dependent, shortness of breath, wheezing, chronic asthmatic bronchitis, sarcoidosis, and post-inflammatory pulmonary fibrosis. In a February 12, 2024 note, he noted that appellant had been under his care since June 2021. Appellant began using home and portable oxygen in April 2021 after a COVID-19 hospitalization for respiratory failure. Dr. Mermelstein indicated that she required oxygen therapy since she was last seen on February 22, 2023.

In an April 24, 2023 note, Dr. Johnson opined that appellant may return to modified-duty work with restrictions, six hours per day, as of May 1, 2023.

In a November 21, 2023 report, Dr. Karen Mrejen, a Board-certified internist, provided assessments of dyspnea on exertion and personal history of COVID-19.

In a November 26, 2023 chest x-ray report, Dr. Steven D. Weck, a Board-certified diagnostic radiologist, provided an impression of clear lungs.

In a progress note dated February 7, 2024, Dr. Wilbur J. Asheld, a Board-certified internist specializing in cardiovascular disease, diagnosed coronary artery disease involving native coronary artery of native heart without angina pectoris (primary encounter diagnosis); class 2 obesity due to excess calories without serious comorbidity with body mass index of 35.0 to 35.9 in adult; right bundle branch block; essential hypertension; mixed hyperlipidemia; abnormal EKG; Type 2 diabetes mellitus without complication, without long-term current use of insulin; sarcoid; and past use of tobacco.

On April 29, 2024 appellant requested reconsideration of the November 18, 2022 decision.

By decision dated May 1, 2024, OWCP denied appellant's April 29, 2024 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.<sup>4</sup> OWCP's regulations<sup>5</sup> 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.<sup>6</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. Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>7</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>8</sup>

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

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<sup>4</sup> 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).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *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).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

<sup>8</sup> *S.S.*, Docket No. 23-0086 (issued May 26, 2023); *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).

decision was in error.<sup>9</sup> 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.<sup>10</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> 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 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.<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 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.<sup>14</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>15</sup>

### 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.

The last merit decision was issued on November 18, 2022. As the most recent request for reconsideration was not received by OWCP until April 29, 2024, more than one year after the November 18, 2022 merit decision, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the

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<sup>9</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>10</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); *supra* note 7 at Chapter 2.1602.5 (September 2020).

<sup>11</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 7 at Chapter 2.1602.5a (September 2020).

<sup>12</sup> *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).

<sup>13</sup> *G.G.*, *supra* note 8; see also 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (September 2020).

<sup>14</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *id.* at Chapter 2.1602.5(a) (September 2020).

<sup>15</sup> *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).

request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.<sup>16</sup>

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether appellant has established disability from work during the period March 1 through July 1, 2022 due to her accepted April 8, 2021 employment injury.

In support of her untimely request for reconsideration, appellant submitted an April 24, 2023 note, wherein Dr. Johnson opined that appellant may return to modified-duty work with restrictions, six hours per day, as of May 1, 2023. However, this note is irrelevant as it does not address the underlying issue of disability during the period March 1 through July 1, 2022 causally related to the accepted employment injury. As such, this evidence does not establish that OWCP committed error in the November 18, 2022 decision.<sup>17</sup>

Similarly, the reports wherein Drs. Mermelstein, Mrejen, and Asheld addressed appellant's respiratory, heart, weight, diabetes, hypertension, and cholesterol conditions, as well as the accepted condition of COVID-19, are insufficient to establish clear evidence of error. This evidence does not address the underlying issue of disability from work during the period March 1 through July 1, 2022 causally related to the accepted employment injury.<sup>18</sup>

Appellant also submitted Dr. Weck's November 26, 2023 chest x-ray report. Diagnostic test reports standing alone, however, do not address the issue of disability.<sup>19</sup> Therefore, this evidence is also irrelevant to the underlying issue and insufficient to demonstrate clear evidence of error.<sup>20</sup>

Accordingly, the Board finds that OWCP properly denied appellant's April 29, 2024 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.

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<sup>16</sup> 20 C.F.R. § 10.607(b); *L.S.*, Docket No. 22-1327 (issued August 19, 2024); *J.N.*, Docket No. 23-0974 (issued May 14, 2024); *A.S.*, Docket No. 24-0104 (issued March 25, 2024); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>17</sup> *L.S.*, *id.*; *F.D.*, Docket No. 24-0145 (issued April 16, 2024); *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>18</sup> *Id.*

<sup>19</sup> See *G.W.*, Docket No. 20-0879 (issued July 28, 2021); *E.H.*, Docket No. 19-0365 (issued March 17, 2021); *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *M.C.*, Docket No. 16-1135 (issued September 11, 2017); *G.B.*, Docket No. 13-1260 (issued December 2, 2013).

<sup>20</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 1, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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