

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

D.P., Appellant)	
)	
and)	Docket No. 24-0848
)	Issued: September 23, 2024
U.S. POSTAL SERVICE, WARREN POST)	
OFFICE, Warren, MI, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 16, 2024 appellant, through counsel, filed a timely appeal from an April 1, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated December 8, 2021 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

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 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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the April 1, 2024 decision, OWCP received additional evidence. 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.*

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

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision and orders are incorporated herein by reference. The relevant facts are as follows.

On August 2, 2016 appellant, then a 30-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date he sprained his right ankle when his right foot got caught in an unpaved/cracked sidewalk while in the performance of duty. He stopped work on August 2, 2016. OWCP accepted the claim for right ankle ligament sprain, and subsequently expanded acceptance of the claim to include other pulmonary embolism without acute cor pulmonale. It paid appellant wage-loss compensation on the supplemental rolls, effective September 17, 2016, and on the periodic rolls, effective March 3, 2019.

By decision dated February 22, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that the opinion of Dr. Jeffrey Lawley, an osteopathic physician Board-certified in orthopedic surgery, serving as an impartial medical examiner (IME), resolved the conflict of medical opinion between appellant's treating physician, Dr. Allan M. Grant, a Board-certified orthopedic surgeon, and OWCP's second opinion physician, Dr. Jiab H. Suleiman, a Board-certified orthopedic surgeon. It found that Dr. Lawley's report represented the special weight of the evidence.

On March 2, 2021 appellant, through counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 27, 2021.

Following the hearing, OWCP received a June 7, 2021 report, wherein Dr. Grant reiterated that appellant needed further right ankle tendon surgery.

By decision dated August 9, 2021, OWCP's hearing representative affirmed the February 22, 2021 termination decision.

OWCP subsequently received additional reports from Dr. Grant.

On September 10, 2021 appellant requested reconsideration. By decision dated December 8, 2021, OWCP denied modification of the August 9, 2021 decision.

On January 26, 2022 appellant, through counsel, requested reconsideration. In support thereof, he submitted January 13, 2022 form reports, including an attending physician's report (Form CA-20) wherein Dr. Grant reported that appellant was medically limited to weightbearing as tolerated. Counsel noted that appellant was held off work from February 8 through April 1,

⁴ *Order Remanding Case*, Docket No. 24-0259 (issued February 16, 2024); *Order Remanding Case*, Docket No. 23-0867 (issued November 15, 2023); Docket No. 22-0840 (issued March 7, 2023).

2021 due to pain, and he also noted that, on November 16, 2020, appellant had previously been given permanent work restrictions of sedentary work only, with no walking, standing, or driving.

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

On May 9, 2022 appellant, through counsel, filed a timely appeal to the Board. By decision dated March 7, 2023, the Board affirmed OWCP's April 26, 2022 nonmerit decision.⁵

On March 29, 2023 appellant, through counsel again requested reconsideration. In support thereof, counsel submitted a February 6, 2023⁶ report wherein Dr. Grant related that appellant had chronic peroneal tendon issues, with sural nerve entrapment. Dr. Grant explained that he had advised appellant that he could not perform work requiring driving a vehicle, or work requiring standing or walking, but could perform sedentary work. He further related that he had advised appellant that if surgery was performed to repair or possibly even excise the peroneal tendons and release or excise the sural nerve, he would not have a normal foot, but hopefully would have much less pain.

By decision dated May 31, 2023, OWCP summarily denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On June 12, 2023 appellant, through counsel, appealed to the Board. By order dated November 15, 2023,⁷ the Board found that OWCP summarily denied appellant's request for reconsideration and failed to properly explain findings with respect to the issue presented so that he could understand the basis for the decision, *i.e.*, whether he had demonstrated clear evidence that OWCP's last merit decision was incorrect. The Board set aside OWCP's May 31, 2023 decision and remanded the case for findings of fact and a statement of reasons, to be followed by an appropriate decision.

By decision dated December 22, 2023, OWCP again denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

On January 19, 2024 appellant, through counsel, appealed to the Board. By order dated February 16, 2024,⁸ the Board found that OWCP failed to consider the February 6, 2023 report from Dr. Grant. The Board set aside OWCP's December 22, 2023 decision and remanded the case for a review of all the evidence of record, to be followed by an appropriate decision.

By decision dated April 1, 2024, OWCP again denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁵ *Id.*

⁶ Counsel referenced the date of this report as April 6, 2022 report from Dr. Grant. However, this appears to be a typographical error as the report received is dated February 6, 2023.

⁷ *Supra* note 4.

⁸ *Supra* note 4.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁹ This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ 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

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.¹³ OWCP's 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 demonstrates clear evidence of error on the part of OWCP.¹⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁵

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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 evidence of error on the part of OWCP.¹⁸ The Board makes an independent determination of whether a claimant has

⁹ 5 U.S.C. § 8128(a); *J.B.*, Docket No. 24-0011 (issued March 19, 2024); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

¹⁰ 20 C.F.R. § 10.607(a).

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

¹² *J.B.*, *supra* note 9; *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).

¹³ See 20 C.F.R. § 10.607(b); *A.L.*, Docket 24-0364 (issued July 30, 2024); *J.B.*, *id.*; *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁴ *A.L.*, *id.*; *J.B.*, *id.*; *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; *supra* note 11 at Chapter 2.1602.5(a) (September 2020).

¹⁵ *A.L.*, *id.*; *J.B.*, *id.*; *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ 20 C.F.R. § 10.607(b); *A.L.*, *id.*; *J.B.*, *id.*; *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁷ See *A.L.*, *id.*; *J.B.*, *id.*; *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁸ *Id.*

demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.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 issue(s).²² The most recent merit decision addressing appellant's continuing disability and medical residuals was OWCP's December 8, 2021 decision denying modification of the February 22, 2021 termination decision. As his request for reconsideration was not received by OWCP until March 29, 2023, more than one year after the December 8, 2021 decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error.

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether the medical evidence of record is sufficient to establish continuing disability and medical residuals causally related to the accepted August 2, 2016 employment injury. In support of appellant's request for reconsideration, OWCP received a report from Dr. Grant dated February 6, 2023, which was substantially similar to his prior reports. Dr. Grant was also on one side of the conflict which Dr. Lawley resolved. Clear evidence of error is intended to represent a difficult standard.²³ 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.²⁴

The Board finds that appellant's request for reconsideration does not show on its face that OWCP committed an error in denying terminating his compensation benefits.²⁵ Thus, the evidence is insufficient to demonstrate clear evidence of error.²⁶

¹⁹ *A.L. id.; U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

²⁰ 20 C.F.R. § 10.607(a); *see F.D.*, Docket No. 24-0145 (issued April 16, 2024); *L.T.*, Docket No. 21-0844 (issued April 21, 2023); *J.W.*, *supra* note 15; *Alberta Dukes*, 56 ECAB 247 (2005).

²¹ *Supra* note 11 at Chapter 2.1602.4.

²² 20 C.F.R. § 10.607(b).

²³ *See supra* note 11 at Chapter 2.1602.5(a) (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²⁴ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

²⁵ *S.C.*, Docket No. 19-1424 (issued September 15, 2020).

²⁶ *J.J.*, Docket No. 23-0155 (issued October 5, 2023).

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

ORDER

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

Issued: September 23, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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