

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

S.J., Appellant	)	
	)	
and	)	Docket No. 21-0217
	)	Issued: December 16, 2021
DEPARTMENT OF VETERANS AFFAIRS, VA	)	
MEDICAL CENTER, Birmingham, AL,	)	
Employer	)	
	)	

*Appearances:*  
Lauren H. Shine, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On December 1, 2020 appellant, through counsel, filed a timely appeal from a September 21, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days have elapsed from the last merit decision, dated January 28,

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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 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.

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal to the Board. 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 considering this evidence for the first time on appeal. *Id.*

2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>3</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**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On February 3, 2014 appellant, then a 46-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that she injured her right knee and lower back on January 24, 2014 when her left foot got caught on a desk drawer as she turned in her chair to get up, causing her to fall while in the performance of duty. On April 29, 2014 OWCP accepted the claim for contusion of the right knee and sprain of the back, lumbar region. It paid appellant intermittent wage-loss compensation on the supplemental rolls from April 14 to June 16, 2014.

In a letter dated January 8, 2015, the employing establishment noted that appellant was to resume regular-duty work as of January 12, 2015, as her treating physician had released her to full-duty on September 24, 2014.

On January 23, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as the weight of the medical evidence established that she no longer had residuals or disability due to the January 24, 2014 work injury.

By decision dated March 13, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date.

On March 30, 2015 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 18, 2015.

In a January 28, 2016 decision, an OWCP hearing representative affirmed the March 13, 2015 decision.

On February 16, 2017 appellant, through counsel, requested reconsideration.

In a February 27, 2017 decision, OWCP 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>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> *Order Remanding Case*, Docket No. 19-1864 (issued August 12, 2020); Docket No. 17-1835 (issued December 19, 2018).

On August 24, 2017 appellant, through counsel, filed a timely appeal before the Board. By decision dated December 19, 2018, the Board found 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.<sup>5</sup>

On June 28, 2019 appellant, through counsel, again requested reconsideration. Counsel argued that appellant filed a timely reconsideration request that included medical evidence from Dr. Kathleen Warner, an internist, that challenged the findings of Dr. Todd Smith, a Board-certified orthopedic surgeon, and that OWCP's failure to consider the medical evidence from Dr. Warner was clear evidence of error in the issuance of the January 28, 2016 decision. Counsel indicated that Exhibit A was attached to her request for reconsideration, which consisted of a certified mail receipt that established the delivery and weight of the package which had contained Dr. Warner's prior report. However, none of the purported exhibits were attached to this request for reconsideration.

By decision dated July 24, 2019, OWCP denied appellant's June 28, 2019 request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a). It found that her reconsideration request neither raised substantive legal questions, nor included new and relevant evidence.

On September 3, 2019 appellant, through counsel, filed an appeal to the Board of the July 24, 2019 nonmerit decision. By decision dated August 12, 2020, the Board issued an order finding that the July 24, 2019 OWCP nonmerit decision applied an incorrect standard of review in denying appellant's reconsideration request.<sup>6</sup> The Board set aside the July 24, 2019 OWCP decision and remanded the case for proper review under the clear evidence of error standard.

On September 21, 2020 OWCP received additional evidence.

In a report dated May 6, 2014, Dr. Johnny Carter, a Board-certified family practitioner, noted that appellant had a history of micro low back surgery in 2002 and chronic intermittent low back pain radiating to the bilateral buttocks and legs. He diagnosed leg pain, sciatica, lumbar foraminal stenosis, cervical disc degeneration, mechanical low back pain, knee joint pain, backache unspecified, degenerative disc disease, and lumbar stenosis. Dr. Carter also saw appellant on August 2, 2016 and diagnosed lumbar foraminal stenosis, lumbar facet arthropathy, and low back pain.

In a June 9, 2015 report, Dr. Brian Thoma, Board-certified in pain medicine, noted that he treated appellant for a chief complaint of low back pain that appeared to be mechanical in nature and was consistent with arthritis and sacroiliitis. He diagnosed chronic pain and noted that she had a laminectomy in 2003. Dr. Thoma saw appellant for follow up on September 18, October 6, and December 21, 2015, and advised that he provided lumbar facet medial branch joint nerve blocks for chronic function-limiting low back pain of facet joint origin. He saw her for follow-up of chronic pain on January 21, 2016 and diagnosed chronic pain syndrome, pain in right hip,

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<sup>5</sup> Docket No. 17-1835 (issued December 19, 2018).

<sup>6</sup> Docket No. 19-1864 (issued August 12, 2020).

sacroilitis not elsewhere classified, spondylitis without myelopathy or radiculopathy, lumbar region, postlaminectomy syndrome not elsewhere classified, and radiculopathy.

Dr. Aniga Baqauddin, a Board-certified family practitioner, treated appellant on May 13, 2015 and noted that appellant had a disorder characterized by back pain. She related that appellant referenced a January 24, 2014 fall at work that had her “back hurting [ever] since.” Dr. Baqauddin diagnosed essential hypertension and abdominal pain. She saw appellant on April 21, 2016 and provided similar findings.

In August 1, 2016 treatment notes Dr. Ariane Maico, Board-certified in physical medicine and rehabilitation, noted that appellant presented for low back pain, knee pain, neck pain, and buttock and leg pain. She related that appellant had a history of micro low back surgery in 2002, and had chronic intermittent low back pain radiating to the bilateral buttocks and legs. Dr. Maico found that appellant had scoliosis, multilevel disc disease, and left foraminal stenosis at L5-S1, per previous magnetic resonance imaging (MRI) scan imaging, and a history of knee pain. She also noted that appellant had some previous low back pain which she attributed to a work injury at the employing establishment; however, she advised that appellant was “settled and no longer pursuing treatment under her work insurance.” Dr. Maico noted a prior disc surgery in 2003, and diagnosed lumbar foraminal stenosis, lumbar facet arthropathy, low back pain, degenerative lumbar disc pain, and a high suspicion for facetogenic pain.

In treatment notes dated August 17, October 13, and November 9, 2016, and January 4, 2017, Dr. Rebecca Byrd, a Board-certified internist, noted that she saw appellant for chief complaints of chronic back pain. She diagnosed chronic low back pain, lumbar radiculopathy, essential hypertension, and provided work restrictions which included no prolonged standing and no lifting over 10 pounds.

Dr. Thoma saw appellant on September 26 and 29, 2016 for pain in the right leg. He diagnosed chronic low back pain, right leg pain, chronic pain syndrome, musculoskeletal pain, lumbar spondylosis, degeneration of lumbar intervertebral disc, sacroiliac joint inflamed, lumbar postlaminectomy syndrome, and recommended long-term drug therapy.

A December 19, 2016 MRI scan of the lumbar spine read by Dr. Brandon Schwartz, an internal medicine specialist, demonstrated broad-based annular bulge and bilateral facet joint hypertrophy at L5-S1 leading to moderate-to-severe left-sided neural foraminal stenosis and multilevel degenerative spondylosis.

By decision dated September 21, 2020, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

OWCP’s regulations provide that to be entitled to a merit review of an OWCP decision, a request 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> 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>8</sup>

OWCP, however, may not deny a request for reconsideration solely because it was untimely filed. It may consider an untimely request for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.<sup>9</sup> In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</sup> Its regulations and procedures provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s request demonstrates clear evidence of error on the part of OWCP.<sup>11</sup>

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.<sup>12</sup> The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>13</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>14</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>16</sup> In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>17</sup> The Board makes an independent

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<sup>7</sup> 20 C.F.R. § 10.607; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

<sup>8</sup> *Id.* at Chapter 2.1602.4(b).

<sup>9</sup> *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>10</sup> *See G.G., id.*; *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Supra* note 9; *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

<sup>12</sup> *G.G.*, *supra* note 9.

<sup>13</sup> *M.P.*, Docket No. 19-0200 (issued June 14, 2019).

<sup>14</sup> *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

<sup>15</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

<sup>16</sup> *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

<sup>17</sup> *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018); *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>18</sup>

### ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the timeliness of appellant's June 28, 2019 reconsideration request, as the Board found on prior appeal that her request was untimely filed. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.<sup>19</sup>

As appellant's request for reconsideration was untimely filed, appellant must demonstrate clear evidence of error on the part of OWCP in its January 28, 2016 decision.

On reconsideration, appellant submitted a series of medical reports dated May 6, 2014 to January 4, 2017 from Drs. Carter, Thoma, Baquaddin, Maico, Byrd, and Schwartz. However, none of these reports contained an opinion that she continued to suffer residuals from the accepted conditions of contusion of the right knee and sprain of the back, lumbar region. As such, they do not raise a substantial question as to the correctness of OWCP's September 21, 2020 decision.<sup>20</sup>

Clear evidence of error is intended to represent a difficult standard. Even the submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>21</sup> Counsel has not shown that OWCP erred in issuing the contested decision, or that the decision was incorrect at the time it was issued, based upon the independent determination of the Board.<sup>22</sup> For these reasons, the Board finds that appellant has not demonstrated clear evidence of error by OWCP in its January 28, 2016 decision.

### CONCLUSION

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

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<sup>18</sup> *W.R., id.*; and *C.Y., id.*

<sup>19</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>20</sup> *See S.P.*, Docket No. 17-1708 (issued February 23, 2018).

<sup>21</sup> *James R. Mirra*, 56 ECAB 738 (2005); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

<sup>22</sup> *See S.C.*, Docket No. 20-1537 (issued April 14, 2021); *Nancy Marciano*, 50 ECAB 110 (1998).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 21, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board