

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

M.G., Appellant	)	
	)	
and	)	Docket No. 21-0893
	)	Issued: December 27, 2021
U.S. POSTAL SERVICE, PALM BAY WEST	)	
POST OFFICE, Palm Bay, FL, Employer	)	
	)	

*Appearances:*  
Gary L. Drake, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 20, 2021 appellant, through her representative, filed a timely appeal from an April 21, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated January 29, 2020 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.

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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.*

## ISSUE

The issue is whether OWCP properly denied appellant's February 1, 2021 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

On November 13, 2019 appellant, then a 35-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 7, 2019 she was involved in a motor vehicle accident and sustained injuries to her neck, back, and shoulder, while in the performance of duty. She stopped work on November 13, 2019.

In a December 18, 2019 development letter, OWCP advised appellant that additional factual and medical evidence was necessary to establish her claim. It noted that no medical report had been received, which provided a diagnosis of any condition resulting from the alleged incident. OWCP afforded appellant 30 days to respond.

Appellant submitted medical evidence in support of her claim, which included a November 18, 2019 note by Dr. Stephen H. Canuel, a chiropractor, wherein he held appellant off work from November 17 to 29, 2019. Progress notes dated November 20, 2019 from Dr. Brian C. Dowdell, Board-certified in pain medicine, noted that appellant had been involved in a motor vehicle accident and that she was seen for back pain. Dr. Dowdell related diagnoses of cervical facet syndrome, strain of neck muscle, lumbar facet joint syndrome, strain of lumbar region, cervical radiculopathy, lumbar radiculopathy, cervical disc displacement, and visual aura and light sensitivity. OWCP also received a November 19, 2019 x-ray of appellant's lumbar spine and November 19, 2019 magnetic resonance imaging (MRI) scans of her cervical and lumbar spines.

By decision dated January 29, 2020, OWCP denied appellant's claim. It found that the evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted November 7, 2019 employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury or medical condition causally related to the accepted employment incident.

Appellant subsequently submitted additional evidence, including February 21 and June 8, 2020 return-to-work notes, a copy of the November 19, 2019 MRI scan of the cervical spine, a January 13, 2020 intraoperative neurophysiological monitoring report, an April 27, 2020 surgery report, and postoperative instructions for a lumbar left four to five micro-endoscopic discectomy with bone marrow aspiration concentrate and amnion transplant to bilateral lumbar three and four to five facets.

On February 1, 2021 appellant's representative requested reconsideration. He submitted a report dated January 25, 2021 from Dr. Dowdell. Dr. Dowdell noted appellant's history of injury and medical treatment. He provided appellant's physical examination findings and diagnosed cervical facet syndrome, strain of neck muscle, lumbar facet syndrome, motor vehicle accident victim, cervical radiculopathy, lumbar radiculopathy, visual aura, light sensitivity, disc displacement cervical, and disc displacement lumbar. Dr. Dowdell opined that appellant had reached a medical end point and suffered a permanent aggravation of her neck pain and a

permanent injury to her lower back. He opined that the injuries were causally related to her motor vehicle accident. Dr. Dowell also indicated that appellant would need ongoing medical treatment.

By decision dated April 21, 2021, OWCP denied appellant's 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>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, *i.e.*, the "received date" in OWCP's 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>

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 decision was in error.<sup>7</sup> 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 for reconsideration demonstrates "clear evidence of error" on the part of OWCP.<sup>8</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>10</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

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<sup>3</sup> *Id.* at § 8128(a); *see T.J.*, Docket No. 21-0586 (issued September 30, 2021); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>6</sup> *G.G.*, Docket No. 18-1072 (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* 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

<sup>9</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>10</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted 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>11</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). 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>12</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The last merit decision was dated January 29, 2020. As her request for reconsideration was not received by OWCP until February 1, 2021, more than one-year after January 29, 2020, pursuant to 20 C.F.R. § 10.607(a), the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.<sup>14</sup>

The Board further finds that OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.<sup>15</sup> As noted, section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>16</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings and facts and a statement of reasons.<sup>17</sup> As well, OWCP's procedures provide that the reasoning behind

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<sup>11</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>12</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

<sup>13</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>14</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>15</sup> *See Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607(b).

<sup>16</sup> 5 U.S.C. § 8124(a).

<sup>17</sup> 20 C.F.R. § 10.126.

OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>18</sup>

In the April 21, 2021 decision, OWCP did not mention or address any of the medical reports received since the January 29, 2020 decision. It failed to analyze this evidence as to whether it was sufficient to demonstrate clear evidence of error. The Board finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether she had demonstrated clear evidence that OWCP's last merit decision was incorrect.

The case must, therefore, be remanded for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

### **CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed. The Board further finds that the case is not in posture for decision regarding whether appellant has demonstrated clear evidence of error.

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<sup>18</sup> Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 27, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board