

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 July 31, 2018 appellant, then a 63-year-old sales and services distribution associate, filed an occupational disease claim (Form CA-2) alleging that he developed left cervical radiculopathy and muscle spasm due to repetitive factors of his federal employment.³ He indicated that he first became aware of his condition in 1992 and realized that it resulted from his federal employment on July 28, 2018. Appellant stopped work on July 28, 2018.

OWCP received a July 27, 1993 cervical spine magnetic resonance imaging (MRI) scan report, which showed a small left posterior paracentral disc protrusion at the C5-6 level and questionable mild straightening of normal cervical lordotic curvature. A February 15, 2008 cervical spine MRI scan report revealed spondylosis with disc space narrowing and protrusion causing mild cord compression at C5-6, smaller disc protrusions at C4-5 and C6-7, and mild uncovertebral joint hypertrophy.

In a development letter dated August 14, 2018, OWCP advised appellant of the type of medical and factual evidence necessary to support his claim and provided a questionnaire for his completion. It afforded him 30 days to submit the requested information.

On September 4, 2018 appellant responded to OWCP's development letter. He indicated that he worked five days a week at the window and distributing mail into "P.O. [post office] boxes." Appellant described his specific work duties and how long he performed each activity. He also noted a specific incident when he injured his left hand and finger while at work and provided a handwritten statement from a coworker who observed that his finger was bent.

Appellant also submitted medical evidence, including a July 28, 2018 consent for procedure note, a July 28, 2019 medical excuse form, a July 28, 2018 urgent care examination note, and an August 19, 2018 cervical spine MRI scan report.

In an August 30, 2018 letter, Dr. Hema Vaidya-Nathan, who specializes in family medicine, reported that on July 28, 2018 appellant began to experience a significant amount of neck pain radiating to his arms while performing his repetitive work duties. She noted that he received medical treatment from urgent care and discussed those reports. Dr. Vaidya-Nathan provided examination findings and diagnosed cervical disc disease with radiculopathy and trapezius myofascitis. She indicated that appellant could return to work with restrictions.

³ The record reflects that appellant has a previously accepted July 11, 1992 traumatic injury under OWCP File No. xxxxxx237 for a cervical strain. Appellant also filed a separate claim for a February 20, 2008 employment injury under OWCP File No. xxxxxx499, which was denied.

In a prescription note dated August 30, 2018, Dr. Vaidya-Nathan indicated that appellant had work-related neck pain and radiculopathy that occurred on July 28, 2018.

By decision dated October 29, 2018, OWCP denied appellant's occupational disease claim finding that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted employment factors.

On November 1, 2019 appellant requested reconsideration.

Appellant submitted an October 23, 2019 letter by Dr. Vaidya-Nathan, wherein she noted that his employment duties involved standing in front of the counter, stamping, lifting, moving, and shifting. Dr. Vaidya-Nathan also indicated that on July 18, 2018 he sustained an injury at work and experienced neck pain radiating down into his upper extremities. She reported that appellant currently complained of significant pain moving his neck, with pain radiating to the upper extremities. Dr. Vaidya-Nathan noted that he was able to work on certain days, but when his injury was triggered by repetitive motion, his pain worsened and he was unable to work. She provided examination findings and indicated that a cervical spine MRI scan revealed cervical lordosis. Dr. Vaidya-Nathan opined that appellant had a permanent condition requiring intermittent relief from work to avoid repetitive motion. She requested that OWCP allow disability benefits, especially during the time when he was unable to work.

By decision dated December 2, 2019, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

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 of error.⁷ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review,

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

⁶ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

⁷ 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

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.⁸

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.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ The Board makes an independent determination of whether a claimant has 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.¹²

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹³ The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁴

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.¹⁵ Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons.¹⁶ The Board has held that the reasoning behind 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.¹⁷

⁸ *Id.*; *supra* note 5 at Chapter 2.1602.5(a).

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

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

¹¹ *B.W.*, *supra* note 9.

¹² *Id.*; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹³ *Supra* note 5 at Chapter 2.1602.5(b).

¹⁴ *G.B.*, *supra* note 10; *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹⁵ 5 U.S.C. § 8124(a).

¹⁶ 20 C.F.R. § 10.126.

¹⁷ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *supra* note 5 at Chapter 2.1400.5 (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

OWCP received appellant's request for reconsideration on November 1, 2019 which was more than one year after the last merit decision, dated October 29, 2018. As appellant's request for reconsideration was untimely filed, he must demonstrate clear evidence of error on the part of OWCP.¹⁸

The Board further finds, however, that this case is not in posture for decision with regard to whether appellant's untimely request for reconsideration demonstrates clear evidence of error.

In support of his untimely request for reconsideration, appellant submitted an October 23, 2019 addendum letter from Dr. Vaidya-Nathan, who described his employment duties and recounted his current complaints of significant neck pain radiating to the upper extremities. Dr. Vaidya-Nathan opined that he had a permanent condition requiring intermittent relief from work and requested that OWCP allow disability benefits, especially during the time when he was unable to work. In its December 2, 2019 decision, OWCP acknowledged appellant's submission of a "medical record." However, it provided no discussion or explanation regarding why Dr. Vaidya-Nathan's October 23, 2019 letter had failed to demonstrate clear evidence of error.¹⁹ Thus, the Board finds that OWCP did not comply with the review requirements of FECA and its implementing regulations.²⁰ Appellant therefore could not understand the precise defect of the claim and the kind of evidence which would overcome it.²¹

The Board will therefore set aside OWCP's December 2, 2019 decision and remand the case 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 OWCP properly determined that appellant's request for reconsideration was untimely filed. The Board further finds, however, that this case is not in posture for decision with regard to whether his untimely reconsideration request demonstrates clear evidence of error.

¹⁸ *Supra* note 8.

¹⁹ *See M.M.*, Docket No. 20-0537 (issued September 24, 2020); *see also R.T.*, Docket No. 19-0604 (issued September 13, 2019).

²⁰ *See C.M.*, *supra* note 17.

²¹ *Supra* note 17 at Chapter 2.1400.5.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 3, 2021
Washington, DC

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

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

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