

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

S.D., Appellant	)	
	)	
and	)	<b>Docket No. 21-0994</b>
	)	<b>Issued: May 8, 2023</b>
PANAMA CANAL COMMISSION,	)	
INDUSTRIAL DIVISION, Cristobal, Panama,	)	
Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On May 19, 2021 appellant filed a timely appeal from a February 4, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated March 7, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</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.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decisions and prior orders are incorporated herein by reference. The relevant facts are as follows.

On October 17, 1979 appellant, then a 31-year-old painting worker, filed a notice of injury and request for medical treatment alleging that on October 16, 1979 he injured his back when he lifted a heavy bag while in the performance of duty. He stopped work on the date of injury. On July 14, 1980 OWCP accepted the claim for acute lumbar strain and an aggravation of a preexisting back condition.<sup>3</sup> Appellant stopped work again on April 15, 1980. On April 29, 1985 OWCP authorized wage-loss compensation from April 16, through October 5, 1980.

On October 9, 1980 appellant returned to work as a custodial worker.<sup>4</sup> On June 20, 1994 he filed a claim for a recurrence of disability commencing May 16, 1994. By decision dated September 16, 1996, OWCP denied the recurrence of disability claim. Appellant appealed to the Board. By decision dated August 11, 1999, the Board affirmed, finding that the medical evidence of record was insufficient to establish the recurrence claim.<sup>5</sup>

Appellant subsequently requested reconsideration. By decision dated September 5, 2008, OWCP denied his May 10, 2006 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board. By decision dated October 19, 2009, the Board affirmed OWCP's September 5, 2008 decision.<sup>6</sup>

On May 31, 2013 and March 12, 2014 appellant requested reconsideration.

By decisions dated September 6, 2013 and April 15, 2014, OWCP denied modification.

On May 5, 2014 appellant again requested reconsideration.

By decision dated June 25, 2014, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a). Appellant appealed OWCP's 2014 decisions to the Board. By decision dated January 7, 2015, the Board found that he had not

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<sup>2</sup> Docket No. 97-2880 (issued August 11, 1999); Docket No. 09-0449 (issued October 19, 2009); *Order Remanding Case*, Docket No. 11-2004 (issued July 25, 2012); *Order Dismissing Appeal*, Docket No. 12-0002 (issued July 26, 2012); Docket No. 14-1855 (issued January 7, 2015); *Order Dismissing Appeal*, Docket No. 19-0110 (issued December 18, 2018).

<sup>3</sup> Appellant was diagnosed with nonemployment-related scoliosis-type spinal deformity.

<sup>4</sup> On September 16, 1980 the employing establishment physician found that appellant was medically able to perform the duties of a custodial worker. On March 20, 1981 Dr. Manfred H. Hecht, a ppellant's physician noted that appellant was symptomatically better and wanted to return to work.

<sup>5</sup> Docket No. 97-2880, *supra* note 2.

<sup>6</sup> Docket No. 09-0449, *supra* note 2.

established a recurrence of disability commencing May 16, 1994 causally related to his accepted October 16, 1979 employment injury.<sup>7</sup>

OWCP subsequently received additional evidence.

On December 8, 2015 appellant requested reconsideration.

By decision dated March 7, 2016, OWCP denied modification of its prior decisions.

On January 10, 2017 appellant submitted a December 2, 2016 letter disagreeing with the March 7, 2016 decision. He contended that OWCP improperly concluded that as the medical evidence established that the aggravation of his underlying scoliosis had ceased by December 12, 1979, that his pain had ceased. Appellant further contended that he completed fitness-for-duty testing prior to and during his federal employment in 1971, 1974, and 1979. He alleged that he had not received the wage-loss compensation authorized for the period April 16, through October 5, 1980.

In a report dated October 26, 2016, Dr. Felix Sanchez Peña, a neurosurgeon, noted that appellant experienced an employment-related lumbar injury on October 16, 1979. He disagreed with the findings that appellant had preexisting lumbar scoliosis, and instead attributed this condition to long-term abnormal functional activity of the muscles and ligaments of the lumbar spine caused by an injury and resulting in progressive damage to the spinal structure. Dr. Peña attributed appellant's ongoing back conditions and spine surgeries to the 1979 employment injury.

On March 13, 2017 appellant again requested reconsideration of the March 7, 2016 decision.

By decision dated October 26, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim, finding that his March 13, 2017 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.<sup>8</sup>

On July 2, 2018 appellant again requested reconsideration of the March 7, 2016 merit decision.

In letters dated August 1 and December 20, 2018, OWCP informed appellant that reconsideration was not an appeal option for its October 26, 2017 decision and no further action would be taken.

On January 28 and February 11, 2019 appellant again requested reconsideration.

In a letter dated February 13, 2019, OWCP informed appellant that it was unclear which decisions he was requesting reconsideration of and thus, no further action would be taken.

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<sup>7</sup> Docket No. 14-1855, *supra* note 2.

<sup>8</sup> *Order Dismissing Appeal*, Docket No. 19-0110, *supra* note 2. The Board dismissed appellant's appeal of the October 26, 2017 OWCP decision finding that it was untimely.

OWCP subsequently received additional evidence. In a letter dated February 22, 2019, appellant asserted that his January 10, 2017 request for reconsideration was received by OWCP within one year of the March 7, 2016 merit decision and was therefore timely filed.

On November 10, 2020 appellant submitted a March 23, 2020 letter and requested that OWCP review the letter to clarify his claim.

By decision dated February 4, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, 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>9</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>10</sup> Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).<sup>11</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>12</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>13</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>14</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>15</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>16</sup> The evidence must be positive, precise, and explicit and

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<sup>9</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>10</sup> 20 C.F.R. § 10.607(a).

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

<sup>12</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>13</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>14</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 11 at Chapter 2.1602.5 (September 2020).

<sup>15</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>16</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 11 at Chapter 2.1602.5a (September 2020).

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. 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>17</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>18</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>19</sup>

### ANALYSIS

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

The last merit decision was issued on March 7, 2016. As the most recent request for reconsideration was not received by OWCP until November 10, 2020, more than the one-year time limitation, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.<sup>20</sup>

The Board further finds that, in its February 4, 2021 decision, OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.<sup>21</sup> As noted above 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>22</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the director of

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<sup>17</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>18</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 11 at Chapter 2.1602.5a (September 2020).

<sup>19</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>20</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>21</sup> *See T.J.*, Docket No. 21-0586 (issued September 30, 2021); *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 id.* at § 10.607(b).

<sup>22</sup> 5 U.S.C. § 8124(a).

OWCP shall contain findings and facts and a statement of reasons.<sup>23</sup> As well, OWCP's procedures provide 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.<sup>24</sup> In the February 4, 2021 decision, OWCP denied appellant's November 10, 2020 reconsideration request, finding that it was untimely filed as it was received more than a year following the most recent merit decision dated March 7, 2016. It referenced the reconsideration request, but failed to explain whether it was sufficient to demonstrate clear evidence of error. The February 4, 2021 decision simply noted: "[b]ecause your letter neither raised substantive legal questions nor included new and relevant evidence, it is insufficient to warrant a review of our prior decision at this time."

The Board will therefore set aside OWCP's February 4, 2021 decision and remand the case for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's reconsideration request, which describes the evidence submitted on reconsideration and provides detailed reasons for accepting or rejecting the reconsideration request.<sup>25</sup>

### CONCLUSION

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

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<sup>23</sup> 20 C.F.R. § 10.126.

<sup>24</sup> *Supra* note 11 at 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).

<sup>25</sup> 5 U.S.C. § 8124(a). All evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. *Supra* note 11 at Chapter 2.1401.5b(2) (November 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 4, 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: May 8, 2023  
Washington, DC

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

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

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