

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

M.M., Appellant	)	
	)	
and	)	<b>Docket No. 11-761</b>
	)	<b>Issued: October 11, 2011</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Springfield, MA, Employer</b>	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 2, 2011 appellant filed a timely appeal of the August 6, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year elapsed between the most recent merit decision dated April 3, 2006 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3 but has jurisdiction over the nonmerit decision.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

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

<sup>2</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

On December 7, 2003 appellant, then a 41-year-old custodian, filed a traumatic injury claim alleging that on January 22, 2001 he sustained herniated discs, degenerative disc disease, intense neck and back pain, dizziness and blackouts as a result of lifting a mop bucket at work.<sup>3</sup> He submitted medical evidence which addressed his neck condition.

In a March 5, 2004 decision, OWCP denied appellant's claim, finding that the medical evidence was insufficient to establish that the claimed condition was causally related to the accepted January 22, 2001 employment incident.

On March 8, 2004 appellant requested an oral hearing. He submitted medical reports and diagnostic test results which addressed his right shoulder, foot and hand, neck and bilateral knee and arm conditions and disability for work.

In an April 3, 2006 decision, an OWCP hearing representative affirmed the March 5, 2004 decision, finding that the medical evidence was insufficient to establish that appellant sustained a neck condition due to the January 22, 2001 employment incident.

By letter dated April 20, 2006, appellant requested reconsideration.

In a June 14, 2006 decision, OWCP denied appellant's request for reconsideration. It found that he failed to raise a substantive legal question or submit new and relevant evidence.

By letter dated July 30, 2010, appellant requested reconsideration. He contended that OWCP denied his claim based on an erroneous medical report from Dr. Thomas S. Kaye, a Board-certified neurosurgeon. Appellant asserted that Dr. Kaye reached his conclusion about his condition based on magnetic resonance imaging (MRI) scans that were performed in July 1999 and November 20, 2000 and predated his claimed injury.

In a February 2, 2001 report, Dr. Kaye stated that appellant could return to work on February 26, 2001 without restrictions. In a February 21, 2001 report, he reviewed the results of cervical MRI scans performed on July 8, 1999 and November 20, 2000 which demonstrated degenerative changes and bulging and herniated discs at various levels. Dr. Kaye listed his findings on physical examination which included normal motor strength testing, sensation and deep tendon reflexes, a questionable Tinel's sign on the left side, a negative Phalen's sign and no evidence of atrophy or fasciculations. He stated that his findings confirmed restricted range of motion of appellant's neck. Dr. Kaye diagnosed degenerative cervical spondylosis. He recommended conservative management since appellant's symptoms appeared to be discordant with the MRI scan findings. In a February 21, 2001 prescription, Dr. Kaye stated that appellant had cervical radiculopathy.

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<sup>3</sup> By letter dated March 16, 2001, the employing establishment stated that appellant was being removed from employment effective March 30, 2001 as he failed to submit evidence to support his inability to report to work since January 23, 2001. Appellant's termination was rescinded in a November 30, 2001 settlement agreement. Instead, the employing establishment issued a letter of warning to him regarding his absence from work.

Treatment notes dated January 10, 1997 to December 1, 2000 from the employing establishment health unit addressed, among other things, appellant's cervical and carpal tunnel syndrome conditions and ability to work.

In reports dated June 30, 1997 and November 15, 2000, Dr. Munir H. Abbasy, a Board-certified neurologist, listed findings on physical, neurologic and diagnostic examination of appellant's cervical spine. He advised that appellant had neck pain. There was no evidence of cervical radiculopathy. Dr. Abbasy suspected that appellant's pain was musculoskeletal in origin. He further suspected that appellant had bilateral carpal tunnel syndrome based on his hand numbness and ordered an electromyogram/nerve conduction study to further evaluate the problem. Dr. Abbasy concluded that appellant could return to work that week.

In a July 8, 1999 cervical MRI scan report, Dr. Paul M. Gagnon, a radiologist, stated that the cervical spinal cord was normal in caliber and signal characteristics. No spinal masses were identified and there was no evidence of significant spinal stenosis. Cervical vertebral bodies maintained normal height and alignment. Hypertrophic changes of vertebral body end-plates were noted at C4-5 and C6-7 along with signal changes of the C6-7 end-plates consistent with discogenic degenerative changes. There was disc space narrowing and loss of characteristic disc signal at those levels as well. The C2-3 disc space level was unremarkable. At C3-4, there was mild centralized bulging of the intervertebral disc that was minimally effacing the thecal sac ventrally. The neural foramina were patent despite hypertrophic degenerative changes of uncovertebral joints of a mild degree. At C4-5, mild generalized disc bulging and central spondylosis effaced the thecal sac ventrally without compressing the cervical spinal cord. Hypertrophic degenerative changes of the uncovertebral joints were noted without significant neural foraminal stenosis. At C5-6, minimal centralized disc bulging and central spondylosis effaced the thecal sac ventrally, but without significant spinal stenosis or cord compression. The neural foramina were patent. At C6-7, mild generalized disc bulging and central spondylosis effaced the thecal sac ventrally accompanied by hypertrophic degenerative changes of the uncovertebral joints. There was no cord compression. The right neural foramen was mildly narrowed.

In an October 27, 1999 report, Dr. Marc A. Goldman, a Board-certified internist, advised that appellant had acute pain in his neck and shoulder which lead to headaches and diminished use of his left arm and back. His condition began in 1982 and was permanent. Dr. Goldman concluded that appellant was not currently incapacitated from performing his work duties, but stated that his condition would require him to be off work intermittently.

OWCP documents dated July 18 and December 6, 2006 set forth the requirements for filing a timely claim under 5 U.S.C. § 8122 and notifying the employing establishment about an injury or death under 5 U.S.C. § 8119, respectively. In a February 8, 2001 letter to the employment establishment, appellant explained that his absence from work was due to his claimed injury. He submitted correspondence dated February 12, 2001 through June 10 2009 which addressed his timely notification of injury to his former supervisors, who he claimed lied and wrote false statements to cover up his injury.

In an August 6, 2010 decision, OWCP denied appellant's July 30, 2010 request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated April 3, 2006.

## LEGAL PRECEDENT

Section 8128(a) of FECA<sup>4</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>5</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.<sup>6</sup>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>9</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* 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>13</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> *Id.* at § 10.607(b).

<sup>8</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>9</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>10</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>11</sup> *Leona N. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

## ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of its original decision.<sup>15</sup> However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>16</sup>

The most recent merit decision in this case was OWCP's April 3, 2006 decision which found that the medical evidence of record was insufficient to establish a causal relationship between appellant's neck condition and the accepted January 22, 2001 employment incident. As appellant's July 30, 2010 letter requesting reconsideration of the merits of his claim by OWCP was made more than one year after the April 3, 2006 merit decision,<sup>17</sup> the Board finds that it was not timely filed.

The Board further finds that appellant has not established clear evidence of error on the part of OWCP. The duplicate medical reports from Dr. Kaye dated February 2 and 21, 2001 were previously of record and considered by OWCP in its prior decisions and do not establish that OWCP committed clear evidence of error in finding that appellant did not sustain an injury causally related to the accepted employment incident. Dr. Kaye addressed appellant's cervical condition and ability to work, but failed to provide a medical opinion explaining how lifting a mop bucket on January 22, 2001 caused the diagnosed condition and any resultant disability. In his July 30, 2010 request for reconsideration, appellant contended that Dr. Kaye's February 21, 2001 opinion was correct as it was based on the July 8, 1999 and November 20, 2000 MRI scans which predated his alleged injury. The Board notes that the diagnosis of degenerative cervical spondylosis was based on physical examination findings which confirmed restricted range of motion of the neck. Dr. Kaye relied on the stated MRI scan results in recommending appellant's treatment plan, which is not relevant to the issue on which the claim was denied by OWCP, namely whether appellant sustained an injury causally related to the January 22, 2001 employment incident. The Board finds that the medical reports resubmitted by appellant do not establish clear evidence of error.

The February 21, 2001 prescription from Dr. Kaye and the reports from Dr. Abbasy, Dr. Gagnon and Dr. Goldman and treatment notes from the employing establishment health unit predate the alleged injury. This evidence does not establish clear evidence of error on the part of OWCP. This evidence did not provide a medical opinion explaining how the diagnosed cervical conditions were caused by lifting a mop bucket on January 22, 2001. The Board finds that the reports from Dr. Kaye, Dr. Abbasy, Dr. Gagnon, Dr. Goldman and the employing establishment health unit are insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Appellant's February 8, 2001 letter to the employing establishment, the correspondence regarding his notification to management about his claimed injury and OWCP documents

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<sup>15</sup> 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

<sup>16</sup> *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>17</sup> Appellant had one year to request reconsideration by OWCP of its March 8, 2004 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

concerning the timely filing of a claim and notification of an injury are not relevant to the issue in this case of causal relation between appellant's claimed injury and the accepted employment incident. The Board finds, therefore, that this evidence is insufficient to establish clear evidence of error.

The Board finds that the argument and evidence submitted by appellant in support of his untimely request for reconsideration do not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet his burden of proof to show clear evidence of error on the part of OWCP.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 11, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board