



## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

## FACTUAL HISTORY

On October 30, 2002 appellant, then a 46-year-old mail handler, filed a traumatic injury claim alleging that on October 27, 2002 she injured her lower back and sustained a pinched nerve while pulling all-purpose containers and emptying an elevator.

Appellant submitted an October 30, 2002 disability slip from Brent Aubrey, a physician's assistant, who attributed her disability on October 30, 2002 to back pain and a pinched nerve. She was released to return to a desk job on October 31, 2002.

In a December 16, 2002 report, Dr. Edward J. Lairson, a treating Board-certified physiatrist, provided findings on physical examination and reviewed an x-ray. He diagnosed lumbar sprain/strain. Appellant related that in late October 2002, she developed low back pain and right leg radicular symptoms due to leaning forward at work. On review an x-ray revealed L4-5 grade 1 spondylolisthesis and some mild L4-5 degenerative disc narrowing.

By letter dated February 24, 2003, OWCP informed appellant that the evidence was insufficient to support her claim. She was requested to submit additional medical and factual evidence and given 30 days to provide this information.

Appellant submitted reports from Dr. Lairson dated January 6, February 4 and March 6, 2003. Dr. Lairson reiterated the diagnosis of sprain/strain and provided findings on physical examination. Appellant informed Dr. Lairson that her back symptoms had been aggravated by her work activities of frequent lifting of 10-pound mail buckets. Dr. Lairson related the x-ray finding of mild degenerative disc disease and mild spondylolisthesis at L4-5.

By decision dated April 3, 2003, OWCP denied appellant's claim. It found that there was not sufficient medical evidence to establish her back condition as a result of the October 27, 2002 employment incident.

In a letter dated May 21, 2004, appellant's counsel requested reconsideration. She submitted additional reports from Dr. Lairson dated March 11, 27 and April 18, 2003. Dr. Lairson reiterated the diagnosis of back sprain/strain. On March 27, 2003 he diagnosed lumbar sprain/strain, L4-5 degenerative lumbar disc disease and mild L4-5 spinal stenosis.

By decision dated August 3, 2004, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

## LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>4</sup> It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>5</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.<sup>6</sup> Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,<sup>7</sup> if the claimant's application for review shows 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 establish 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 establish clear evidence of error. It is not enough to merely 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 show clear evidence of error, the evidence submitted 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>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 shows 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

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<sup>4</sup> See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004);

<sup>5</sup> 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>6</sup> *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000)

<sup>7</sup> 20 C.F.R. § 10.607.

<sup>8</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>9</sup> *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>10</sup> *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>11</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 8.

evidence of error.<sup>12</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide for a one-year time limitation period for requesting reconsideration following an OWCP decision.<sup>14</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>15</sup> As appellant's May 21, 2004 request for reconsideration was submitted more than one year after the most recent merit decision of April 3, 2003, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>16</sup>

Appellant's traumatic injury claim was denied because the medical evidence was found insufficient to establish that her back condition was a result of the October 27, 2002 employment incident. Dr. Lairson's additional reports are not sufficient to establish clear evidence of error as he provided no history of the incident or an opinion on how appellant's back condition was causally related to the October 27, 2002 employment incident. The Board notes that the reports from Dr. Lairson are repetitive of statements he made in the reports of record that were previously reviewed and found insufficient to establish appellant's claim. Accordingly, this evidence does not establish clear evidence of error.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's April 3, 2003 decision denying her claim on the grounds that there was no medical evidence establishing a diagnosed condition as a result of the October 27, 2002 employment incident. Consequently, OWCP properly denied appellant's reconsideration request as it was untimely and failed to establish clear evidence of error.

### CONCLUSION

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

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<sup>12</sup> *James Mirra*, 56 ECAB 738 (2005); 20 C.F.R. § 10.607(b).

<sup>13</sup> *See M.L.*, *supra* note 8; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006);

<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> *Robert F. Stone*, 57 ECAB 393 (2005).

<sup>16</sup> *Supra* note 14; *see D.G.*, *supra* note 6; *Debra McDavid*, 57 ECAB 149 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 3, 2004 is affirmed.

Issued: July 18, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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