

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

---

**J.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Greensboro, NC, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 11-305  
Issued: September 27, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 16, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) September 9, 2010 nonmerit decision denying his request for reconsideration. Since more than 180 days elapsed since the most recent merit decision of January 5, 2009 to the filing of this appeal on November 16, 2010, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2 and 501.3.<sup>2</sup>

**ISSUE**

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

---

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

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

## **FACTUAL HISTORY**

On October 3, 2008 appellant, then a 55-year-old regular rural carrier, filed a traumatic injury claim alleging that he pulled/strained his back that date while lifting, turning and casing large trays of mail. He submitted physical therapy reports and prescription notes referencing back pain right side along with diagnostic testing. In an October 6, 2008 report, Dr. Stephen E. Erlandson, a Board-certified family practitioner, noted the history of injury and that appellant was seen in the emergency room the same day. He diagnosed right-sided sciatica, noting that a herniated nucleus pulposus was doubtful. Dr. Erlandson opined that appellant had a musculoskeletal/sciatic problem with his piriformis and his gluteal muscles and recommended a chiropractor. In an October 16, 2008 report, he noted that the injury of the piriformis and gluteal muscles with spasm was improving. Dr. Erlandson recommended physical therapy and that appellant remain out of work for one more month.

In a December 1, 2008 letter, OWCP advised appellant that the information submitted with his claim was insufficient to establish that he sustained a work-related injury. It advised him of the medical evidence needed to establish his claim, asking that his physician provide a firm diagnosis that resulted from the October 3, 2008 injury as well as an opinion with medical rationale as to how the reported work incident caused or aggravated the claimed injury.

In response, appellant submitted an undated statement, which OWCP received December 17, 2008; a copy of the emergency department report of October 3, 2008 which contained differential diagnosis, including arthritis, sprain, ruptured disc, vertebral fracture and spinal injury; and pictures of the activities appellant performed at work.

In a December 5, 2008 report, Dr. Erlandson advised that appellant injured himself at work while bending to pick up newspapers and magazines out of a bin. Appellant developed a simple back sprain and muscle injury and was diagnosed with work-related back injury and sciatica. He was taken off work because of inflammation of his gluteal and piriformis muscles. During the examination of November 13, 2008, appellant was found to have significant sciatica piriformis syndrome with continuing sciatica pain, so physical therapy was recommended. Dr. Erlandson opined that appellant suffered a work-related injury related to ergonomics and sprain at work. In a December 10, 2008 report, he reiterated that appellant was injured at work and complied with all his directions and recommendations, including physical therapy. Appellant had residual pain, but no weakness. Dr. Erlandson recommended appellant return to work with physical restrictions.

By decision dated January 5, 2009, OWCP denied appellant's claim. It found that the evidence of file supported that the claimed incident occurred, but there was insufficient medical evidence to establish appellant's back condition was caused by the October 3, 2008 incident.

On May 25, 2010 appellant requested reconsideration. He referred to an earlier letter of May 5, 2010, which explained how he tried to obtain additional information for his claim. Appellant submitted copies of physical therapy notes and a treatment summary. In a January 26, 2009 note, Dr. Erlandson released him to work with no restrictions on Tuesday, January 27, 2009. A copy of his December 10, 2008 report, previously of record, was also submitted.

By decision dated September 9, 2010, OWCP denied appellant's reconsideration request on the grounds it was untimely and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.<sup>3</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>4</sup>

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>5</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.<sup>8</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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>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

---

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>5</sup> *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 USC § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2).

<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>9</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>10</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>11</sup> *Id.*

review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>12</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

In its September 9, 2010 decision, OWCP properly determined that appellant failed to file timely applications for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.<sup>14</sup> The most recent merit decision in this claim is OWCP's January 5, 2009 decision. Appellant's request for reconsideration was dated May 25, 2010, more than one year after January 5, 2009. Therefore his reconsideration request was not timely filed.

The Board finds that appellant has not established clear evidence of error on the part of OWCP in the denial of his claim. Appellant's May 5, 2010 letter, which he referred to in his May 25, 2010 request, stated that his injury was real and that he was truthful. However, his contentions do not establish clear evidence of error or raise a substantial question as to the correctness of OWCP's decision.

The Board notes that the underlying issue is medical in nature. Appellant, however, did not submit any new medical evidence sufficient to shift the weight of the evidence in his favor or establish that OWCP erred by denying his claim. He submitted a January 26, 2009 note from Dr. Erlandson releasing him to work with no restrictions. This report does not address causal relationship. It is insufficient to establish clear evidence of error. The term "clear evidence of error" is intended to represent a difficult standard. The submission of 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>15</sup> Dr. Erlandson's December 10, 2008 report was previously considered by OWCP. Appellant did not address how this evidence was positive, precise and explicit in manifesting on its face that OWCP erred in denying his claim. The resubmission of this evidence does not raise a substantial question as to the correctness of OWCP's decision.<sup>16</sup>

Appellant also submitted copies of physical therapy notes and a treatment summary. Section 8101(2) of FECA provides that the term physician includes surgeons, podiatrist, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.<sup>17</sup> Physical therapists are not considered physicians as

---

<sup>12</sup> *Id.*

<sup>13</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> *D.G.*, 59 ECAB 455 (2008).

<sup>16</sup> Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error. *F.R.*, Docket No. 09-575 (issued January 4, 2010).

<sup>17</sup> 5 U.S.C. § 8101(2).

defined under FECA and thus their reports do not constitute competent medical evidence.<sup>18</sup> Consequently, these reports are insufficient to establish clear error by OWCP.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision.

On appeal, appellant expressed his disagreement with OWCP's decision and contended that his back injury was real and resulted from the performance of his duties as a mail carrier. He noted that no physician disagreed with the diagnosis of the physicians who treated him. The Board does not have jurisdiction over the merits of the claim. It only has jurisdiction over the issue of whether OWCP properly determined that his reconsideration request was untimely filed or establish clear evidence of error by OWCP. As explained, the evidence and argument submitted on reconsideration is insufficient to establish clear evidence of error by OWCP. While appellant also submitted, on appeal, documents from his physician and physical therapist, the Board lacks jurisdiction to review evidence for the first time on appeal.<sup>19</sup>

### **CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

---

<sup>18</sup> *Id.*; *J.M.*, 58 ECAB 448 (2007); *G.G.*, 58 ECAB 389 (2007); *David P. Sawchuck*, 57 ECAB 316 (2006); *Allen C. Hundley*, 53 ECAB 551 (2002).

<sup>19</sup> 5 U.S.C. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated September 9, 2010 is affirmed.

Issued: September 27, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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