



## **FACTUAL HISTORY**

On February 6, 2012 appellant, then a 52-year-old information technology management worker, filed a traumatic injury claim alleging that while in the performance of duty on February 3, 2012, at 7:00 a.m., he was standing in the elevator, when it dropped rapidly 8 to 10 feet. He indicated that, after the drop, the elevator stopped suddenly, and jarred his back. Appellant stopped work on February 4, 2012. The employing establishment checked the box “no” in response to whether the injury occurred in the performance of duty. It indicated that the injury occurred as appellant was using the elevator to report to work for his normal scheduled duty hours.

Appellant submitted hospital records dated February 4, 2012. He also submitted reports from Dr. Matthew Bridger, a Board-certified family practitioner, dated February 8, 2012, who noted an injury date of February 3, 2012, appellant’s injury description as “elevator dropped 10 feet -- injury back pain,” and found appellant totally disabled. Dr. Bridger diagnosed lumbar sprain and disc displacement without myelopathy.

In a telephone call memorandum dated May 9, 2012, OWCP noted that Scott Shields, the employing establishment’s human resources (HR) liaison, indicated that appellant was not supposed to report to work until 8:00 a.m. However, there was no stated policy that appellant could not be on the employing establishment premises before his start time, as it was known that he had a long commute to work. Mr. Shields explained that, if an incident happened, it was supposed to be reported to the General Services Administration (GSA), “especially if an elevator dropped 8 to 10 feet....” He indicated that GSA would conduct routine maintenance on an elevator if it would have dropped more than a few inches.

By decision dated May 11, 2012, OWCP denied appellant’s claim. It found that the evidence was insufficient to establish that the events of February 3, 2012 occurred as alleged.

In a May 15, 2012 statement, Mr. Shields noted that appellant requested a hardship transfer on January 9, 2012 and indicated that he had injuries from prior military service. A copy of the request was included. Additional evidence was also submitted.

A May 3, 2012 statement from Jonathan Dixon, a coworker, indicated that on February 3, 2012 appellant came in around 6:50 a.m. and stated that the elevator dropped on the 16<sup>th</sup> floor. He noted that the door opened and he was halfway between the 15<sup>th</sup> and 16<sup>th</sup> floor, then the door closed, and the elevator fell to the 15<sup>th</sup> floor, causing an injury. Mr. Dixon noted that he advised appellant to call GSA to report the malfunction and he believed that he heard appellant do so. In May 11, 2012 e-mail correspondence, Bruce Lazar, the building manager, stated that an elevator technician explained to him that there was no way the elevator would fall 8 to 10 feet and that it was unlikely that the elevator performed as appellant described. He also indicated that no one in GSA’s office recalled anyone coming in on February 3, 2012 to report an elevator malfunction. Furthermore, GSA kept a log and there was no indication that any technician was in the building on February 3, 2012 or that an incident occurred on that date.

By letter dated May 27, 2012, appellant requested reconsideration and submitted additional evidence. He provided an additional statement describing his injuries and noted that,

despite GSA not having a record of his call, he called GSA and reported the incident to his supervisor at 7:20 a.m. Appellant stated that, when the injury occurred at 7:00 a.m., no other offices were open and there was no “personal activity” that he could be engaged in. He indicated that his activities from 7:00 a.m. until he began work at 8:00 a.m. were “by every policy and legal precedent covered under [FECA].” Appellant also indicated that the elevator may have dropped 12 feet, as there was approximately 14 feet between floors in his building.

In a September 5, 2012 decision, OWCP denied modification of its prior decision. It found that, while appellant was in the performance of duty, he provided insufficient evidence to establish that an injury occurred on February 3, 2012. OWCP found that appellant did not provide sufficient factual information concerning the claimed injury as there was no description of exactly what occurred to him inside the elevator when it suddenly stopped. It also found that the medical evidence was of diminished value as the submitted medical evidence did not specify what occurred to appellant when the elevator stopped suddenly.

Appellant continued to submit medical evidence, including evidence previously of record. New medical evidence included a September 19, 2012 discharge note from Dr. Bridger releasing appellant to modified work and a treatment note of the same date in which he noted appellant’s status and treatment history. Both documents related a chief complaint of back pain after an elevator dropped 10 feet. Dr. Bridger diagnosed mild diffuse degenerative disc disease of the thoracic spine and tiny central disc protrusion at T4-5.

By letter dated January 20, 2014, appellant requested reconsideration and provided additional evidence. He explained the sequence of events with regard to the elevator incident and reiterated that he called GSA to report the incident. Appellant also provided records which supported that the elevator company arrived at 6:20 a.m. on February 3, 2012 “a few minutes after.” He also explained that the claim from the elevator technician was incorrect with regard to the elevator not being able to drop rapidly. Appellant argued that he promptly reported the incident and he was injured in the performance of duty.

In a decision dated May 1, 2014, OWCP denied appellant’s request for reconsideration for the reason that it was not timely filed and failed to present 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>2</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 decision for which review is sought.<sup>3</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>4</sup>

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<sup>2</sup> See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>5</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 manifest on its face that OWCP committed an error. Evidence that 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 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.<sup>6</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. 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>7</sup>

### ANALYSIS

In its May 1, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on September 5, 2012. As appellant's January 31, 2014 letter requesting reconsideration was submitted more than one year after the September 5, 2012 merit decision, it was, therefore, untimely.

The Board also finds that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error. In its September 5, 2012 decision, OWCP denied modification of its denial of the claim finding that appellant did not adequately describe what occurred to him in the elevator that caused his claimed back pain. Appellant never explained whether he fell or hit one of the surfaces of the elevator. Thereafter, he submitted additional factual and medical evidence. The Board finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error.

With his January 31, 2014 request for reconsideration, appellant reiterated that he promptly reported the incident, called GSA, and provided records which supported that the elevator company arrived "at 6:20 a.m." on February 3, 2012 "a few minutes after [his] injury."

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<sup>5</sup> *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

<sup>6</sup> *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

<sup>7</sup> *Id.*

He also argued that the elevator technician was incorrect with regard to the elevator not being able to drop rapidly. However, it is not disputed that appellant reported the incident. OWCP denied the claim in part because he did not sufficiently describe his injury and also because the medical evidence was insufficient to show causal relationship. These arguments are not 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.

Appellant also submitted medical evidence noting his assertion that he was injured when the elevator fell on February 3, 2012. However, it did not explain how the incident contributed to an injury. In any event, OWCP procedures provide 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.<sup>8</sup> The evidence submitted does not rise to this level.

The Board finds that this evidence is insufficient to show clear evidence of error. Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, appellant reiterates that the elevator dropped as he alleged and that he called GSA. As explained, these arguments are insufficient to establish clear evidence of error. Appellant also submitted additional evidence. However, the Board has no jurisdiction to review this evidence for the first time on appeal.<sup>9</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

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<sup>8</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>9</sup> 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 1, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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