



## **FACTUAL HISTORY**

The Office accepted that on July 27, 2005 appellant, then a 53-year-old letter carrier, sustained a back sprain/strain, sprain of the sacroiliac ligament and sacroilitis as a result of delivering packages on her route. Following the injury, she performed limited-duty work. On August 8, 2007 Dr. Robert S. Winfield, an attending Board-certified physiatrist, released appellant to return to her regular work duties with no physical limitations.

On September 24, 2008 appellant filed a claim alleging that she sustained a recurrence of disability on September 7, 2007. In an undated narrative statement, she related that, due to a left knee injury, she shifted all of her weight to her right side which caused back pain. Appellant underwent left knee surgery on January 16, 2008.

Medical reports dated February 15 through October 29, 2008 noted that appellant had sacroilitis, left knee problems, right-sided S1 dysfunction, lumbar sprain and right hip pain. Appellant underwent physical therapy to treat her back pain.

In a December 23, 2008 decision, the Office denied appellant's claim, finding the medical evidence insufficient to establish that she sustained a recurrence of disability commencing September 7, 2007 due to her July 27, 2005 employment injuries.

On January 23, 2009 appellant requested an oral hearing before an Office hearing representative. In medical reports dated September 24 through December 29, 2008, Dr. Winfield advised that she had a sacroilitis condition, right hip pain. In a January 20, 2009 report, he advised that appellant was released to full-duty work as of August 3, 2007. Dr. Winfield noted that she had left knee problems for which she underwent arthroscopic surgery. He advised that appellant sustained a recurrence of employment-related right sacroilitis condition due to her left knee problems which required her to change her gait. Dr. Winfield concluded that she was no longer disabled due to the accepted condition and that she had returned to full-duty work.

In a March 18, 2009 decision, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that it was postmarked January 23, 2009, more than 30 days after the December 23, 2008 decision. It exercised its discretion and determined that the issue in the case could be addressed equally well through a reconsideration request and the submission of new evidence establishing that she sustained a recurrence of disability causally related to her July 27, 2005 employment injuries.

By letter dated March 12, 2010, appellant requested reconsideration. Reports from physical therapists addressed the treatment of her back, left leg and right hip pain from February 25, 2008 to January 19, 2009. In a July 9, 2007 report, a physical therapist stated that a functional capacity evaluation demonstrated that appellant had no physical limitations related to her employment-related right sacroiliac joint condition.

In addition to the prior progress reports of Dr. Winfield previously submitted, appellant submitted an August 19, 2008 report, wherein the physician indicated that he injected her right sacroiliac joint to treat her sacroilitis.

In reports dated December 18, 2008 through December 3, 2009, Dr. Jeffrey R. Carlson, a Board-certified orthopedic surgeon, listed his findings on physical and x-ray examination and diagnosed right hip pain and osteoarthritis, low back pain, L4-5 and L5-S1 degenerative disc disease and spondylolisthesis. He advised that appellant's chronic right hip and lower back pain may have developed over a number of years as she had no distinct work episode. Dr. Carlson further advised that her back problems may have been related to her hip problems. He stated that as of December 3, 2009 appellant could be as active as she felt comfortable.

In a December 30, 2008 report, Dr. Robert J. Snyder, a Board-certified orthopedic surgeon, advised that an x-ray demonstrated severe bone changes in the right hip. In a January 23, 2009 note, he indicated that appellant was scheduled to undergo right total hip replacement surgery, which he performed on January 28, 2009. In a February 26, 2009 report, Dr. Snyder opined that her right hip pain and arthritis were work related since she did not have any recognizable cause for her pain. In a February 10, 2009 treatment note, he advised that appellant was doing well following her total right hip replacement surgery. In treatment notes dated March 24 and April 28, 2009, Dr. Snyder indicated that she was still recovering from her right hip replacement surgery. Appellant was still out of work. In a May 1, 2009 addendum to the April 28, 2009 treatment note, Dr. Snyder advised that x-rays of her right hip confirmed her hip replacement with components in place with no acute changes. In an April 17, 2009 report, he advised that appellant was out of work until May 24, 2009 due to her right total hip replacement surgery which was due to an employment-related injury. On May 19, 2009 Dr. Snyder released her to return to light-duty work on June 1, 2009. In a July 16, 2009 report, he noted appellant's symptoms of gluteal and right thigh pain. Dr. Snyder advised that an x-ray of the low back confirmed L4-5 spondylolisthesis. He recommended additional diagnostic testing and concluded that it appeared that components of the back and hip produced appellant's inability to return to full-duty work. In a July 31, 2009 treatment note, Dr. Snyder advised that a magnetic resonance imaging (MRI) scan confirmed that she had foraminal narrowing at L4-5 and L5-S1. He believed that the condition accounted for appellant's gluteal and thigh pain.

A July 23, 2009 lumbar spine MRI scan report from Dr. Charles M. Hecht-Leavitt, a Board-certified radiologist, advised that appellant had L5-S1 diffuse disc bulging with accompanying osteophytes and four-millimeter retrolisthesis resulting in moderate bilateral lateral recess and mild-to-moderate bilateral neural foraminal stenosis. Appellant also had L4-5 bilateral facet joint arthrosis with three- to four-millimeter anterolisthesis mildly narrowing the lateral recesses and mild-to-moderate narrowing of the neural foramina.

In an April 26, 2010 decision, the Office denied appellant's March 12, 2010 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated December 23, 2008.<sup>2</sup>

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<sup>2</sup> On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003). Appellant may submit this new evidence with a formal, written request for reconsideration to the Office. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

## LEGAL PRECEDENT

Section 8128(a) of the Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>5</sup>

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>8</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup> This entails a limited review by the Office 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 the Office.<sup>11</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 the Office decision.<sup>12</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>13</sup>

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *Id.* at § 10.607(b).

<sup>7</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>8</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>9</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>10</sup> *Leona N. Travis*, *supra* note 8.

<sup>11</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>13</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

## ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>14</sup> However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>15</sup>

The most recent merit decision in this case was the Office's December 23, 2008 decision which found that appellant did not sustain a recurrence of disability commencing September 7, 2007 due to her July 27, 2005 employment injuries. As appellant's March 12, 2010 letter requesting reconsideration of her claim by the Office was made more than one year after the December 23, 2008 merit decision,<sup>16</sup> the Board finds that it was not timely filed.

The Board further finds that the evidence submitted by appellant in support of her March 12, 2010 request for reconsideration does not raise a substantial question as to the correctness of the Office's denial of her recurrence of disability claim or shift the weight of the evidence of record in her favor. The reports from Dr. Winfield dated August 19 through December 29, 2008 found that she had sacroilitis and right hip pain. Dr. Winfield addressed appellant's continuing employment-related sacroiliac condition, but did not address whether she was disabled commencing September 7, 2007 due to the accepted conditions.<sup>17</sup> The Board finds that his reports are insufficient to show that the Office's December 23, 2008 denial of her recurrence claim was erroneous. Dr. Winfield's January 20, 2009 report found that appellant's left knee problems which required her to change her gait caused a recurrence of her employment-related right sacroilitis condition. He advised that she was no longer disabled due to the accepted condition, which was the threshold issue of the case and had returned to full-duty work. Dr. Winfield did not state that appellant was disabled commencing September 7, 2007 due to the accepted condition.<sup>18</sup> The Board finds that his report does not raise a substantial question concerning the correctness of the Office's decision denying appellant's recurrence claim.

Dr. Carlson's reports found that appellant had right hip pain and osteoarthritis, low back pain and L4-5 and L5-S1 degenerative disc disease and spondylolisthesis. He advised that her chronic right hip and lower back pain may have developed over a number of years as she had no distinct work episode. Dr. Carlson further advised that appellant's back problems may have been related to her hip problems. He did not address whether the diagnosed right hip and lower back conditions were causally related to the July 27, 2005 employment-related conditions or whether appellant was totally disabled due to the accepted conditions.<sup>19</sup> The Board finds that

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<sup>14</sup> 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

<sup>15</sup> *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>16</sup> Appellant had one year to request reconsideration by the Office of its December 23, 2008 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

<sup>17</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>18</sup> *Id.*

<sup>19</sup> *Id.*

Dr. Carlson's reports are insufficient to establish clear evidence of error in the Office's denial of her recurrence claim.

Dr. Hecht-Leavitt's July 23, 2009 lumbar spine MRI scan report is insufficient to show clear evidence of error as he did not address whether the accepted work injuries caused disability.<sup>20</sup>

Dr. Snyder's reports advised that appellant had severe bone changes in her right hip for which she underwent total hip replacement surgery on January 28, 2009 and remained out of work through May 24, 2009. He did not provide an opinion concerning the causal relationship between her disability and the July 27, 2005 employment-related conditions. Further, Dr. Snyder did not address whether the diagnosed back condition was caused by the accepted July 27, 2005 employment injuries. Regarding his opinion on causal relation between appellant's hip pain and arthritis and her employment, the Board has held that a medical opinion stating that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but became symptomatic is insufficient, without supporting rationale, to establish causal relationship. Dr. Snyder provided no additional medical reasoning to support his opinion on causal relation. The Board finds that his reports are insufficient to show that the denial of appellant's recurrence claim was erroneous.

The reports from appellant's physical therapists do not constitute probative medical evidence. A physical therapist is not defined as a physician under the Act.<sup>21</sup> The Board finds, therefore, that these reports are insufficient to establish clear evidence of error in the Office's December 23, 2008 decision.

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

Although appellant contended on appeal that her continuing back pain was due to an employment-related left knee injury, the instant case involves her July 27, 2005 employment-related back and sacroiliac conditions. As discussed above, the medical evidence was not sufficient to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office decision.

### **CONCLUSION**

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

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<sup>20</sup> *Id.*

<sup>21</sup> See *David P. Sawchuk*, 57 ECAB 316 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 9, 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