



## **FACTUAL HISTORY**

This case has previously been before the Board. On October 27, 2008 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2008 he sustained an aggravation of a lower back injury in the performance of duty. By decision dated February 19, 2010, OWCP denied the claim finding that the medical evidence was not sufficient to establish a diagnosis in connection to the October 14, 2008 employment incident. Appellant, through his attorney, filed an appeal with the Board. In a decision dated March 8, 2011, the Board affirmed OWCP's February 19, 2010 merit decision.<sup>2</sup> The facts of the case, as set forth in the prior decision, are incorporated by reference.

By letter dated March 9, 2012 appellant, through counsel, requested reconsideration and submitted a February 28, 2012 report by Dr. Kevin L. Trangle, a Board-certified internist and occupational medicine specialist, who stated that he performed a medical record review for evaluation only. Appellant was not seen or examined. Based on his review of appellant's medical record, Dr. Trangle concluded that appellant experienced a recurrence of his low back pain following the performance of heavy labor at work while transferring heavy mail trays from his truck on October 14, 2008.

By decision dated May 3, 2012, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

## **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of OWCP's decision as a matter of right.<sup>3</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup> One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<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>

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<sup>2</sup> Docket No. 10-1252 (issued March 8, 2011).

<sup>3</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> See; *F.R.*, Docket No. 09-575 (issued January 4, 2010); *Jesus D. Sanchez*, *supra* note 3.

<sup>7</sup> 20 C.F.R. § 10.607(b).

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 establish 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>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations<sup>15</sup> and procedures<sup>16</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues,<sup>17</sup> including any merit decision by the Board and any merit decision following action by the Board.<sup>18</sup> The most recent merit decision was the Board's March 8, 2011 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since he did not file his request until March 9, 2012, it was filed outside the one-year time period. As appellant's March 9, 2012 request for reconsideration was submitted

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<sup>8</sup> See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

<sup>9</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

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

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>12</sup> See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

<sup>14</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>15</sup> 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (January 2004); see *Velvetta C. Coleman*, *supra* note 13.

<sup>17</sup> See *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>18</sup> See *supra* note 16 at Chapter 2.1602.3.b (January 2004).

more than one year after the March 8, 2011 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.<sup>19</sup>

OWCP denied appellant's traumatic injury claim because there was insufficient medical evidence to establish a diagnosis in connection with the October 14, 2008 employment incident, the medical component of fact of injury. In his February 28, 2012 report, Dr. Trangle concluded that appellant sustained a recurrence of his low back injury in the performance of duty on October 14, 2008, but his opinion was based solely on a review of appellant's medical record. He did not see or examine appellant, nor did he provide a firm diagnosis in connection with the October 14, 2008 employment incident. The February 28, 2012 report by Dr. Trangle does not establish clear evidence of error as it does not show that OWCP committed an error in denying appellant's claim on the grounds that the medical evidence did not establish fact of injury, nor does it raise a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that the medical evidence submitted by appellant is not sufficient to establish clear error by OWCP in denying his claim.<sup>20</sup>

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.<sup>21</sup> None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, counsel contends that the May 3, 2012 OWCP decision is contrary to fact and law. For the reasons stated above, the Board finds counsel's argument is not substantiated.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was not timely filed and failed to establish clear evidence of error.

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<sup>19</sup> *Supra* note 7; see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>20</sup> See *J.R.*, Docket No. 10-2137 (issued July 12, 2011).

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 17, 2012  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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