



2010 appellant requested a hearing. OWCP informed her by letter dated December 9, 2010 that a telephonic hearing would be held on January 14, 2011 at 2:00 p.m., eastern time. It mailed the December 9, 2010 letter to appellant's last known address. By decision dated February 18, 2011, OWCP found that she had abandoned her request for a hearing.<sup>1</sup> The Board affirmed the February 18, 2011 OWCP decision. The complete facts of this case are set forth in the Board's August 18, 2011 decision and are herein incorporated by reference.

By letter dated June 12, 2012, appellant requested reconsideration. In support of her request, she submitted several medical documents.

In a September 9, 2010 report, it was indicated that appellant underwent a magnetic resonance imaging (MRI) scan of the thoracic spine. It showed that appellant had no acute fracture or subluxation. The report further stated that there was mild degenerative disease throughout the thoracic spine, with no acute herniation of the nucleus pulposus and no spinal canal stenosis. The spinal cord was within normal limits of appearance, with normal foramina.

In a July 13, 2011 report, Dr. Steven K. Groff, Board-certified in orthopedic surgery, stated that appellant had been experiencing mid-back pain for approximately one year. Appellant asserted that this pain stemmed from an incident in which she injured her back while lifting 70 pounds of mail; she stated that she has had constant pain since that time, which increased with twisting and turning. Dr. Groff diagnosed a thoracic sprain which she apparently sustained one year prior as a result of a work-related incident. He indicated that a thoracic MRI scan showed minimal thoracic degenerative changes and advised that her neurological examination was intact.

Appellant reported having numbness and tingling in both legs. Dr. Groff advised that she had undergone physical therapy which did not provide any relief. He recommended chronic pain management. Dr. Groff stated that appellant was currently on disability and not working.

In an August 9, 2011 report, Dr. Stephen Dietrich, an osteopath, stated that appellant was experiencing ongoing back pain. He diagnosed thoracic disc disease.

In a January 18, 2012 report, Dr. Joseph Devlin, a Board-certified family practitioner, stated that appellant had complaints of thoracic pain and had experienced thoracic strains in the past. He related that she had aching and burning pain in her mid back. Dr. Devlin diagnosed thoracic disc disease and opined that appellant did not require surgery.

In a June 15, 2012 report, Dr. Chad M. Rutter, an osteopath, stated that appellant was experiencing low back and right leg pain which occasionally radiated down into the legs. Appellant attributed these symptoms to a July 3, 2011 work injury. Dr. Rutter stated that x-rays showed facet joint arthrosis at the L4-5 level, with minor narrowing of the L5-S1 disc space. He did not believe that she sustained a lumbar condition as a result of an employment injury.

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<sup>1</sup> Docket No. 11-1202 (issued August 18, 2011).

By decision dated July 11, 2012, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely filed and that appellant had not established clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle an employee to a review of an OWCP decision as a matter of right.<sup>3</sup> This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>4</sup> As one such limitation, OWCP has stated that 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> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).<sup>6</sup>

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>7</sup> OWCP procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>4</sup> Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

<sup>5</sup> 20 C.F.R. § 10.607(b).

<sup>6</sup> *See* cases cited *supra* note 2.

<sup>7</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.<sup>8</sup>

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifested on its face that it committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</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 OWCP's decision.<sup>14</sup> The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on August 31, 2010. OWCP received appellant's request for reconsideration on June 12, 2012; thus, the request is untimely as it was outside of the one-year time limit.

The Board finds that appellant's June 12, 2012 request for reconsideration failed to show clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. Her claim was denied on the grounds that she had not established fact of injury, that is, that the alleged event occurred as alleged on July 4, 2010. In support of the request for reconsideration, appellant submitted reports from Drs. Groff, Dietrich, Devlin and Rutter, in addition to the September 9, 2010, thoracic MRI scan report. These reports stated findings on examination, noted complaints of

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> See *Jesus D. Sanchez*, *supra* note 2.

<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> *Faidley*, *supra* note 2.

<sup>15</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

thoracic and lumbar pain and indicated that appellant had mild degenerative disease of the thoracic spine. However, they are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP's decision regarding fact of injury, *i.e.*, that appellant did sustain an injury as alleged on July 4, 2010. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

### **CONCLUSION**

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her reconsideration request dated June 12, 2012. Inasmuch as her reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on July 11, 2012.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 11, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: December 5, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board