

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

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**J.W., Appellant**

**and**

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

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**Docket No. 12-668  
Issued: June 7, 2012**

*Appearances:*

*Bryant Duke Paris, III, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 27, 2012 appellant, through her attorney, filed a timely appeal from an August 1, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year elapsed from the last merit decision dated March 15, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her case. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.<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 failed to establish clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. 20 C.F.R. § 501.3(d)(2). An appeal of an OWCP decision issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

## **FACTUAL HISTORY**

On February 3, 2010 appellant filed a traumatic injury claim alleging that she sustained a right shoulder injury on that date in the performance of duty. She stated that her right rotator cuff began to hurt while she was boxing mail.

Appellant submitted February 3, 2010 emergency room reports and disability slips reflecting treatment for right shoulder pain. Christine A. Verga, a physician's assistant, diagnosed right shoulder strain and related appellant's history that she had developed acute shoulder pain from casing mail.

By decision dated March 15, 2010, OWCP denied appellant's claim. It found that she had established the incident of February 3, 2010 but that the medical evidence was insufficient to establish a causal relationship between her shoulder condition and the established work activities.

In an appeal request form postmarked April 20, 2010, appellant requested a review of the written record. By decision dated May 12, 2010, an OWCP hearing representative denied her request as untimely.

Subsequent to OWCP's March 15, 2010 decision, appellant submitted medical reports from Dr. Clifford R. Wheelless, III, a Board-certified orthopedic surgeon, dated March 5, 2010 through May 13, 2011. Dr. Wheelless found that she was not able to perform the duties of her regular position. He restricted appellant from sitting longer than two hours, standing longer than six hours and lifting or carrying more than 10 pounds. Appellant was prohibited from climbing, kneeling, bending, pushing, pulling, grasping or reaching above the shoulder.<sup>3</sup>

On March 24, 2010 Dr. Wheelless reported the results of a March 20, 2010 magnetic resonance imaging (MRI) scan of the right shoulder, which revealed marked mild partial supraspinatus tear and mild distal acromioclavicular (AC) joint arthritis. On examination the right shoulder had full abduction and no instability. There was positive impingement sign and mild AC joint tenderness.

In a March 30, 2010 attending physician's report, Dr. Wheelless diagnosed rotator cuff tear, degenerative joint disease (DJD) and bursitis. By placing a checkmark in the "yes" box, he indicated his belief that appellant's condition was caused or aggravated by employment factors. The record also contains the March 20, 2010 MRI scan.

In an August 27, 2010 addendum report, Dr. Wheelless stated that appellant did not slip and fall on her right shoulder. Rather, appellant felt immediate pain in her arm as she was lifting heavy objects. Dr. Wheelless diagnosed arthroscopic rotator cuff tear, which he indicated was supported by arthroscopic findings.

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<sup>3</sup> Appellant also submitted regular duty status reports from Dr. Wheelless through May 4, 2011 reflecting similar work restrictions.

Appellant submitted medical reports dated January 26 through May 7, 2010 from Dr. Cary Idler, a Board-certified orthopedic surgeon, related to a September 3, 2009 back injury. On March 5, 2010 Dr. Idler stated that she continued to experience severe back and leg pain, as well as right shoulder pain. On April 9, 2010 he diagnosed spondylosis, spinal stenosis, lumbar radiculopathy and herniated disc, which he opined were causally related to the September 3, 2009 injury. Dr. Idler also opined that appellant's shoulder injury was aggravated by the 2009 back injury.

The record contains notes dated February 5, 2010 from Kenneth Ramsauer, a physician's assistant, who stated that appellant was experiencing right shoulder pain and difficulty with overhead use. The record also contains a June 29, 2010 surgical report of a right shoulder arthroscopic rotator cuff repair and physical therapy notes dated July 13, 2010.

Appellant, through her attorney, requested reconsideration on May 10, 2011. Counsel argued that OWCP's March 15, 2010 decision denying her claim was erroneous based on newly-discovered evidence. He contended that the following documents showed clear evidence of error in OWCP's decision: February 3, 2010 discharge instructions (showing that appellant sustained a right rotator cuff tear); a report of a March 20, 2010 MRI scan (reflecting a rotator cuff tear); June 29, 2010 operative notes (showing that appellant required surgery for a rotator cuff tear); and notes from physical therapists and orthopedists noting that appellant sustained a right shoulder injury.

By decision dated August 1, 2011, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.<sup>4</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>5</sup>

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>6</sup> OWCP regulations and procedure provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

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<sup>4</sup> 20 C.F.R. § 10.607(a).

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

<sup>6</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>7</sup>

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 manifest on its face that OWCP committed an error.<sup>9</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>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 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 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>

### ANALYSIS

OWCP's merit decision of March 15, 2010 denied appellant's traumatic injury claim on the basis that the medical evidence did not establish a causal relationship between her diagnosed right shoulder condition and the accepted work-related incident of February 3, 2010. As appellant's May 10, 2011 request for reconsideration was not filed within one year of the March 15, 2010 decision, the Board finds that OWCP properly determined that it was untimely and properly evaluated the evidence submitted under the clear evidence of error standard.

In appellant's request for reconsideration, counsel argued that the March 15, 2010 decision was erroneous because newly-discovered evidence established that she sustained a traumatic injury to her right shoulder on the date in question. The issue, however, is not whether the evidence establishes that she sustained a traumatic injury, but rather, whether OWCP erred in denying the claim at the time it issued its March 15, 2010 decision. Therefore, counsel's argument concerning the merits of the claim is not sufficient to establish clear evidence of error.

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<sup>7</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedure further provides 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 that a schedule award was miscalculated). Evidence such as 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. *Id.* at Chapter 2.1602.3c.

<sup>8</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>9</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>10</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

Appellant submitted numerous medical reports in support of her request for reconsideration. The Board finds, however, that the evidence submitted is not sufficient to establish error on the part of OWCP.

In a March 24, 2010 client note, provided examination findings and reported the results of a March 20, 2010 MRI scan of the right shoulder. The MRI scan revealed marked mild partial supraspinatus tear and mild distal AC joint arthritis. On March 30, 2010 Dr. Wheelless diagnosed rotator cuff tear, DJD and bursitis and placed a checkmark in the “yes” box to reflect that appellant’s condition was caused or aggravated by employment factors. On August 27, 2010 Dr. Wheelless stated that she felt immediate pain in her arm as she was lifting heavy objects on February 3, 2010 and diagnosed arthroscopic rotator cuff tear, which he indicated was supported by arthroscopic findings. The remainder of his reports consisted of duty status reports that provided work restrictions. While Dr. Wheelless’ reports were generally supportive of the claim, they do not establish error on the part of OWCP in denying appellant’s claim. It is not enough to show that evidence could be construed so as to produce a contrary result.<sup>14</sup> The submission of a well-rationalized medical report which, if submitted before the denial of the claim was issued, would have created a conflict in medical opinion is not clear evidence of error.<sup>15</sup> None of the reports are sufficient to raise a substantial question as to the correctness of the March 15, 2010 decision. The reports of Dr. Wheelless did not provide a rationalized causal relationship between the diagnosed explanation of the shoulder condition and the events of February 3, 2010.<sup>16</sup>

Reports from Dr. Idler relating to appellant’s prior back injury are not relevant to the instant case and are therefore insufficient to establish error.<sup>17</sup> The March 5, 2010 report did not address the issue of causal relationship and is insufficient to establish clear evidence of error.<sup>18</sup> On April 9, 2010 Dr. Idler opined that appellant’s right shoulder injury was aggravated by her 2009 back injury. This unrationalized report is of insufficient probative value to shift the weight of the evidence in favor of her or to raise a substantial question as to the correctness of OWCP’s decision.<sup>19</sup> Similarly, reports from physicians’ assistants and physical therapists, MRI scan reports and operative reports, which do not contain any opinion on the issue of causal relationship, are of limited probative value and are insufficient to establish clear evidence of error.<sup>20</sup>

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<sup>14</sup> *D.E.*, 59 ECAB 438 (2008).

<sup>15</sup> *See A.F.*, 59 ECAB 714 (2008).

<sup>16</sup> Medical conclusions unsupported by rationale are of little probative value. *Willa M. Frazier*, 55 ECAB 379 (2004). A mere checkmark or affirmative notation in response to a form question on causal relationship is not sufficient to establish a claim. *See Gary J. Watling*, 52 ECAB 278 (2001).

<sup>17</sup> *See Dean D. Beets*, *supra* note 8.

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

<sup>19</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

<sup>20</sup> Medical evidence which does not offer any opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship. *Michael E. Smith*, 50 ECAB 313 (1999).

On appeal, appellant's representative requested oral argument before the Board. The Board, within its discretion, denies the request for reconsideration as this matter can be adequately addressed from the record and oral argument would serve no useful purpose.<sup>21</sup>

**CONCLUSION**

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely and failed to establish clear evidence of error such that review of the merits was warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 2012  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>21</sup> See 20 C.F.R. § 501.5.