



## **FACTUAL HISTORY**

On December 25, 1994 appellant, then a 33-year-old city letter carrier, filed an occupational disease claim alleging that his right arm condition was causally related to factors of his federal employment.<sup>3</sup>

In a letter dated February 10, 1995, OWCP requested additional factual and medical evidence in support of appellant's occupational disease claim. Appellant submitted a statement together with medical evidence from Dr. Louis Horne, an orthopedic surgeon, and Dr. Donald Ross, a chiropractor.

By decision dated June 20, 1995, OWCP denied appellant's claim finding that he failed to submit sufficient medical evidence to establish a causal relationship between his diagnosed condition and his work duties.

Appellant requested a hearing, which was held on January 23, 1996. He submitted additional medical evidence. By decision dated May 29, 1996, an OWCP hearing representative affirmed the June 20, 1995 decision.<sup>4</sup>

In an undated letter received September 4, 2012, appellant requested reconsideration. He stated that his condition worsened and that he underwent right-sided ulnar nerve transposition surgery. Appellant stated that his physicians told him that repetitive motion from 1994 to 1998 caused nerve damage, loss of range of motion and pain. He could no longer work and had medically retired in 2004.

In a November 30, 1995 report, Dr. F. Calame Sammons, a Board-certified orthopedic surgeon, noted that appellant sustained a fracture of the right radial head and subsequently developed osteoarthritis of the elbow with chronic medial epicondylitis, cubital tunnel syndrome and deformity of the radial head. Because of the problems related to the elbow, appellant was having progressive problems using his arm, including pain and decreased range of motion. Dr. Sammons opined that appellant could not continue to do the pulling and repetitive lifting and carrying with the right upper extremity at work and should permanently be taken off those activities.

By report dated August 27, 1998, Dr. Joseph W. Clark, a Board-certified orthopedic surgeon, reported that appellant worked as a postal letter carrier. Appellant stated that he had surgery on the right elbow because of "little leaguer's elbow problems" about 22 years prior. Since that time, he continued to have pain about the elbow. Dr. Clark reported an injury at appellant's job about four years prior with pain about his elbow. He listed an impression of mild ulnar neuropathy and arthritic changes about the elbow. Appellant underwent arthroscopic surgery on October 30, 1998.

---

<sup>3</sup> Under claim number xxxxxx947, OWCP approved a claim for a June 7, 1994 injury when appellant slipped and fell, striking his right arm. Appellant missed a couple of days of work as a result of the injury, but continued to seek medical treatment.

<sup>4</sup> Appeal rights attached to the May 29, 1996 decision notified appellant of his right to request reconsideration before OWCP within one year of the date of the decision.

In progress notes dated November 4, 1998 to February 25, 1999, Dr. Clark addressed appellant's status post arthroscopy for degenerative joint disease of the right elbow. He stated that an x-ray of appellant's wrist showed early arthritis about the distal radial ulnar joint. The combination of arthritis of the elbow and distal radial ulnar arthritis in conjunction with repetitive pronation, supination flexion and extension in appellant's work sorting mail exacerbated his condition. Dr. Clark opined that appellant probably could not function with these activities.

In an October 18, 2002 report, Dr. Clark advised that appellant had post-traumatic arthritis of the right elbow and developed secondary ulnar nerve palsy. Appellant had previous multiple surgical procedures for his elbow. Dr. Clark opined that appellant's work as a postman aggravated his condition. He stated that repetitive flexion and extension of an arthritic joint certainly could lead to appellant's pain and symptoms.

In a May 3, 2004 report, Dr. Clark reiterated that appellant had chronic problems with his right elbow with multiple surgical procedures. He opined that appellant was not able to perform the duties of mail carrier efficiently due to degenerative arthritis of the elbow with subsequent stiffness and chronic ulnar neuropathy. Dr. Clark opined that the repetitive nature of his job (repetitive flexion and extension of the elbow) probably exacerbated his ulnar neuropathy. Appellant also submitted copies of June 22, 1994 and September 4, 1998 electromyogram (EMG) reports and the October 30, 1998 surgical report.

By decision dated December 3, 2012, OWCP denied appellant's request for reconsideration of the merits, finding that his request was untimely filed and failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>5</sup> OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.<sup>6</sup> In *Leon D. Faidley, Jr.*,<sup>7</sup> the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant's case.

---

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> 41 ECAB 104, 111 (1989).

If the request for reconsideration is made after more than one year has elapsed from the issuance of a merit decision, the claimant may only obtain a merit review if the application for review demonstrates clear evidence of error on the part of OWCP.<sup>8</sup>

To establish clear evidence of error, a claimant 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 manifest on its face that OWCP 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 fundamental question as to the correctness of OWCP's decision.<sup>14</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.<sup>15</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>16</sup> A right to reconsideration within one year also accompanies any subsequent merit decision.<sup>17</sup> Appellant's undated reconsideration request was received on September 4, 2012, more than one year following the most recent merit decision of May 29, 1996. It was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>18</sup>

---

<sup>8</sup> 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<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 8.

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

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

<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 7.

<sup>15</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

<sup>16</sup> 20 C.F.R. § 10.607(a).

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

<sup>18</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

The Board finds that OWCP did not abuse its discretion by declining to reopen appellant's claim for further reconsideration on the merits

In 1996, OWCP denied appellant's claim on the grounds that he failed to submit sufficient medical evidence to establish the causal relationship between his right elbow condition and his employment duties. In support of his request for reconsideration, appellant submitted several medical reports addressing his right elbow condition. The Board has independently reviewed these medical reports and finds that the evidence submitted does not establish clear evidence of error by OWCP in denying his claim.

In his October 18, 2002 and May 3, 2004 reports, Dr. Clark opined that appellant's work as a postman aggravated his post-traumatic arthritic right elbow for which he developed ulnar nerve palsy. He stated generally that repetitive flexion and extension of an arthritic joint could lead to appellant's pain and symptoms. This opinion is equivocal in nature. Dr. Clark opined that the repetitive flexion and extension of the elbow in appellant's job probably exacerbated his ulnar neuropathy. This opinion is similarly speculative on causal relationship and is insufficient to establish that OWCP erred in its denial of his claim.<sup>19</sup> The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.<sup>20</sup> While the reports of appellant's physician are generally supportive of his claim, they do not establish clear evidence of error on the part of OWCP in denying his claim.<sup>21</sup> The reports of Dr. Clark do not raise a substantial question as to the correctness of OWCP's May 29, 1996 merit decision or demonstrate clear evidence of error.<sup>22</sup>

The medical evidence of record also includes Dr. Sammons' report, surgical reports, and diagnostic studies. They do not provide an opinion on causal relationship. This evidence is not sufficient to shift the weight of the evidence in favor of the claimant or raise a fundamental question as to the correctness of OWCP's decision in denying his claim.

Appellant's contentions on appeal and before OWCP do not establish clear evidence of error.<sup>23</sup>

---

<sup>19</sup> See *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (March 2011).

<sup>21</sup> *V.W.*, Docket No. 12-1901 (issued March 5, 2013).

<sup>22</sup> Docket No. 12-90 (issued July 2, 2012).

<sup>23</sup> Appellant submitted additional evidence with his appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration.

**ORDER**

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

Issued: August 5, 2013  
Washington, DC

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

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

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