



## **FACTUAL HISTORY**

On October 20, 2009 appellant, a 56-year-old automation clerk, filed a claim alleging a low back condition causally related to employment factors. OWCP accepted the claim for a herniated disc at L4-5. It paid compensation for temporary total disability.

On January 27, 2010 appellant filed a Form CA-2a claim alleging a recurrence of disability on January 16, 2010 causally related to her accepted low back condition. The employing establishment indicated on the form that she had returned to full duty on November 30, 2009.

In an October 16, 2009 report, Dr. Jarob N. Mushaweh, a specialist in neurosurgery, stated that appellant had complaints of low back pain which radiated to her groin and lower extremities with numbness in her left foot. Appellant first experienced pain approximately three years prior while working on a machine at work. Dr. Mushaweh advised that appellant was able to return to work without restrictions approximately six months later and remained symptom free until August 2009. The pain became significantly worse with associated burning along the posterior of her legs. Dr. Mushaweh noted that a magnetic resonance imaging (MRI) scan of the lumbar spine showed a large herniated disc centrally at L4-5, slightly more eccentric towards the left side, with degenerative changes at the L4-5 and L5-S1 levels. On examination, appellant was overweight and appeared to be in a deconditioned state. She walked with a limp, favoring the left side and had difficulty with heel walking because of anterior tibial weakness on the left. Dr. Mushaweh found that her back dynamics were limited, both in flexion and extension, with increasing lumbar pain, as well as a slight sciatica on the left side. He opined that appellant's condition was brought on by her employment with the employing establishment. Dr. Mushaweh recommended surgical intervention, given the size of the herniation and the neurological symptoms. Appellant was adamant about not having surgery and preferred a course of physical therapy. She expressed a desire to return to work in a limited-duty capacity.

In progress reports dated November 19, 2009 and February 17, 2010, Dr. Mushaweh reiterated the previous findings and conclusions. A January 4, 2010 report from Melissa M. Redlinger, a physician's assistant, noted that appellant had been working full duty since November 20, 2009. Ms. Redlinger noted, however, that appellant had been doing a different job throwing letters and, as of November 16, 2010, was going to be reassigned back to job as a machinist. She advised that appellant was very concerned as the job required repetitive lifting, turning and bending. Ms. Redlinger noted that appellant's pain in her lower back had not changed significantly since the previous year.

In a November 19, 2009 report, Dr. Mushaweh noted that appellant walked with a subtle limp which was exacerbated by having her attempting to walk on her heels. He advised that she had left-sided sciatica. Dr. Mushaweh stated that, given the weakness in her left foot, surgical management was more prudent to prevent further neurological deficits or total foot drop. Appellant, however, was still adamant about not having surgery and expressed a desire to return to work. Dr. Mushaweh extended her physical therapy program for a few more weeks.

On February 17, 2010 Dr. Mushaweh stated that appellant continued to walk with a limp but that the remainder of her examination was unchanged. Appellant had a large herniated disc

with cauda equina compression, which concerned him. Dr. Mushaweh reiterated that surgery would be the most prudent course of action. Appellant was cleared to return to work at modified duty. She had the ability to do light duty and should not be subjected to repetitive bending or heavy lifting.

By decision dated March 23, 2010, OWCP denied appellant's recurrence of disability claim. It found that she failed to submit medical evidence sufficient to establish that her disability as of January 16, 2010 was causally related to the October 20, 2009 injury.

On April 23, 2010 appellant requested an oral hearing.

By decision dated May 11, 2010, OWCP denied appellant's request for a hearing on the grounds of untimeliness.

By letter dated May 18, 2012, received by OWCP on May 22, 2012, appellant's attorney requested reconsideration. Appellant resubmitted the October 16 and November 19, 2009 and February 17, 2010 reports of Dr. Mushaweh and the January 4, 2010 report from Ms. Redlinger. She did not submit any new medical or factual evidence.

By decision dated October 11, 2012, OWCP denied appellant's request for reconsideration without merit review, finding that the request was untimely and failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<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 vests OWCP with discretionary authority to determine whether it will review an award for or against compensation and 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, it will not review a

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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) advances 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).

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 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 that OWCP must 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 OWCP will reopen an appellant's case for merit review, notwithstanding the one-year filing 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 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 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 OWCP abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

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<sup>5</sup> 20 C.F.R. § 10.607(b).

<sup>6</sup> See cases cited *supra* note 3.

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

<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 3.

<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 3.

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

## 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 March 23, 2010. OWCP received appellant's request for reconsideration on May 22, 2012; thus, the request was outside the one-year time limit.<sup>16</sup>

On appeal, appellant's attorney contends that OWCP committed error by failing to understand the circumstances surrounding appellant's claimed recurrence of disability. Following her period of total disability due to the accepted low back condition she returned to work in November 2009 doing manual work which involved throwing letters. The postmaster subsequently withdrew this position because the employing establishment no longer had work available to meet her physical restrictions. In December 2009, appellant was given a position at the Stamford Post Office which required heavy lifting, bending and moving heavy equipment, duties she was not able to perform due to her accepted work conditions. On January 15, 2010 she reported to the worksite for four hours of training; however, she was sent home because her stated medical restrictions would not allow her to perform the duties of this job. Counsel contends that the withdrawal of the Waterbury position, a job within her physical restrictions which she was capable of performing, constituted a recurrence of total disability. He contends that this argument is supported by the medical reports from Dr. Mushaweh, appellant's treating physician.

The Board finds that counsel's arguments do not establish 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. The issue in this case is a medical one; *i.e.*, whether appellant sustained a recurrence of disability causally related to her accepted conditions as of January 16, 2010. Appellant returned to full duty on November 30, 2009 and filed a claim for recurrence on January 27, 2010. Her attorney repeated arguments previously raised before OWCP and considered in its March 23, 2010 merit decision. It found that the medical reports from Dr. Mushaweh were not sufficient to establish her claim for a recurrence of disability. The Board further notes that the January 4, 2010 report from Ms. Redlinger, the physician's assistant, does not constitute medical evidence under section 8101(2). Healthcare providers such as a nurse, acupuncturist, physicians' assistant or physical therapist are not considered a "physician" as defined under FECA. Their reports do not constitute medical evidence on the issue of disability or causal relationship.<sup>17</sup> The evidence submitted by appellant is not sufficient to shift the weight of the evidence in favor of her and raise a substantial question as to the correctness of OWCP's decision. 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.

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<sup>16</sup> See Federal (FECA) Procedure Manual, Part 2 -- Reconsiderations, *Time Limitations*, Chapter 2.1602(e)(6) (August 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

<sup>17</sup> 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

**CONCLUSION**

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her reconsideration request received May 22, 2012. Inasmuch as her reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on October 11, 2012.

**ORDER**

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

Issued: August 14, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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