

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

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**M.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Calumet City, IL, Employer**

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**Docket No. 12-1713  
Issued: February 12, 2013**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 13, 2012 appellant, through her attorney, filed a timely appeal of a July 25, 2012 decision of the Office of Workers' Compensation Programs (OWCP) which denied her request for reconsideration without conducting a merit review. As more than 180 days elapsed from the last merit decision of June 29, 2009 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

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

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> In an April 13, 2010 decision, the Board affirmed the June 29, 2009 OWCP decision finding that the medical evidence did not address how the February 6, 2009 pulling incident caused or aggravated a left shoulder condition. The Board found that the medical evidence was of limited probative value and insufficient to establish that the accepted incident caused or aggravated the claimed injury.<sup>3</sup> The facts and history contained in the prior appeal are incorporated by reference.

On September 22, 2011 appellant's attorney requested a schedule award. In a December 12, 2011 letter, OWCP advised counsel that appellant's traumatic injury claim was denied on June 29, 2009 and, therefore, there was no entitlement to a schedule award.

On April 18, 2012 counsel requested reconsideration of the June 29, 2009 OWCP decision. In support of the request, appellant submitted evidence from Dr. John D. Sonnenberg, a Board-certified orthopedic surgeon. In an October 6, 2010 report, Dr. Sonnenberg noted that she had left shoulder pain since February 2009 and reported a history that she injured herself while she was at work pulling equipment. He examined appellant and noted that a magnetic resonance imaging (MRI) scan from May 2009 revealed a partial tear of the supraspinatus and infraspinatus tendon with no evidence of a full thickness tear.<sup>4</sup> On November 17, 2010 and January 26, 2011 Dr. Sonnenberg diagnosed a left shoulder rotator cuff tear. He indicated that appellant was disabled from this injury and continued to have pain. Dr. Sonnenberg recommended additional treatment to include cortisone injections and physical therapy.

In a February 23, 2011 report, Dr. Sonnenberg noted appellant's history of injury and treatment. He examined her and noted that she had tenderness over the anterior aspect of her left shoulder, a positive impingement sign, a positive Hawkins' test, a positive adduction test and a positive empty can test. Resisted rotator cuff exercises were painful. Appellant had a positive Speed's test, a positive O'Brien's test and full passive range of motion of her left shoulder. Dr. Sonnenberg noted that actively she was somewhat restricted secondary to pain. Spurling's test of the neck was negative and she had no neurological loss in the upper extremity. Dr. Sonnenberg advised that appellant continued to have weakness of her left shoulder girdle and left shoulder. He opined that he believed that she had a "work-related injury to her left shoulder which happened in February 2009 when she was doing lifting activities." Dr. Sonnenberg diagnosed a partial thickness tear of the left rotator cuff which had not resolved with conservative measures. He indicated that appellant continued to perform light duty four-hour days.

In a March 23, 2011 report, Dr. Sonnenberg advised that appellant was complaining of pain around the periscapular musculature and radiating down her arm. He examined her and

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<sup>2</sup> Docket No. 09-1867 (issued April 13, 2010).

<sup>3</sup> The Board issued an order denying the petition for reconsideration on September 9, 2010.

<sup>4</sup> A May 5, 2009 left shoulder MRI scan from Dr. David S. Lewin, a Board-certified diagnostic radiologist, noted findings that included tendinopathy of the distal supraspinatus tendon with localized partial tear at the distal tendon insertion and a partial tear of the distal infraspinatus tendon.

noted a positive Spurling's test at the neck and pain over the trapezius muscle and tenderness over the periscapular muscle on the left side. Left shoulder range of motion was normal. Dr. Sonnenberg advised that appellant had pain on the empty can test and weakness over the rotator cuff. External rotation resistance was very strong and appellant had pain radiating down the C6-7 distribution of her arm with numbness in the first dorsal web space. An x-ray of the cervical spine revealed degenerative changes at the C4-5 level. Dr. Sonnenberg advised that this could account for radicular pain down her left upper extremity. He noted that appellant was exhibiting signs of significant cervical radiculitis. OWCP also received evidence from a physical therapist.

In a decision dated July 25, 2012, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>5</sup> This discretionary authority, however, is subject to certain restrictions. 20 C.F.R. § 10.607(a) provides that a request for reconsideration must be filed within one year of the date of the OWCP decision for which review is sought.<sup>6</sup> The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup> The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.<sup>8</sup>

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>10</sup> is positive, precise and explicit and manifests on its face

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<sup>5</sup> See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>6</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

<sup>7</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>9</sup> *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

<sup>10</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

that OWCP committed an error.<sup>11</sup> The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>12</sup>

### ANALYSIS

In its July 25, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. The most recent merit decision is the Board's April 13, 2010 decision. Appellant's April 18, 2012 letter requesting reconsideration was submitted more than one year after the April 13, 2010 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening her case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by her in support of her application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review is insufficient to establish clear evidence of error.

OWCP received several reports and treatment notes from Dr. Sonnenberg. In an October 6, 2010 report, Dr. Sonnenberg noted appellant's history of injury and indicated that she injured herself while she was at work pulling equipment. He diagnosed a partial tear of the supraspinatus and infraspinatus tendon with no evidence of full thickness. In the November 17, 2010 and January 26, 2011 reports, Dr. Sonnenberg noted appellant's status and diagnoses. On February 23, 2011 he advised that she continued symptoms and opined that he believed that she had a "work-related injury to her left shoulder which happened in February 2009 when she was doing lifting activities." In a March 23, 2011 report, Dr. Sonnenberg asserted that degenerative changes at C4-5 could account for radicular pain down appellant's left upper extremity. The Board finds that his reports are insufficient to raise a substantial question as to the correctness of OWCP's determination in its June 29, 2009 decision. OWCP accepted the February 6, 2009 incident but denied the claim based on the insufficiency of medical evidence. The Board has held that the term "clear evidence of error" is intended to represent a difficult standard. A well-rationalized medical report that, if timely filed, could have created a conflict in medical

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

<sup>12</sup> See *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

evidence, is insufficient to establish clear evidence of error.<sup>13</sup> Dr. Sonnenberg first treated appellant a year and a half after the incident at work. He listed a general history of pulling equipment in February 2009 without specifying the date of the incident. The May 5, 2009 MRI scan of the left shoulder does not establish clear evidence of error as it does not address causal relation or raise a substantial question as to the correctness of OWCP's determination in its June 29, 2009 decision. Evidence from a physical therapist is also of no probative medical value as such evidence does not constitute medical evidence under section 8101(2).<sup>14</sup>

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in its June 29, 2009 decision. Therefore, the Board finds that appellant has not presented clear evidence of error.

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

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<sup>13</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>14</sup> A physical therapist is not a physician within the meaning of section 8101(2) and cannot render a medical opinion. *Vickey C. Randall*, 51 ECAB 357 (2000). *See* 5 U.S.C. § 8101(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 25, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 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