



## **FACTUAL HISTORY**

The case has been before the Board on prior appeals. Appellant filed a traumatic injury claim alleging that he sustained shoulder, clavicle strain and right rotator cuff injury on August 9, 2000 when a coworker tapped him on the shoulder, causing him to “go to his knees.”<sup>2</sup> By merit decisions dated November 22, 2000 and April 22, 2002, OWCP denied the claim on the grounds that the medical evidence did not establish that the diagnosed conditions were causally related to the alleged incident.

By decision dated December 21, 2005, the Board affirmed an August 27, 2004 OWCP decision finding that appellant’s request for reconsideration was untimely filed and failed to show clear evidence of error.<sup>3</sup> In a decision dated August 17, 2007, the Board dismissed his appeal as there was no final decision issued within one year of the filing of the appeal.<sup>4</sup> By decision dated June 20, 2008, the Board affirmed an October 12, 2007 OWCP decision, finding that appellant’s application for reconsideration was untimely and showed no clear evidence of error.<sup>5</sup> In a decision dated December 17, 2009, the Board affirmed a February 13, 2009 OWCP decision, finding his application for reconsideration as untimely and failed to show clear evidence of error.<sup>6</sup> In a decision dated August 16, 2011, the Board affirmed an August 3, 2010 OWCP decision, finding appellant’s application for reconsideration was untimely and failed to show clear evidence of error.<sup>7</sup> The history of the case as contained in the Board’s prior decisions and orders is incorporated herein by reference.

In a letter dated March 28, 2012 and received by OWCP on April 3, 2012, appellant requested reconsideration. Appellant reiterated his argument that there was no new injury on August 9, 2000 and that OWCP failed to consider evidence. He submitted an employing establishment “authorization for medical report” dated May 23, 2000.

Appellant did not submit other evidence with the application for reconsideration. The Board notes that OWCP’s file for the September 18, 1991 claim contains reports from Dr. Andrew Kant, an orthopedic surgeon, regarding neck, shoulder and elbow pain. Dr. Kant did not discuss an August 9, 2000 injury.

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<sup>2</sup> The record indicates that appellant also had a May 3, 2000 claim accepted for right shoulder strain and a September 18, 1991 claim accepted for left elbow lateral epicondylitis, left shoulder adhesive capsulitis, left brachial plexus lesions, left other tenosynovitis hand/wrist, right sprain/strain shoulder and upper arm, right acromioclavicular sprain/strain. The September 18, 1991 claim has been designated as a master file for both the May 3, 2000 claim and the August 9, 2000 claim on appeal.

<sup>3</sup> Docket No. 04-2283 (issued December 21, 2005).

<sup>4</sup> Docket No. 07-978 (issued August 17, 2007).

<sup>5</sup> Docket No. 08-271 (issued June 20, 2008).

<sup>6</sup> Docket No. 09-1027 (issued December 17, 2009).

<sup>7</sup> Docket No. 10-2378 (issued August 16, 2011). By order dated February 23, 2012, the Board denied appellant’s petition for reconsideration.

By decision dated June 21, 2012, OWCP found the application for reconsideration untimely. It denied merit review on the ground that appellant's application for reconsideration did not show clear evidence of error.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act (FECA) provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>8</sup> The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>9</sup>

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.<sup>10</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>11</sup> It, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>12</sup> As one such limitation, 20 C.F.R. § 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. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>13</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> The Board makes an independent

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<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.605 (1999).

<sup>10</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>12</sup> 5 U.S.C. §§ 8101-8193.

<sup>13</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>14</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>15</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>16</sup> *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>17</sup>

### ANALYSIS

The case has been before the Board on several prior appeals. The last decision on the merits of the claim for an injury on August 9, 2000 was dated April 22, 2002. The application for reconsideration was dated March 28, 2012, which is more than one year after April 22, 2002 and is properly found to be untimely.

Appellant argued that there was clear evidence of error in the April 22, 2002 decision, stating that there was no new injury on August 9, 2000 and he sustained a recurrence of disability. The Board addressed this argument in both the December 21, 2005 and August 16, 2011 decisions, finding that if there is a new employment incident then the claim is properly considered a claim for a new injury. The March 28, 2012 application for reconsideration also reiterated appellant's argument that there is relevant evidence not previously considered. But appellant did not identify any specific relevant evidence that establishes clear evidence of error. He referred to an August 15, 2000 attending physician's report from, general practitioner, Dr. John Trowbridge as "not in the record." A review of the record indicates that this report was before OWCP at the time of the April 22, 2002 decision. Dr. Trowbridge provided diagnoses that included acute rotator cuff sprain right shoulder and checked a box "yes" that the diagnoses were causally related to the employment incident. The checking of a box "yes" is of little probative value in establishing causal relationship between a diagnosed condition and an employment incident.<sup>18</sup>

The evidence necessary to establish clear evidence of error, must be sufficient 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. Appellant enumerated the evidence of record but did not identify any evidence that was of such probative value that it shifted the weight of the evidence in favor of appellant. The "authorization for medical report" form submitted is a form authorizing any medical provider to furnish information to the employing establishment. It does not provide any probative medical evidence on the issue presented.

On appeal, appellant's representative again asserts that there was clear evidence of error by OWCP. She reviews the history of the case and requests that the Board restore appellant's benefits. The only issue in the case is whether appellant has established clear evidence of error in the denial of the claim for injury on August 9, 2000. For the reasons noted above as well as those discussed in the Board's prior decisions, the record does not establish clear evidence of error in this case.

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<sup>17</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>18</sup> *See Barbara J. Williams*, 40 ECAB 649, 656 (1989).

**CONCLUSION**

The Board finds that OWCP properly denied merit review on the grounds the application for reconsideration was untimely and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 21, 2012 is affirmed.

Issued: February 5, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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