



## **FACTUAL HISTORY**

On July 27, 2009 appellant, then a 39-year-old rural carrier, filed a Form CA-1, notice of traumatic injury. On July 18, 2009, while delivering mail on her route, her motor vehicle struck a deer and she injured her left shoulder, elbow and back. OWCP accepted appellant's claim for neck sprain and right shoulder and left upper arm sprain. Appellant stopped work on July 18, 2009 and returned to full duty on July 28, 2009.

From July 23 to August 17, 2009 appellant was treated by Dr. Gregory T. Koo, a Board-certified family practitioner, for a neck and shoulder strain sustained in an automobile accident. In reports dated December 8, 2009 and February 3, 2010, Dr. Koo advised that she developed fibromyalgia as a result of the July 18, 2009 work injury and opined that her condition was directly related to the automobile accident as she was asymptomatic prior to the accident. In return to work slips dated January 25 to February 10, 2010, he noted that appellant was under his care and could return to work on March 11, 2010.

On February 13, 2010 appellant filed a Form CA-7, claim for compensation for total disability for the period November 17 to December 18, 2009 and from January 25 to March 11, 2010.

By letter dated March 1, 2010, OWCP requested that appellant submit medical evidence establishing total disability from work for the periods claimed.

Appellant submitted reports dated July 27, 2009 to March 8, 2010, from Dr. Koo who treated her for shoulder and neck pain, fibromyalgia and depression. On February 24, 2010 Dr. Koo noted that she sustained injuries in a work-related accident on July 18, 2009 and developed fibromyalgia. He noted that appellant returned to work on December 21, 2009 and worked until January 25, 2010 when she became disabled due to severe pain from her injuries and fibromyalgia. Dr. Koo was unsure when appellant would return to work. A computerized tomography (CT) scan of the head dated October 20, 2009 revealed no abnormalities. A November 27, 2009 magnetic resonance imaging (MRI) scan of the left shoulder revealed tendinopathy of the supraspinatus tendon, degenerative changes and bursitis.

In a decision dated April 5, 2010, OWCP denied appellant's claim for total disability from November 17 to December 18, 2009 or January 25 to March 11, 2010. It found that the evidence did not establish that her total disability was due to her accepted work injury.

On May 5, 2010 appellant requested reconsideration. She submitted return to work slips from Dr. Koo dated July 23, 2009 to January 28, 2010. Dr. Koo noted that appellant was under his care and could return to work on February 11, 2010. Appellant was treated by Dr. Koo on May 3, 2010. Dr. Koo related that she was in a work-related automobile accident and had classic symptoms of neck strain and shoulder pain. He noted that during the course of her illness appellant developed fibromyalgia, mood disturbance, sleep disorder, extreme fatigue and headaches. Dr. Koo referenced literature on fibromyalgia. He advised that appellant had no symptoms of fibromyalgia prior to her accident and opined that the fibromyalgia was directly related to her accident.

In a decision dated August 26, 2010, OWCP denied modification of the April 5, 2010 decision.

On September 25, 2012 appellant, through her attorney, submitted a statement asserting that on May 10, 2010 her physician diagnosed fibromyalgia and found that the condition was causally related to her employment; however, OWCP failed to further develop the issue. She contended that OWCP had an obligation to further develop whether she sustained fibromyalgia caused or aggravated by her work injury.<sup>2</sup>

On November 27, 2012 appellant, through her attorney, requested reconsideration and further asserted that OWCP made clear error by failing to develop the evidence of fibromyalgia and improperly denied compensation without evaluating the evidence. Appellant requested that OWCP's decision be vacated based on Dr. Koo's May 3, 2010 report, previously of record. In reports dated June 15 to July 8, 2010, Dr. Koo noted appellant's treatment for neck, shoulder and knee pain and fibromyalgia. He continued to treat appellant from August 30 to December 28, 2010 for chronic shoulder, neck and back pain and fibromyalgia associated with a motor vehicle accident. Dr. Koo noted tenderness of the right and left shoulder and cervical, thoracic and lumbar spine. He diagnosed shoulder strain, fibromyalgia, neck and back pain. In other reports dated February 15 to November 22, 2011, Dr. Koo noted appellant's complaints of total body pain including the back, neck and shoulder pain. He noted positive findings upon examination and diagnosed shoulder strain, neck and back pain, fibromyalgia and depression.

Appellant was also treated by Dr. John B. Kelly, a Board-certified family practitioner, from December 16, 2010 to March 24, 2011, for injuries sustained in the motor vehicle accident of July 18, 2009. Dr. Kelly noted that appellant was diagnosed with neck and left arm pain. He noted that, on November 17, 2009, during an acupuncture treatment, she was given a cortisone injection and experienced severe pain in all her joints, and upper and lower extremities. Appellant reported that her symptoms spread over her entire body diffusely into the arms, legs and trunk. Dr. Kelly listed findings upon physical examination of intact muscle strength and sensory function, tenderness over the neck, back and arms and no joint swelling. He opined that appellant very likely had fibromyalgia syndrome which could be precipitated by an injury. Dr. Kelly diagnosed myofascial pain, insomnia, cognitive symptoms, depression and anxiety.

By decision dated December 12, 2012, OWCP denied appellant's request for reconsideration as it was untimely filed and did not establish clear evidence of error.

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<sup>2</sup> The Board notes that as OWCP has not issued a final decision denying appellant's claim of fibromyalgia, it is not an issue on the present appeal. *See* 20 C.F.R. § 501.2(c).

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“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, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>3</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the date of that decision.<sup>4</sup> However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>5</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 *prima facie* 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>6</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>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>9</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>10</sup>

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>5</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>6</sup> *Annie L. Billingsley*, *supra* note 4.

<sup>7</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

## ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>11</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues. Appellant's November 27, 2012 request for reconsideration was submitted more than one year after the most recent merit decision of August 26, 2010 it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>12</sup>

The Board finds that appellant has not met her burden of proof. Appellant submitted a September 25, 2012 letter asserting that on May 10, 2010 her physician diagnosed fibromyalgia and noted that it was causally related to her employment; however, OWCP failed to further develop the issue. Similarly, in a November 27, 2012 reconsideration request, appellant asserted that OWCP made clear error of law by failing to consider the May 3, 2010 report from Dr. Koo and further develop the issue of fibromyalgia and requested that the decision be vacated based on this new evidence. While appellant addressed her disagreement with OWCP's decision to deny her claim for a recurrence of disability, her allegations do not raise a substantial question as to the correctness of OWCP's decision. OWCP properly found that appellant's statements of September 25 and November 27, 2012 did not establish clear evidence of error.

The Board notes that the underlying issue as to appellant's disability for the claimed periods is medical in nature. On reconsideration, appellant resubmitted a May 3, 2010 report from Dr. Koo. OWCP had previously considered this evidence and appellant, in submitting this document, did not explain how this evidence was positive, precise and explicit in manifesting on its face that it committed an error in denying her claim for compensation. The resubmission of this evidence is not sufficient to raise a substantial question as to the correctness of OWCP's decision.

Following OWCP's August 26, 2010 decision and on reconsideration appellant submitted additional medical evidence. Appellant submitted reports dated June 15 to July 8, 2010 from Dr. Koo who treated appellant from August 30 to December 28, 2010 for chronic shoulder, neck and back pain and fibromyalgia associated with a motor vehicle accident. He diagnosed shoulder strain, fibromyalgia, neck and back pain. Similarly in reports dated February 15 to November 22, 2011, Dr. Koo noted appellant's complaints of total body pain including the back, neck and shoulder pain and diagnosed shoulder strain, neck and back pain, fibromyalgia and depression. Even though he noted that appellant had symptoms of her neck, left shoulder and upper arm injuries sustained in the workplace accident, he did not specifically explain the reasons why appellant had any employment-related disability from November 17 to December 18, 2009 and January 25 to March 11, 2010 causally related to her accepted employment conditions. These reports are not rationalized as Dr. Koo does not explain the reasons why any particular period of total disability was caused by the accepted neck sprain and

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<sup>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

left shoulder and left upper arm sprain. Thus, these reports are insufficient to discharge appellant's burden of proof. Additionally, Dr. Koo attributes appellant's disability to fibromyalgia and depression which are conditions not accepted as work related.

On reconsideration, appellant relied on Dr. Koo's May 3, 2010 report as establishing clear evidence of error. However, as noted above, this evidence was previously considered by OWCP and found deficient and appellant did not explain how on resubmission this considered evidence was positive, precise and explicit in manifesting on its face that OWCP erred by denying her claim for compensation beginning November 17, 2009. Clear evidence of error is intended to represent a difficult standard. The submission of 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.<sup>13</sup>

Appellant submitted reports from Dr. Kelly from December 16, 2010 to March 24, 2011, who treated her for injuries sustained in a work-related motor vehicle accident on July 18, 2009. Dr. Kelly noted that during an acupuncture treatment she was given a cortisone injection and experienced severe pain in all her joints, upper and lower extremities. He diagnosed myofascial pain, insomnia, cognitive symptoms, depression and anxiety and opined that appellant very likely had fibromyalgia syndrome. No other medical evidence submitted by appellant raises a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that appellant has not established clear evidence of error by OWCP in its December 12, 2012 decision.

### **CONCLUSION**

The Board finds that appellant's request for reconsideration dated November 27, 2012 was untimely filed and did not demonstrate clear evidence of error.

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<sup>13</sup> *D.G.*, 59 ECAB 455 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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