



2013 which contained her request. The request was deposited in the postal mail system. Appellant's representative noted that the record does not contain the envelope containing the reconsideration request.

### **FACTUAL HISTORY**

This case has previously been before the Board. In a May 2, 2005 decision,<sup>2</sup> the Board affirmed OWCP's October 30, 2003 and June 10, 2004 decisions, denying appellant's claim for compensation for total disability commencing August 26, 2003 causally related to her accepted August 25, 2003 employment injury. In a May 3, 2010 decision,<sup>3</sup> the Board affirmed OWCP decisions dated December 10, 2008 and April 9, 2009, denying her claim for total disability compensation for the period in question and request for further merit review. In a July 29, 2013 decision,<sup>4</sup> the Board affirmed OWCP's January 22, 2013 decision, denying appellant's request for an oral hearing before an OWCP hearing representative regarding the August 20, 2012 denial of her claim for compensation for total disability commencing August 26, 2003 as untimely filed. The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.<sup>5</sup> The facts relevant to the current appeal are set forth.

On November 11, 2013 appellant, through her representative, requested reconsideration of the August 20, 2012 merit decision and submitted additional evidence.

Progress notes from J.A. Morgan, a licensed counselor and providers whose signatures are illegible addressed the treatment of appellant's chronic low back and knee symptoms from March 1, 2013 to March 24, 2014. It was noted that her depression and anxiety also prevented her return to work.

In progress notes dated July 24, 2013 to February 26, 2014, Dr. Orlando P. Peccora, a psychiatrist, noted appellant's symptoms and provided examination findings. He diagnosed lumbar disc protrusion and sprain and prolonged depression.

In reports dated August 5 and December 23, 2013, Dr. Peccora reviewed a history of the August 25, 2003 employment injuries and appellant's medical treatment. He diagnosed pain disorder associated with psychological factors and general medical condition on Axis 1, major depressive disorder on Axis 2, lumbar disc displacement on Axis 4 and a global assessment functioning score of 40 on Axis 5. Dr. Peccora found no diagnosis on Axis 2. He advised that appellant was temporarily totally disabled as a direct result of her August 25, 2003 work injury. Appellant could not function in a work environment in her present condition. Due to the job injury, she had a lumbar disc displacement and lower back strain to such a degree that she

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<sup>2</sup> Docket No. 04-2235 (issued May 2, 2005).

<sup>3</sup> Docket No. 09-1525 (issued May 3, 2010).

<sup>4</sup> Docket No. 13-1100 (issued July 29, 2013).

<sup>5</sup> OWCP accepted that on August 25, 2003 appellant, then a 31-year-old transportation security screener, sustained lumbar strain, prolonged depressive reaction and displacement of lumbar intervertebral disc with myelopathy while in the performance of duty.

required assistance when getting out of bed or rising from a sitting position. Further, appellant could not lift more than three to four pounds or walk more than one-half a city block. She also had blinding headaches, an inability to walk without stumbling and stand more than 15 minutes, required help with routine household tasks and had trouble grasping and holding objects as a result of weakness in her arms and hands. Dr. Peccora related that appellant struggled daily with intense psychological distress. Appellant was not stable enough to focus on duties or tasks at hand. She also had impaired concentration, chronic depression and anxiety, sleep impairment, confusion and unresolved anger especially towards the employing establishment. Dr. Peccora stated that it was not unusual for chronic pain patients to develop secondary ailments as a result of the initial injury. He noted while trying to accept her fate and put on a brave face, appellant was often tearful, demonstrated loss of concentration and often used incorrect words when speaking. The additional worry of having a teenage son in the military added to her stress and diminished her quality of life. Dr. Peccora opined that appellant could possibly regain the ability to reenter the workforce and be productive and independent. He stated that she had shown considerable improvement.

In medical reports dated August 9 to November 8, 2013, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, noted appellant's complaint of back pain and muscle spasms. Appellant also complained about bilateral leg pain, numbness, tingling and weakness, greater on the right than left and depression. Dr. Shade reviewed her medical records which included diagnostic and laboratory test results. On physical examination, Dr. Shade assessed chronic lumbosacral strain, bilateral lower extremity neuritis, hyperreflexia of the lower extremities with lumbar stenosis, depression and anxiety, lumbar disc protrusion at L4-5 and L5-S1 and lumbar spinal stenosis at L4-5. He noted that appellant had been off work since 2003. Dr. Shade advised that she should continue to be off work due to lumbar muscle spasms and difficulty with proper ambulation. He suspected that appellant had secondary emotional conditions that were directly related to her August 25, 2003 employment injury and impeded her ability to recover. Dr. Shade advised that she continued to require mental and physical care as a result of her employment injury. He concluded that appellant was temporarily totally disabled and she would be at risk to herself and the employing establishment if she returned to work. In an August 9, 2013 prescription, Dr. Shade recommended that she continue her chronic pain program.

Dr. Jeffrey D. Reuben, a Board-certified orthopedic surgeon, reviewed the results of an October 23, 2013 autonomic nervous system assessment performed by Dr. Julia Franklin, a chiropractor. Dr. Reuben listed a diagnosis of lumbar spine disc disease. He advised that the test results revealed postural orthostatic tachycardia syndrome. Dr. Reuben recommended that appellant be referred to a cardiologist.

A December 6, 2013 laboratory report found no evidence of specimen adulteration.

By letter dated January 15, 2014, appellant's representative stated that a decision regarding appellant's August 7, 2013 request for reconsideration was past due. He contended that she was entitled to a merit review because OWCP had failed to issue a decision within 120 days of the filing of the reconsideration request.

In an April 7, 2014 decision, OWCP denied appellant's request for reconsideration, without a merit review. It found that the request was not filed within one year of its August 20, 2012 merit decision and did not establish clear evidence of error.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>6</sup> It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>7</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.<sup>8</sup> Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,<sup>9</sup> if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>10</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>12</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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>13</sup>

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<sup>6</sup> See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

<sup>7</sup> 20 C.F.R. § 10.607(a); see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>8</sup> *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>12</sup> *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>13</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 10.

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>14</sup> The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence, such as 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>15</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>16</sup>

### ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>17</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>18</sup> As appellant's August 7, 2013 request for reconsideration was received by OWCP on November 11, 2013, more than one year after the August 20, 2012 merit decision it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>19</sup>

The Board finds that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error. In its August 20, 2012 decision, OWCP denied her claim for wage-loss compensation commencing August 26, 2003 as she failed to submit sufficient medical evidence establishing that her claimed total disability was causally related to the accepted August 25, 2003 employment injuries. By letter dated January 15, 2014, appellant's representative alleged that appellant was entitled to a merit review as OWCP had failed to issue a decision within 120 days of the filing of the reconsideration request. The Board finds, however, that OWCP's delay did not constitute error or prejudice her claim.<sup>20</sup> The most recent merit review in this case was conducted by OWCP on August 20, 2012. A request for reconsideration was not filed until November 11, 2013. A nonmerit review was conducted on April 7, 2014. Appellant did not seek review of the August 20, 2012 decision before the Board within 180 days of issuance.<sup>21</sup>

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<sup>14</sup> S.S., Docket No. 11-1579 (issued April 24, 2012).

<sup>15</sup> *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (October 2011).

<sup>16</sup> See *M.L.*, *supra* note 10; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

<sup>17</sup> 20 C.F.R. § 10.607(a).

<sup>18</sup> See *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>19</sup> 20 C.F.R. § 10.607(b); see *D.G.*, *supra* note 8; *Debra McDavid*, 57 ECAB 149 (2005).

<sup>20</sup> See *C.J.*, Docket No. 09-2103 (issued June 1, 2010); see Federal (FECA) Procedure Manual *supra* note 15 at Chapter 2.1602.9 (March 2010) (when OWCP delays a reconsideration decision beyond 90 days and such delay jeopardizes the claimant's right to review the merits of the case before the Board, it should conduct a merit review).

<sup>21</sup> The Board has jurisdiction to review final adverse decisions of OWCP within 180 days from the date of issuance. See 20 C.F.R. §§ 501.3(a) and 3(e), respectively.

Dr. Peccora's progress stated that appellant was temporarily totally disabled as a direct result of the accepted August 25, 2003 work injuries. He diagnosed lumbar disc protrusion and sprain and prolonged depression. Dr. Peccora noted appellant's limitations and reactions to her conditions. He stated that it was not unusual for chronic pain patients to develop secondary ailments as a result of the initial injury. Appellant's worries about her son added to her stress which further diminished her quality of life. While Dr. Peccora's progress notes are generally supportive of her claim for total disability compensation, his progress notes are not sufficient to establish clear evidence of error on the part of OWCP. The Board has noted that clear evidence of error is intended as a difficult standard. Evidence such as a well-rationalized medical report which, if submitted prior to when the denial was issued, would have created a conflict in medical opinion, is not clear evidence of error.<sup>22</sup> This evidence does not shift the weight of the medical evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's August 20, 2012 decision. For the stated reasons, the Board finds that Dr. Peccora's reports do not demonstrate clear evidence of error in the August 20, 2012 decision.

Dr. Shade found that appellant was temporarily totally disabled for work. He diagnosed chronic lumbosacral strain, bilateral lower extremity neuritis, hyperreflexia of the lower extremities with lumbar stenosis, depression and anxiety, lumbar disc protrusion at L4-5 and L5-S1 and lumbar spinal stenosis at L4-5. Dr. Shade suspected that appellant's secondary emotional conditions were directly related to the August 25, 2003 employment injuries. While Dr. Shade opined that appellant was temporarily totally disabled for work, his reports do not establish clear evidence of error or shift the weight of evidence in favor of appellant's claim.

Similarly, Dr. Reuben's report which found that appellant required referral to a cardiologist is insufficient to shift the weight of the medical evidence in favor of her claim. He did not provide any medical opinion explaining how her diagnosed condition and any resultant disability were causally related to the accepted employment injuries.<sup>23</sup> The Board finds that this evidence is insufficient to establish clear evidence of error in the August 20, 2012 decision.

The progress notes from J.A. Morgan, a licensed counselor and providers whose signatures are illegible have no probative medical value. A licensed counselor is not a physician as defined under FECA<sup>24</sup> and the illegible signatures do not establish whether the person completing the reports qualified as a physician as defined under FECA.<sup>25</sup> The Board finds that the argument and evidence submitted by appellant are insufficient to shift the weight of the evidence in favor of her claim or raise a substantial question as to the correctness of OWCP's

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<sup>22</sup> See *Joseph R. Santos*, *supra* note 12.

<sup>23</sup> *Id.*

<sup>24</sup> See 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. See *Roy L. Humphrey*, 57 ECAB 238 (2005); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>25</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010) (a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2); reports lacking proper identification do not constitute probative medical evidence).

last merit decision denying her claim. Therefore, appellant has not established clear evidence of error.<sup>26</sup>

On appeal, appellant's representative contended that appellant's request for reconsideration was timely as he and appellant observed a "Ring" date being placed on the envelope which contained the request and it being deposited in the postal mail system. He further contended that the envelope containing the reconsideration request was not contained in the case record. Effective August 29, 2011 OWCP amended its procedures to reflect that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought<sup>27</sup> as opposed to the use of the postmark to determine timeliness.<sup>28</sup> Appellant's request was untimely as it was not received by OWCP until November 11, 2013.

Appellant's representative further contends that the reconsideration request was timely under the mailbox rule. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>29</sup> This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.<sup>30</sup> The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee. This is known as the mailbox rule.<sup>31</sup> Although the mailbox rule raises a presumption of receipt, it does not raise a presumption of timeliness. Receipt by OWCP is established. Timely receipt is not.

Appellant also submitted new evidence on appeal. However, the Board lacks jurisdiction to review such evidence for the first time on appeal.<sup>32</sup>

### CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

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<sup>26</sup> See *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>27</sup> See Federal (FECA) Procedure Manual *supra* note 15 at Chapter 2.1602.4(e) (August 29, 2011).

<sup>28</sup> Prior to August 29, 2011, OWCP regulations provided in pertinent part: "An application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed." *Id.* at Chapter 2.1602.3(b)(1) (January 2004).

<sup>29</sup> *George F. Gidicsin*, 36 ECAB 175 (1984) (when OWCP sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

<sup>30</sup> *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>31</sup> *Larry L. Hill*, 42 ECAB 596 (1991) (the presumption of receipt under the mailbox rule must apply equally to claimants and OWCP alike).

<sup>32</sup> 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 15, 2014  
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