



## **FACTUAL HISTORY**

On June 2, 2011 appellant, then a 49-year-old mail processing clerk, filed a traumatic injury claim alleging that on May 30, 2011 he injured his left rib when he attempted to flip a full tray of mail onto a postal machine.

Appellant submitted a May 31, 2011 report from South Seminole Hospital that diagnosed a rib fracture and bronchitis and a May 30, 2011 chest x-ray, which noted normal findings. He also submitted a June 7, 2011 Florida Workers' Compensation Uniform Medical Treatment/Status Report form from Dr. Olivia Alexander, an attending Board-certified family practitioner, who diagnosed chest wall sprain and checked "yes" to the question of whether it was work related. The date of injury was noted as May 30, 2011.

By correspondence dated June 13, 2011, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised as to the medical and factual evidence required to support his claim and given 30 days to provide the requested information. He submitted medical reports for the period June 7 to July 20, 2011 concerning treatment for rib pain.

On June 7, 2011 Dr. Alexander reported seeing appellant for rib pain. She related that appellant sustained a work injury on May 30, 2011 and that he had a history of prior injury.

In office visit reports dated June 14 to July 6, 2011, Dr. Russell Wheatley, an attending treating osteopath Board-certified in family practitioner, treated appellant for rib pain. He reported that appellant sustained an injury on May 31, 2011 due to lifting a heavy object at work and that there had been a previous injury. Dr. Wheatley noted that the injury date was May 30, 2011. In form reports dated June 14 to July 20, 2011, he reported an injury date of May 31, 2011. Dr. Wheatley diagnosed a closed fracture of the ribs and checked "yes" to the question of whether it was work related. OWCP also received medical and hospital reports dated February 28 to May 11, 2011 concerning treatment for a left rib fracture.

By decision dated July 21, 2011, OWCP denied appellant's claim. It found that the evidence was insufficient to establish that the diagnosed condition was causally related to the May 30, 2011 employment incident.

Following the denial of appellant's claim OWCP received additional medical evidence dated June 7 to July 20, 2011 from Dr. Wheatley, who related that appellant sustained a work injury to his rib on May 30, 2011 due to lifting a heavy object. Dr. Wheatley also noted that appellant had previously sustained a rib injury.

On May 13, 2013 OWCP received a letter dated January 17, 2013 from appellant's counsel requesting reconsideration. Counsel stated that a request for reconsideration had been filed on or about June 26, 2012 and submitted a copy of the letter.

By decision dated July 12, 2013, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to show clear evidence of error. It noted that the record did not reflect any request for reconsideration submitted on or about June 26, 2012 and that no proof was provided to establish that a request had been submitted in a timely manner.

## LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>2</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>3</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>4</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>5</sup> if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>6</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>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</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>9</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. 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

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<sup>2</sup> See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

<sup>3</sup> 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>4</sup> *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>7</sup> *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>8</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>9</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 6.

evidence of error.<sup>10</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>11</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration must be received by OWCP within one year of the date of the decision.<sup>12</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>13</sup> As OWCP did not receive appellant's January 17, 2013 or June 26, 2012 requests for reconsideration until May 13, 2013, which was more than one year after the merit decision, issued on July 21, 2011. Therefore, the request was untimely. Appellant did not submit any evidence to establish that the June 26, 2012 request for reconsideration was mailed or received by OWCP prior to the receipt of his reconsideration request on May 13, 2013. There is no evidence of record that establishes that he submitted a timely request for reconsideration. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for wage-loss compensation.<sup>14</sup>

The Board finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of his claim was erroneous. Appellant has not shown how OWCP committed any error in denying his claim that his rib fracture had been caused or aggravated by the May 30, 2011 employment incident. Nothing in his January 17, 2013 request for reconsideration remotely suggests that OWCP's July 21, 2011 decision was erroneous in finding that he did not establish that his rib fracture was caused or aggravated by the May 30, 2011 employment incident. The medical evidence received by OWCP subsequent to the July 21, 2011 decision and with appellant's appeal is repetitive. The July 12 and 20, 2011 reports by Dr. Wheatley note that appellant sustained an injury at work lifting something heavy on May 30, 2013 and that he had previously sustained an injury to his ribs. However, neither of these reports contain any rationale explaining how appellant's left rib fracture had been aggravated or caused by the May 30, 2011 incident. Furthermore, these reports are repetitive of Dr. Wheatley's prior reports. Lastly, as noted above appellant has not submitted any evidence showing that he submitted a timely request for reconsideration. With his May 13, 2013 request for reconsideration, he submitted correspondence dated June 26, 2012 in which his counsel requested reconsideration. However, there is no documentation showing that the letter was mailed or received by OWCP within one year of the July 20, 2011 decision. Consequently, OWCP properly denied appellant's reconsideration request as it was untimely and failed to establish clear evidence of error.

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<sup>10</sup> *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (October 2011).

<sup>11</sup> *See M.L.*, *supra* note 6; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

<sup>12</sup> 20 C.F.R. § 10.607(a).

<sup>13</sup> *Robert F. Stone*, 57 ECAB 393 (2005).

<sup>14</sup> 20 C.F.R. § 10.607(a); *see D.G.*, *supra* note 4; *Debra McDavid*, 57 ECAB 149 (2005).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 12, 2013 is affirmed.

Issued: January 28, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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