



On appeal, counsel asserts that OWCP should not have selected an independent medical examiner as there was no conflict of medical opinion.

### **FACTUAL HISTORY**

OWCP accepted that on April 18, 2008 appellant, then a 49-year-old mailhandler, sustained a contusion of the lower left leg when she struck wood on the side of a trailer. She stopped work on April 18, 2008. Appellant did not return and received compensation beginning June 4, 2008.

Dr. Frank Carr, an attending Board-certified orthopedic surgeon, submitted periodic treatment notes from May 2008 to May 2009. He noted limited left knee and ankle motion following a left calf and Achilles tendon contusion. Dr. Carr found appellant totally disabled for work. On December 4, 2008 OWCP obtained a second opinion from Dr. Michael J. Katz, a Board-certified orthopedic surgeon, who diagnosed a resolved left leg contusion. Dr. Katz found appellant able to perform full-time limited duty.

OWCP found a conflict of medical opinion between Dr. Carr, for appellant, and Dr. Katz, for the government, regarding the nature and extent of the accepted injury and her capacity for work. To resolve the conflict, it selected Dr. Stanley Soren, a Board-certified orthopedic surgeon, as the impartial medical specialist, who submitted a March 24, 2009 report reviewing the medical record and a statement of accepted facts. On examination, Dr. Soren noted no objective findings of a left calf contusion. He found appellant able to perform full-time limited duty.

Appellant was then followed by Dr. Arthur Thompson, a Board-certified orthopedic surgeon, who submitted reports through July 2009 holding her off work due to a left flexor hallucis longus tear or strain that he attributed to the accepted injury.

By notice dated June 26, 2009, OWCP advised appellant that it proposed to terminate her wage-loss and medical benefits, based on Dr. Soren's opinion that the accepted injury had ceased without residuals. In response, appellant submitted a July 14, 2009 report from Dr. Thompson diagnosing a left calf muscle contusion and Achilles tendon contusion. He found that she remained totally disabled for work.

By decision dated July 29, 2009, OWCP terminated appellant's compensation benefits effective that day on the grounds that the accepted injury had ceased without residuals. Dr. Soren's opinion represented the weight of the medical evidence.

On August 19, 2009 appellant requested a review of the written record. She submitted March 2009 reports from Dr. Carr and July 21 to August 4, 2009 reports from Dr. Thompson, finding edema in the left flexor hallucis longus muscle and Achilles tendon. Appellant also provided reports dated October 20 to November 7, 2009 from Dr. Laxmindhar Diwan, an attending Board-certified orthopedic surgeon, who noted an unspecified April 18, 2008 injury and diagnosed an unresolved left ankle sprain.

By decision dated February 3, 2010, an OWCP hearing representative affirmed the July 29, 2009 termination. He found that the additional evidence submitted was insufficient to

outweigh Dr. Soren's opinion. The hearing representative noted that Dr. Carr was on one side of the conflict resolved by Dr. Soren. Further, Dr. Diwan did not review the medical record, provide a history of injury or offer medical rationale explaining how or why the accepted injury would continue to disable appellant for work. The hearing representative also noted that Dr. Soren's opinion contained detailed rationale resolving the conflict between Dr. Carr and Dr. Katz regarding the nature and extent of the accepted left leg injury and appellant's capacity to work.

In an October 9, 2012 letter, counsel requested reconsideration, asserting that there was no conflict in opinion between Dr. Katz and Dr. Carr. He argued that in the absence of a conflict, Dr. Soren could not serve as an impartial medical examiner and his opinion should not be accorded special weight. Counsel submitted reports dated from March 2, 2010 to July 26, 2011 from Dr. Richard M. Seldes, an attending Board-certified orthopedic surgeon, who found appellant totally disabled for work due to mild internal derangement of the left knee and an unresolved left ankle sprain. Counsel also provided July 10, 2011 and July 24, 2012 reports from Dr. Dimitry Fuzaylov, an attending Board-certified orthopedic surgeon, finding appellant totally disabled for work due to vasculitis and possible complex regional pain syndrome of the lower left leg. He also submitted an August 12, 2012 imaging study of the left ankle and a December 19, 2012 report from Dr. Maxim Tyorkin, a Board-certified orthopedic surgeon, diagnosed internal derangement of the left knee and an unresolved left lower extremity sprain. Counsel also provided a September 3, 2009 report from Dr. Diwan diagnosing the same conditions as in his reports previously of record.

By decision dated March 27, 2013, OWCP denied appellant's October 9, 2012 request for reconsideration finding that it was not timely filed and failed to present clear evidence of error. It found that her request was received on October 9, 2012 more than one year after the February 3, 2010 decision, the final merit decision in the claim. OWCP further found that counsel's argument did not establish clear evidence of error and that the medical evidence submitted was irrelevant as it did not address appellant's condition on or before July 29, 2009.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>2</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>3</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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>5</sup> The Board has found that the imposition of this

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>4</sup> *Id.* See also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>5</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>6</sup>

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>7</sup> OWCP's regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which decided by OWCP.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> 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 by OWCP.<sup>13</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

### ANALYSIS

In its March 27, 2013 decision, OWCP found that appellant failed to file a timely application for review. It rendered its most recent merit decision on February 3, 2010. Appellant requested reconsideration on October 9, 2012, more than one year from the issuance of the February 3, 2010 decision. OWCP denied the request by March 27, 2013 decision on the grounds that it was not timely filed and failed to present clear evidence of error. The Board finds that the October 9, 2012 reconsideration request was not timely filed. It must now be determined whether the request demonstrated clear evidence of error in OWCP's February 3, 2010.

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<sup>6</sup> 5 U.S.C. § 10.607(b); *supra* note 4.

<sup>7</sup> *Supra* note 3.

<sup>8</sup> 20 C.F.R. § 10.607(b).

<sup>9</sup> *Supra* note 3.

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *Jesus D. Sanchez*, *supra* note 4.

<sup>12</sup> *Supra* note 10.

<sup>13</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>14</sup> *Gregory Griffin*, *supra* note 5.

In his October 9, 2012 letter, counsel asserted that there was no conflict between Dr. Carr, an attending Board-certified orthopedic surgeon, and Dr. Katz, a Board-certified orthopedic surgeon and second opinion physician. The Board finds that this argument does not raise a substantial question as to whether OWCP's February 3, 2010 decision was in error or shift the weight of the evidence in appellant's favor. The conflict in medical opinion was previously set out in the prior OWCP merit decisions. Therefore, it is insufficient to establish clear evidence of error. The reports of Drs. Fuzaylov, Seldes and Tyorkin, attending Board-certified orthopedic surgeons, do not address appellant's medical condition on or before July 29, 2009, which was the underlying issue at the time of the February 3, 2010 decision. Evidence which is irrelevant to the claim does not establish clear evidence of error.<sup>15</sup> The September 3, 2009 report from Dr. Diwan, an attending Board-certified orthopedic surgeon, duplicates his reports previously of record. The Board has held that evidence that repeats or duplicates evidence previously submitted is insufficient to shift the weight of the evidence or support clear evidence of error.<sup>16</sup> Consequently, OWCP properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

On appeal, counsel asserts that OWCP should not have selected an impartial medical examiner as there was no conflict of opinion. The Board notes that this argument was previously considered and rejected by OWCP.

### **CONCLUSION**

The Board finds that the evidence submitted does not demonstrate clear evidence of error. Appellant has not provided argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's February 3, 2010 merit decision.

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<sup>15</sup> *Supra* note 10.

<sup>16</sup> *D.E.*, 59 ECAB 438 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 27, 2013 is affirmed.

Issued: March 6, 2014  
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