



## **FACTUAL HISTORY**

On May 18, 2009 appellant, then a 55-year-old custodian, filed an occupational disease alleging a low back condition due to lifting and bending. He first noticed his condition on May 1, 2008 and attributed it to his employment on that date. Appellant's attending physician, Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, stated that appellant initially developed back pain in June 2007 and diagnosed spondylolysis at L5 with a grade 1 L5-S1 spondylolisthesis. He stated that a chair at work bothered appellant's back.

By decision dated September 14, 2009, OWCP denied appellant's claim. It found that the medical evidence did not establish a causal relationship between his diagnosed condition and his employment duties.

Appellant requested reconsideration of the September 14, 2009 decision in a form dated September 13, 2010 and received by OWCP on September 14, 2010. In a note dated January 12, 2009, Dr. Millheiser noted that appellant could work and diagnosed chronic back pain and spondylolisthesis. He stated, "[Appellant] apparently has problems using a casing chair as he is forced to move it forward and this apparently bothers his back." Dr. Millheiser recommended that appellant avoid bending and lifting and that he lose weight. On June 29, 2009 he stated that appellant should avoid repetitive bending, twisting and lifting. Dr. Millheiser diagnosed spondylolisthesis at L5-S1 with spondylolysis.

The employing establishment noted that appellant returned to work on November 30, 2007 in a limited-duty status following a left foot injury. Appellant began work as a custodian on August 2, 2008. He stopped working on August 6, 2008 and returned on June 18, 2009. Appellant filed his occupational disease claim on May 18, 2009 during a period that he was not working, alleging that he first became aware of his low back condition and its relationship to his employment duties of lifting and bending as a custodian on May 1, 2008 prior to his work as a custodian.

OWCP denied appellant's claim by decision dated November 26, 2010. It found that the medical evidence did not establish a causal relationship between his job duties and his diagnosed back condition.

In a statement dated November 22, 2010, appellant attributed his heavy lifting performed prior to his traumatic lower extremity injury. He stated that heavy lifting combined with stress from the casing chair had a tremendous impact on his spondylolysis. Appellant asserted that the employing establishment reassigned him as a custodian despite warnings from his physician regarding his back condition.

Appellant requested reconsideration on March 25, 2011. By decision dated April 26, 2011, OWCP denied further review of the merits as he failed to submit evidence in support of the reconsideration request.

Appellant again requested reconsideration on May 11, 2011. Dr. Amaya completed a report dated August 25, 2010, noting appellant's low back symptoms for the preceding two years. Appellant attributed his back condition to bending and lifting at work. Dr. Amaya found

mild spondylolisthesis at L5-S1 and diagnosed chronic lumbar pain. Dr. Sam Ash, a Board-certified orthopedic surgeon, completed a report dated August 20, 2010. He obtained a history that appellant had to lift heavy weights occasionally and experienced back pain for three years. Dr. Ash diagnosed discogenic disease L5-S1 as demonstrated on x-ray. On September 16, 2010 Dr. Amaya stated that appellant's back pain had been aggravated by repetitive bending and lifting at work. On September 22, 2010 Dr. Ash noted that appellant had to lift weights and do strenuous activity at work, which could produce problems in his back. He diagnosed herniated disc at L5-S1 and several bulging discs demonstrated on magnetic resonance imaging scan.

By decision dated July 13, 2011, OWCP denied modification of its prior decision. It found that appellant did not submit sufficient medical evidence to establish a causal relationship between his diagnosed back condition and his job duties.

Appellant, through counsel, requested reconsideration on February 24, 2014. Counsel argued that causal relationship was established through Dr. Amaya's September 16, 2010 report and that OWCP was required to undertake further development of the medical evidence. He submitted a note dated August 30, 2012, from Dr. Hodor, who noted appellant's statements that his custodial work had aggravated his low back pain and he also attributed his back pain to a change in his walking pattern following his foot injury. Dr. Hodor stated, "It appears that a combination of [appellant's] work-related injury to his ankle and foot, his low back situation referable to his having to case mail and sit in a specific type chair aggravated his ongoing back situation."

On December 13, 2012 Dr. Hodor stated that he first examined appellant on May 8, 2012 due to lumbar spine, left foot and ankle conditions. He stated that appellant began to have increasing pain in his lower back due to heavy lifting as a mail clerk. Appellant stated that his mail clerk duties including repetitive lifting, loading and unloading 50- to 60-pound satchels of mail. Dr. Hodor also noted that appellant was on light duty after his ankle injury and was required to sit in a certain chair to sort mail which resulted in constant pain in his lower back. He examined appellant on January 31, 2013 and listed additional duties to which he attributed his low back pain including loading and unloading mail trucks. Dr. Hodor stated, "It appears from [appellant's] description that the combination of the different responsibilities he was subject to, including the repetitive lifting, loading and unloading satchels of mail and these types of BMC [bulk mail carriers] and containers, he had chronic and continuing pain across his lumbar spine in association with his spondylolisthesis."

In a decision dated March 18, 2014, OWCP denied appellant's request for reconsideration. It found that his request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA<sup>1</sup> OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides

---

<sup>1</sup> 5 U.S.C. § 8128(a).

that “An application for reconsideration must be sent within one year of the date of [OWCP] decision for which review is sought.”<sup>2</sup> In *Leon D. Faidley, Jr.*,<sup>3</sup> the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant’s case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates “clear evidence of error” on the part of OWCP.<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>5</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>6</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>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 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.<sup>9</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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 fundamental question as to the correctness of OWCP decision.<sup>10</sup> The Board makes 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>11</sup>

---

<sup>2</sup> 20 C.F.R. § 10.607.

<sup>3</sup> 41 ECAB 104, 111 (1989).

<sup>4</sup> 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>5</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>6</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>7</sup> *See Jesus D. Sanchez*, *supra* note 4.

<sup>8</sup> *See supra* note 6.

<sup>9</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *See supra* note 3.

<sup>11</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

## ANALYSIS

The only OWCP decision before the Board is dated March 18, 2014, which denied appellant's request for reconsideration because the request was not timely filed or show clear evidence of error. Since more than 180 days elapsed from the date of issuance of OWCP's July 13, 2011 merit decision to the date of the filing of this appeal, on April 14 2010, the Board lacks jurisdiction to review that decision.<sup>12</sup>

The Board finds that OWCP properly denied reopening appellant's claim for merit review under 5 U.S.C. § 8128(a). Appellant's request for reconsideration was not timely filed under 20 C.F.R. § 10.607 and did not show clear evidence of error.

Appellant submitted medical reports from Dr. Hodor addressing the causal relationship between appellant's diagnosed back condition and his various employment duties. Dr. Hodor opined that appellant's regular work duties, his light-duty of sitting and casing mail and his custodial work had aggravated his back pain. The Board finds that these reports are not of sufficient probative value to shift the weight of the evidence in favor of the claimant or raise a fundamental question as to the correctness of OWCP decision. Dr. Hodor opined that appellant's various work duties aggravated his back pain and symptoms. The Board has held that the diagnosis of "pain" is not a firm medical diagnosis.<sup>13</sup> Dr. Hodor did not explain how appellant's employment activities caused or aggravated the diagnosed condition of spondylolisthesis. Furthermore, he did not address how appellant's back condition was aggravated given the periods of total disability reported by the employing establishment and during which he did not work. The Board finds that the evidence submitted in support of appellant's request for reconsideration was not sufficiently detailed and well reasoned to establish clear evidence of error on the part of OWCP.

Counsel also argued that Dr. Amaya's 2010 report was sufficient to require OWCP to undertake additional development of appellant's claim and its failure to do so was clear evidence of error. The Board finds that this argument is not persuasive. Dr. Amaya's reports were not based on a complete factual background or provide sufficient medical opinion evidence to require further development of the medical evidence.

## CONCLUSION

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

---

<sup>12</sup> See 20 C.F.R. § 501.3(e).

<sup>13</sup> *Robert Broome*, 55 ECAB 339 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** March 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 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