



## **FACTUAL HISTORY**

Appellant, a 44-year-old mail processing clerk, alleged that she injured her low back and right leg in the performance of duty on August 10, 2012. She was bending into a postal container to retrieve mail when she felt a sharp pain in her low back that traveled down her right buttock and leg to her knee. Appellant was treated in the emergency room that same day for unspecified backache and sciatica. The employing establishment authorized her treatment by Form CA-16 at Hackensack University Medical Center.<sup>2</sup> The August 10, 2012 emergency department treatment records appellant submitted did not include a specific history of injury.

On August 13, 2012 Dr. Samuel A. Banigo, an internist, diagnosed acute lumbosacral sprain, lumbago and lumbar radiculopathy. He relieved appellant from all work and referred her for physical therapy.

On September 4, 2012 OWCP advised appellant of the need for additional factual and medical information in support of her August 10, 2012 traumatic injury claim. It afforded her 30 days to submit the requested information.

OWCP subsequently received a September 5, 2012 note from Dr. Jackson A. Okoya, a Board-certified internist, whose handwritten note stated "Lower back [follow-up] ... sciatica." Dr. Okoya cleared appellant to return to work in a part-time, limited-duty capacity.

Appellant also provided a September 27, 2012 statement. She explained that on August 10, 2012, she was handling third class mail on a delivery bar code sorter and was required to lift mail out of a post-con to load on the feeder. Appellant stated that while bending to lift mail out of the tray, she felt a sharp pain in her low back, which traveled down into the right side of her buttock and leg.

In an October 11, 2012 decision, OWCP denied appellant's claim. It accepted that the August 10, 2012 employment incident occurred as alleged, however, the medical evidence did not reference the August 10, 2012 employment incident and she failed to establish that her back condition was causally related to the accepted incident.

On November 16, 2012 the Branch of Hearings and Review received a request for an oral hearing from appellant's counsel. The hearing request was postmarked November 14, 2012.

By decision dated December 31, 2012, OWCP's hearing representative found that appellant's request was untimely and therefore she was not entitled to a hearing as a matter of right. The hearing representative denied a discretionary hearing noting that the matter could be

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<sup>2</sup> The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim. See *Tracy P. Spillane*, 54 ECAB 608 (2003); 20 C.F.R. § 10.300.

equally well addressed by filing a request for reconsideration with OWCP and submitting new evidence regarding the relevant issue.<sup>3</sup>

On March 5, 2013 OWCP received additional medical records regarding the August 10, 2012 emergency department visit. The treatment records noted a prior history of L5-S1 bulging disc. Appellant presented with lower back pain for two hours. She was “lifting heavy metal plate at work and bent over and pulled her [right] lower back....” Appellant had “achy pain radiating to her [right] thigh,” which she rated a 6 on a scale of 1 to 10. Dr. Jesson S. Yeh, who treated her in the emergency department, noted complaints of low back pain radiating to her right leg “after lifting heavy object.”<sup>4</sup> He indicated that appellant’s condition was likely sciatica versus muscular strain.

On December 30, 2013 OWCP received a request for reconsideration from counsel, who identified OWCP’s hearing representative’s December 31, 2012 nonmerit decision as the subject of the reconsideration request. The request was accompanied by another copy of the August 10, 2012 emergency department treatment records. OWCP also received a copy of a March 14, 2012 acceptance letter under claim file number xxxxxx152.<sup>5</sup>

Counsel also submitted an April 4, 2013 lumbar magnetic resonance imaging (MRI) scan and three reports from Dr. Richard A. Boiardo, a Board-certified orthopedic surgeon,<sup>6</sup> who initially examined appellant on August 31, 2012 for complaints of severe low back pain and sciatic radiculopathy. Dr. Boiardo noted that appellant was employed by the employing establishment, but did not otherwise identify a specific history of injury. He conducted a physical examination which revealed restricted range of motion in the lumbar spine. Dr. Boiardo also noted there were no lower extremity neurologic deficits. Lumbar x-rays showed no evidence of joint space narrowing. An MRI scan was obtained, but the results were not available for review. Dr. Boiardo did not provide a specific diagnosis. He recommended ice, anti-inflammatory medication, physical therapy and electromyography (EMG).

Appellant returned to Dr. Boiardo for a follow-up examination on October 28, 2012. Dr. Boiardo noted that she “presents after work[-]related injury, now with severe low back pain.” Appellant reported a recent setback where she could not arise from a bent kyphotic position and was having severe low back pain with sciatica. On physical examination, range of motion of the lumbar spine was restricted, straight leg raise was restricted and she had marked paralumbar spasm. Dr. Boiardo also noted evidence of a trigger point in the area of the supracluneal region,

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<sup>3</sup> The December 31, 2012 nonmerit decision advised appellant of her right to file an appeal with the Board regarding the denial of her hearing request. This was the only avenue of review with respect to OWCP’s hearing representative’s December 31, 2012 decision.

<sup>4</sup> Dr. Yeh is Board-certified in emergency medicine.

<sup>5</sup> Appellant sustained a work-related injury on March 23, 2011, which OWCP accepted for contusion of buttock and contusion of back.

<sup>6</sup> The April 4, 2013 lumbar MRI scan revealed right foraminal disc extrusion at L4-5 with crowding of the L4 nerve root and degenerative changes at L5-S1.

which he treated with a corticosteroid injection. Appellant was unable to work. Dr. Boiardo referred her for physical therapy and pain management.

In an April 26, 2013 report, Dr. Boiardo noted that appellant attributed her low back pain and sciatic radiculopathy to three work-related incidents; most recently a March 20, 2011 slip and fall on a wet floor. He first examined her on August 31, 2012. Dr. Boiardo reviewed the findings on examination from August 31 and October 28, 2012. He reported seeing appellant in December 2012 and January 2013 and noted that she had gone to the emergency room on February 2, 2013 for complaints of severe low back pain and sciatica. When seen on February 12, 2013, appellant's physical examination revealed restricted range of motion and restricted straight leg raise. There were no lower extremity neurologic deficits. Dr. Boiardo last saw appellant on March 3, 2013, at which time she complained of severe low back pain and sciatica. According to appellant's estimation, she was unable to work. Dr. Boiardo noted that appellant was in marked distress. Appellant's systemic examination was unchanged and her musculoskeletal examination was essentially unchanged as well. She was able to heel walk and toe walk with difficulty and her lumbar range of motion was restricted in flexion and extension. Dr. Boiardo also reported paralumbar spasm. There were no neurologic deficits. A September 6, 2012 EMG was noted to be consistent with bilateral L4-5 and right L5-S1 radiculopathy/radiculitis. Dr. Boiardo diagnosed discogenic disease at L4-5 with herniated disc at L5-S1. He expressed familiarity with appellant's job description and noted that her work activities had aggravated her medical condition. Dr. Boiardo further stated that her current lumbar condition was causally related to the injuries she sustained at work on August 10 and December 8, 2012 and February 2, 2013.

In a February 11, 2014 decision, OWCP denied appellant's December 30, 2013 request for reconsideration finding it was untimely and she failed to establish clear evidence of error with respect to OWCP's October 11, 2012 merit decision.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>7</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>8</sup> One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>9</sup> The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>10</sup> When a request for reconsideration is untimely, OWCP will undertake a limited review

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<sup>7</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607.

<sup>9</sup> *Id.* at § 10.607(a). The one-year period begins on the date of the original decision and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

<sup>10</sup> *D.G.*, 59 ECAB 455 (2008).

to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.<sup>11</sup>

### ANALYSIS

Appellant's request for reconsideration is dated December 24, 2013. OWCP received it on December 30, 2013, which was more than one year after the October 11, 2012 decision, the most recent merit decision of record.<sup>12</sup> Based on OWCP's date of receipt, the request for reconsideration was untimely.<sup>13</sup> Because appellant's request for reconsideration was untimely, she must demonstrate clear evidence of error on the part of OWCP in denying her August 10, 2012 traumatic injury claim.<sup>14</sup>

OWCP denied the claim because appellant failed to establish a medical diagnosis attributable to the August 10, 2012 employment incident. Appellant had been handling third class mail on a delivery bar code sorter machine and was required to lift mail out of a post-con to load on the feeder. She attributed her injury to bending into a post-con to grab mail. Although appellant was diagnosed with a lumbosacral sprain with lumbar radiculopathy, the medical evidence she submitted did not identify the August 10, 2012 employment incident as a causative factor. This includes the emergency department treatment notes and the information provided by both Dr. Banigo and Dr. Okoya. Consequently, OWCP denied the claim on October 11, 2012 for failure to establish fact of injury.

Thereafter, appellant submitted additional treatment records associated with her August 10, 2012 emergency room visit. However, the history of injury included in the treatment records reflect that she was "lifting heavy metal plate at work and bent over and pulled her [right] lower back..." which was inconsistent with her allegations to OWCP. Given the inaccurate history of injury, the emergency room records do not raise a substantial question concerning the correctness of OWCP's October 11, 2012 decision.

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<sup>11</sup> 20 C.F.R. § 10.607(b).

<sup>12</sup> Counsel mistakenly believed that appellant had one year to request reconsideration following OWCP's hearing representative's December 31, 2012 nonmerit decision. *See supra* note 3.

<sup>13</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (October 2011).

<sup>14</sup> *Supra* note 11. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 *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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Dr. Boiardo's three reports are similarly deficient. His August 31 and October 28, 2012 reports do not identify a work-related injury occurring on August 10, 2012. The initial report noted that appellant worked for the employing establishment, but did not include either a history of injury or a specific diagnosis. In his October 28, 2012 report, Dr. Boiardo noted appellant was seen in follow-up for a work-related injury, but again he did not identify a date of injury, a cause of injury or a specific diagnosis. He ultimately diagnosed discogenic disease at L4-5 with herniated disc at L5-S1. Dr. Boiardo's April 26, 2013 report attributed appellant's current lumbar condition to work-related injuries on August 10 and December 8, 2012 and February 2, 2013. He did not provide a description of the August 10, 2012 employment incident.

The evidence submitted on reconsideration similarly fails to establish a medical diagnosis in connection with the August 10, 2012 employment incident, which appellant described as bending into a post-con to grab mail. Accordingly, she failed to establish clear evidence of error on the part of OWCP in denying her August 10, 2012 traumatic injury claim.

### **CONCLUSION**

Appellant's December 30, 2012 request for reconsideration was untimely, and she failed to demonstrate clear evidence of error. Therefore, she is not entitled to further merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 11, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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