



## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

On appeal, appellant argues the merits of his claim.

## **FACTUAL HISTORY**

On April 17, 2012 appellant, then a 49-year-old park manager, filed an occupational disease claim (Form CA-2) alleging that he developed carpal tunnel syndrome due to factors of his federal employment, including keyboarding.

By decision dated July 24, 2012, OWCP denied the claim on the basis that the evidence submitted was not sufficient to establish a causal relationship between appellant's condition and factors of his federal employment.

On July 9, 2014 appellant requested reconsideration and submitted diagnostic testing dated February 23, 2012 that was negative for rheumatoid arthritis.

In a May 3, 2012 report, Dr. Richard Gelberman, a Board-certified orthopedic hand surgeon, diagnosed bilateral carpal tunnel syndrome, left trigger thumb, and left little trigger finger. He indicated that appellant's symptoms had been present for two years and were more severe over the past six to eight months.

On March 20, 2014 Dr. Michael Moore, an emergency medicine specialist, diagnosed carpal tunnel syndrome, hyperlipidemia, and nonalcoholic fatty liver disease. He indicated that appellant had worked for the employing establishment for the past 25 years and repetitively used a keyboard for work. Dr. Moore opined that appellant's federal employment was "a significant contributing factor in the development of his carpal tunnel syndrome."

By decision dated August 14, 2014, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. It noted that it had reviewed the evidence submitted to determine whether its July 24, 2012 decision was incorrect.

## **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup> One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which

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<sup>3</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

review is sought.<sup>5</sup> The Board has found that the imposition of this 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>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<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.<sup>9</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</sup>

To establish 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 *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> 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>14</sup>

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> See *Jesus D. Sanchez*, *supra* note 3; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

<sup>7</sup> 20 C.F.R. § 10.607(b).

<sup>8</sup> See *Nancy Marciano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>9</sup> See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

<sup>10</sup> See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>12</sup> See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>13</sup> See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>14</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

## ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations<sup>15</sup> and procedures<sup>16</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was OWCP's July 24, 2012 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since he did not file his request until July 9, 2014, it was filed outside the one-year time period. As appellant's July 9, 2014 request for reconsideration was submitted more than one year after the July 24, 2012 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.<sup>17</sup>

OWCP denied appellant's occupational disease claim because there was insufficient medical evidence to establish a causal relationship between his carpal tunnel syndrome and factors of his federal employment, including keyboarding. On March 20, 2014 Dr. Moore diagnosed carpal tunnel syndrome and indicated that appellant had worked for the employing establishment for the past 25 years and repetitively used a keyboard for work. He opined that appellant's federal employment was "a significant contributing factor in the development of his carpal tunnel syndrome." Dr. Moore failed to provide a rationalized medical explanation as to how factors of appellant's federal employment, such as keyboarding, caused appellant to develop carpal tunnel syndrome. His conclusions are of a speculative and equivocal nature.<sup>18</sup> Dr. Moore's report does not establish clear evidence of error as it does not show that OWCP committed an error in denying the claim, nor does it raise a substantial question as to the correctness of OWCP's decision.

In a May 3, 2012 report, Dr. Gelberman diagnosed bilateral carpal tunnel syndrome, left trigger thumb, and left little trigger finger. He indicated that appellant's symptoms had been present for two years and were more severe over the past six to eight months. Dr. Gelberman also failed to provide a rationalized medical explanation as to how factors of appellant's federal employment, such as keyboarding, caused or aggravated his conditions. His report does not establish clear evidence of error as it does not show that OWCP committed an error in denying appellant's claim, nor does it raise a substantial question as to the correctness of OWCP's decision.

The testing dated February 23, 2012 is diagnostic in nature and therefore does not address causal relationship. As such, the Board finds that it is insufficient to establish clear evidence of error.

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<sup>15</sup> 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (January 2004); see *Veletta C. Coleman*, *supra* note 13.

<sup>17</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>18</sup> See *Michael R. Shaffer*, 55 ECAB 339 (2004). To be of probative value, a physician's opinion on causal relationship should be one of reasonable medical certainty. See *Beverly R. Jones*, 55 ECAB 411 (2004).

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.<sup>19</sup> None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, appellant argues the merits of his claim. The Board noted above that it only has jurisdiction over OWCP's August 14, 2014 nonmerit decision which denied his request for reconsideration and therefore is precluded from conducting a merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 27, 2015  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets, supra* note 8.