



## **FACTUAL HISTORY**

This case has previously been before the Board. In the most recent appeal, the Board, in a June 4, 2009 decision, affirmed a July 2, 2008 OWCP decision, which found that appellant had not met his burden of proof to establish disability commencing February 5, 1991 due to his accepted January 17, 1988 employment injury.<sup>3</sup> The relevant facts are incorporated herein by reference.<sup>4</sup>

Appellant requested reconsideration on November 19, 2013 and submitted new medical evidence. In a September 24, 2013 report, Dr. Francis Allen Johnston, an orthopedic surgeon, diagnosed chronic low back pain and documented L5-S1 disc herniation with positive discogram with concordant production of pain. He opined that “[g]iven the information provided and giving the finding of production of concordant pain on two separate occasions that directly related to pain generated as a result of his work-related injury in January 1988, it is reasonable to assume that the low back pain for which the patient was initially placed on disability benefits is tied directly to his work-related injury in 1988. As time has gone on, the patient’s symptoms have progressed.” Dr. Johnston noted that appellant “sustained an L5-S1, [herniated nucleus pulposus] in 1988 that remained symptomatic and he now has developed spondylosis at the same level.”

A lumbar discography report dated February 22, 2006, from Dr. Yaakov Applbaum, a Board-certified diagnostic radiologist, revealed a left paracentral grade five radial tear at L5-S1. A September 25, 2012 magnetic resonance imaging (MRI) scan of the cervical and lumbar spine, read by Dr. Quoc L. Hoang, a Board-certified diagnostic radiologist, diagnosed mild C4-5 and C5-6 degenerative disc disease, and mild C2-3 facet arthrosis, without significant interval change; chronic maxillary and sphenoid sinus disease; and mild multilevel degenerative change without compromise of the thecal sac or the neural exit foramen seen with mild streaky densities in the perinephric fat, likely scarring.

In a November 14, 2013 report, Dr. Alfred E. Palmieri, a Board-certified orthopedic surgeon, noted appellant’s history of injury and treatment and examined him. He opined:

“[I]n my opinion, based on a reasonable degree of medical probability, this patient’s current cervical and lumbosacral symptoms are causally related to the work[-]related motor vehicle accident of January 17, 1988. Long term prognosis is guarded, as his condition [is] of long duration and appears to be chronic in

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<sup>3</sup> Docket No. 08-1986 (issued June 4, 2009), *order denying petition for recon.* (issued September 25, 2009).

<sup>4</sup> On January 19, 1988 appellant, then a 38-year-old city letter carrier, while he was driving his mail vehicle, was struck from behind by another vehicle. OWCP accepted cervical and lumbar strains and appellant received intermittent periods of compensation. In a November 19, 1992 decision, the Board affirmed its termination of appellant’s compensation benefits effective February 5, 1991. Docket No. 92-1353. Prior to the Board’s June 4, 2009 decision, *id.*, the Board previously affirmed OWCP decisions finding that appellant had not met his burden of proof to establish disability due to his January 17, 1988 work injury. Docket No. 94-2110 (issued June 2, 1997); Docket No. 03-698 (issued August 3, 2004), *order denying petition for recon.* (issued April 5, 2005); Docket No. 06-515 (issued January 12, 2007).

nature. It is therefore unlikely that his symptoms will improve and may worsen with the passage of time.”

In a March 28, 2014 decision, OWCP denied appellant’s request for reconsideration, finding that it was not timely filed within one year of the last merit decision, dated June 4, 2009, and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>5</sup> vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>6</sup>

OWCP’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).<sup>7</sup> This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP decision for which review is sought.<sup>8</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>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Id.* at § 8128(a).

<sup>7</sup> *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *Id.* at § 10.607(b).

evidence of error. It is not enough merely to 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.<sup>10</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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 substantial question as to the correctness of OWCP's decision. 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>

### ANALYSIS

In its March 28, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. The Board issued a merit decision on June 4, 2009, in which it affirmed OWCP's July 2, 2008 decision, finding that appellant had not met his burden of proof to establish disability after February 5, 1991 due to his January 17, 1988 employment injury. Appellant's November 19, 2013 letter requesting reconsideration was submitted more than one year after the last merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by him in support of his application for review, but found that it did not clearly show that OWCP's most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error in the underlying merit decision.

With his November 19, 2013 request for reconsideration, appellant submitted lumbar discography reports dated February 22, 2006 and a September 25, 2012 MRI scan of the cervical and lumbar spine. The Board finds that this evidence is insufficient to show that OWCP's denial of the claim was erroneous or to raise a substantial question as to the correctness of OWCP's determination that appellant did not meet his burden of proof to establish disability after February 5, 1991 due to his January 17, 1988 employment injury.

Appellant submitted a September 24, 2013 report from Dr. Johnston, who opined that it was "reasonable to assume that the low back pain for which the patient was initially placed on disability benefits is tied directly to his work-related injury in 1988. As time has gone on, the patient's symptoms have progressed." Appellant also submitted a November 14, 2013 report

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<sup>10</sup> *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

<sup>11</sup> *Id.*

from Dr. Palmieri, who noted appellant's history of injury and opined that appellant's current cervical and lumbosacral symptoms were causally related to the January 17, 1988 work-related motor vehicle accident and that it was unlikely that his symptoms would improve. While these reports offer some support for causal relationship, the Board has held 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.<sup>12</sup> The Board finds that this medical evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred denying his claim for disability due to his January 17, 1988 employment injury.

Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, appellant argues that Dr. Palmieri's report was not adequately addressed by OWCP. The Board notes, however, that OWCP reviewed appellant's request for reconsideration dated November 19, 2013, which discussed at length the arguments as to why Dr. Palmieri's report met appellant's burden of proof. Dr. Palmieri's report is not sufficient to establish clear evidence of error. Appellant also raises arguments on appeal pertaining to the merits of the claim. However, as noted, the Board does not have jurisdiction over the merits of the claim.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

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<sup>12</sup> D.G., 59 ECAB 455 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2015  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board