



## **FACTUAL HISTORY**

The case has previously been before the Board on prior appeals. There have been six traumatic injuries to appellant's back accepted by OWCP: a lumbar strain on December 19, 1981 (File No. xxxxxx669); acute low back strain, cervical strain, and psychogenic pain disorder on December 17, 1985 (File No. xxxxxx047); aggravation of degenerative disc disease C5-6 and C6-7 on May 10, 1988 (File No. xxxxxx048); cervical strain, lumbar strain, and herniated C6-7 disc on November 28, 1988 (File No. xxxxxx412); lumbar strain on June 19, 1999 (File No. xxxxxx644); and aggravation of preexisting cervical spine conditions on November 23, 2005 (File No. xxxxxx891).<sup>3</sup>

Since the issue in this case concerns the December 19, 1981 injury, the Board will review the relevant facts regarding this injury. Appellant alleged that she sustained an injury on December 19, 1981 when she bent down to lift two trays of mail. As noted above, OWCP accepted the claim for a lumbar strain. Appellant received compensation for intermittent periods through September 9, 1982.

In a report dated December 19, 1983, Dr. Fred Nelson, an orthopedic surgeon, indicated that appellant was seen at the request of the employing establishment. He provided results on examination, noting contradictory findings. Dr. Nelson stated that appellant had a chronic low back sprain that was related to the December 19, 1981 injury. In a report dated April 1, 1985, he provided results on examination. Dr. Nelson stated that appellant had a chronic low back sprain and her current complaints were probably related to the December 19, 1981 injury. He indicated that appellant should have a thermogram performed. In a report dated May 30, 1985, Dr. Nelson reported the results of the thermogram were normal.

By decision dated November 13, 1985, OWCP found that appellant was not entitled to continuing compensation for wage-loss or medical benefits after September 9, 1982. It noted that the thermogram was normal and previous tests were within normal limits. By decision dated April 19, 2000, OWCP denied merit review of the claim.

In a decision dated April 12, 2002, the Board affirmed the April 19, 2000 decision.<sup>4</sup> The Board noted that appellant had returned to work in November 1985, and she argued she should receive compensation until that time. The Board found that her request for reconsideration was insufficient to warrant merit review of the claim.

By decision dated November 22, 2006, the Board affirmed OWCP decisions dated May 27 and January 28, 2005, denying a claimed recurrence of disability commencing April 2004 causally related to appellant's cervical condition.<sup>5</sup>

On February 19, 2009 appellant requested reconsideration of the November 13, 1985 decision. She submitted a March 19, 1984 report from Dr. Bruce Smoller, a Board-certified

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<sup>3</sup> The master file for all of these claims is File No. xxxxxx047.

<sup>4</sup> Docket No. 00-2528 (issued April 22, 2002).

<sup>5</sup> Docket No. 06-0263 (issued November 22, 2006).

neurologist, who indicated that appellant had sustained a lumbosacral strain on December 19, 1991 and presented now with some recurrence, which must be considered a new episode, and a retarded depression. Appellant also submitted a portion of a February 11, 1998 report from Dr. Bahman Sadr, a Board-certified orthopedic surgeon, who noted that appellant had chronic cervical and lumbar strains related to work injuries on December 19, 1981 and April 1985.

By decision dated July 1, 2009, OWCP found that the reconsideration request was untimely and failed to show clear evidence of error. In a decision dated June 28, 2010, the Board found OWCP had properly denied appellant's request for reconsideration of the November 13, 1985 decision as it was untimely and failed to show clear evidence of error.<sup>6</sup> The Board noted that Dr. Nelson had acknowledged in his December 19, 1983 report that examination results were contradictory, and his brief opinion as to a chronic back strain related to the 1981 injury was of diminished probative value. In addition, the Board noted Dr. Smoller had reported in his March 19, 1984 report that the back strain should have resolved three to four weeks after the incident. The history of the case as provided in the Board's prior decisions is incorporated herein by reference.

In a letter received by OWCP on June 12, 2014, appellant requested reconsideration of the November 13, 1985 decision arguing there was clear evidence of error. She stated that on September 27, 1983 an OWCP medical adviser had opined that she could return to regular duties, but OWCP never informed the employing establishment that she could return to work. According to appellant, she was sent to Dr. Nelson as a referee physician and a referee should be given special weight. Appellant argued that she had a chronic condition and should receive compensation from OWCP. She submitted the second page of a February 11, 1989 report from Dr. Sadr, and reports dated December 20, 2009, August 13, 2013, and April 11, 2014 from Dr. Phillip Schneider, an orthopedic surgeon. In the February 11, 1989 report, Dr. Sadr stated that appellant had chronic cervical and lumbar strains related to the December 19, 1981 and April 1983 injuries. In the December 20, 2009 report, Dr. Schneider provided results on examination and diagnosed lumbar herniated nucleus pulposus. He indicated in the August 13, 2013 report that appellant should continue modified duty. In the April 11, 2014 report, Dr. Schneider diagnosed: cervical HNP, pseudoarthrosis, cervical radiculopathy, herniated lumbar disc, carpal tunnel syndrome, lumbar spondylosis, and spondylolisthesis. He noted that appellant reported her job had been abolished and the Department of Labor had "put her on total disability." Dr. Schneider reported that "the effects of the work injury have not ceased" appellant was unable to perform her job.

By decision dated September 4, 2014, OWCP found that appellant's application for reconsideration was untimely. It further denied the application without merit review of the claim, finding that it did not show clear evidence of error by OWCP.

### **LEGAL PRECEDENT**

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>7</sup> The

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<sup>6</sup> Docket No. 09-2258 (issued June 28, 2010).

<sup>7</sup> 5 U.S.C. § 8128(a).

employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>8</sup>

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.<sup>9</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>10</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>11</sup> As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.<sup>12</sup> OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>13</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>14</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>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>17</sup>

### ANALYSIS

The application for reconsideration in this case was received by OWCP on June 12, 2014 and is untimely as it was received more than one year after issuance of the November 13, 1985

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<sup>8</sup> 20 C.F.R. § 10.605 (2012).

<sup>9</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>10</sup> Under section 8128 of FECA, “[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.”

<sup>11</sup> 5 U.S.C. §§ 8101-8193.

<sup>12</sup> 20 C.F.R. § 10.607 (2012).

<sup>13</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>14</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>15</sup> *Jimmy L. Day*, 48 ECAB 0652 (1997).

<sup>16</sup> *Id.*

<sup>17</sup> *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

decision. Appellant must therefore show clear evidence of error by OWCP to require a merit review of the claim.

This is the second time the Board has reviewed the issue of clear evidence of error. In its June 28, 2010 decision, the Board noted that Dr. Nelson acknowledged in his December 19, 1983 report there were contradictory examination results. The Board found that his opinion regarding an alleged employment-related condition was of diminished probative value and there was no clear evidence of error by OWCP.

In her current reconsideration request, appellant states that Dr. Nelson was a referee physician.<sup>18</sup> However, there is no evidence of record that Dr. Nelson was selected to resolve a conflict under 5 U.S.C. § 8123(a). As his December 19, 1983 report indicated, the employing establishment initially requested an examination.

The medical evidence submitted on reconsideration does not establish clear evidence of error by OWCP. The reports from Dr. Schneider do not discuss the December 19, 1981 injury or disability after September 9, 1982, causally related to the December 19, 1981 employment injury. In his April 11, 2014 report, Dr. Schneider refers briefly to the effects of the “work injury,” without further explanation. As noted in the history of the case, appellant has six traumatic injuries. Dr. Schneider did not provide probative evidence with respect to the medical issue presented in the November 13, 1985 OWCP decision. With respect to the February 11, 1998 report from Dr. Sadr, this was previously addressed by the Board in the June 28, 2010 Board decision.

The clear evidence of error standard is, as noted above, a difficult standard to meet. Even if the evidence could be construed to produce a contrary conclusion, this does not establish clear evidence of error. The Board finds that OWCP properly denied the untimely application for reconsideration in this case.

On appeal, appellant states that she believes errors were made in her case and her injury did not cease on September 9, 1982. She states that Dr. Nelson and Dr. Smoller supported her claim. The Board has previously addressed the evidence from Dr. Nelson and Dr. Smoller, and found that these reports do not establish clear evidence of error. Appellant also requests that the Board review the merits of the claim. As to the November 13, 1985 OWCP decision, appellant’s application was untimely, and therefore the only issue presented is whether there was clear evidence of error by OWCP. The merits of appellant’s claims are not before the Board in this appeal.

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<sup>18</sup> FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulations state that if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 4, 2014 is affirmed.

Issued: July 29, 2015  
Washington, DC

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

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

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