

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Duluth, GA, Employer**

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**Docket No. 15-135  
Issued: June 4, 2015**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 24, 2014 appellant filed a timely appeal from an April 30, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated March 29, 2012 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of her claim.

**ISSUE**

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

**FACTUAL HISTORY**

This case has previously been before the Board on appeal on two occasions. On December 7, 2008 appellant, then 50-year-old clerk, filed a traumatic injury claim alleging that she injured her hand, knee, and back on that date when she tripped and fell in the performance of

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

duty. OWCP accepted her claim for right wrist sprain, contusion of the left knee and lumbar sprain on June 17, 2009. By decision dated December 29, 2009, it denied appellant's claim for intermittent periods of disability from September 1 through October 13, 2009 finding that she failed to submit supportive medical evidence. In its October 5, 2010 decision,<sup>2</sup> the Board found that there was not sufficient medical evidence attributing appellant's current back condition and any resulting disability to her accepted employment injuries.

Appellant filed claims for compensation for periods from December 3, 2010 through March 11, 2011. OWCP denied these claims by decisions dated February 14, March 18 and April 14, 2011. In a decision dated September 22, 2011, an OWCP hearing representative affirmed the denial of compensation benefits for the period from December 3 through 14, 2011. Appellant requested reconsideration and in March 29, 2012 decisions, OWCP reviewed the merits of her claim and denied modification of the February 14, March 18 and April 14, 2011 decisions. OWCP declined to reopen appellant's claim for consideration of the merits on April 20 and June 21, 2012. Appellant appealed the June 21, 2012 denial of merit review to the Board. In its July 9, 2013 decision,<sup>3</sup> the Board found that OWCP properly declined to reopen her claim for consideration of the merits. The facts and circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

Appellant requested reconsideration on November 14, 2013 and stated that her claim was approved from a sprained wrist when she sustained a torn ligament. She stated that her employment injury resulted in a wrist scapholunate ligament tear. On December 19, 2013 appellant again requested reconsideration and stated that her disability was caused by her December 7, 2008 employment injury, which resulted in a torn ligament in her wrist.

In a January 22, 2014 decision, OWCP found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

By letter dated February 8, 2014, received by OWCP on February 18, 2014, appellant requested reconsideration of the March 29, 2012 merit decisions and asserted that the physicians in the record diagnosed scapholunate ligament tear with arthritis rather than a sprain. She referenced a note dated July 22, 2009 from Dr. Stephen McCollam, a Board-certified orthopedic surgeon. On July 22, 2009 Dr. McCollam diagnosed isolated capitulate osteoarthritis. He stated that this condition preexisted appellant's employment injury and was an exacerbation of a preexisting problem.

Appellant also alleged that Dr. Robert L. Howell, a Board-certified plastic surgeon, submitted a report dated August 25, 2010 supporting her claim. The record contains a right wrist computed tomography scan dated August 24, 2010 diagnosing arthritis changes of the lunate-capitate and lunate-hamate articulations consistent with osteoarthritis. An x-ray dated August 24, 2010 demonstrated arthritic changes of the lunate-capitate and lunate-hamate articulations consistent with osteoarthritis. In a note dated October 7, 2009, Dr. Howell examined appellant due to degenerative arthritis of the right wrist and noted that she had not worked since July 22, 2009. He examined x-rays and diagnosed entire mid-carpal osteoarthritis.

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<sup>2</sup> Docket No. 10-800 (issued October 5, 2010).

<sup>3</sup> Docket No. 13-189 (issued July 9, 2013).

Dr. Howell opined that appellant's condition of chronic degenerative arthritis of the right wrist should be addressed under private insurance as he did not believe that her employment incident caused this condition.

In a report dated October 4, 2010, Dr. Howell noted appellant's history of a fall and landing on an outstretched hand. He diagnosed scapholunate ligament tear and stated that it was extremely difficult to know whether this condition was caused by the December 7, 2008 fall. Dr. Howell stated that the fall either caused or significantly exacerbated appellant's scapholunate ligament tear and was the cause of her current complaints. He completed a note on May 10, 2011 and diagnosed degenerative arthritis of the right and left wrists.

In a report dated January 28, 2011, Dr. Howell reviewed appellant's history of a fall on July 12, 2008 and diagnosed hyperextension of her right wrist. He noted that Dr. McCollam diagnosed degenerative arthritis of the right wrist not related to the employment injury. Dr. Howell stated that he now believed that appellant had degenerative arthritis, which was asymptomatic and "It may have been the fall indeed exacerbated the problem and she remains symptomatic after the exacerbation at this time." He noted that appellant did not have a traumatic rupture of the scapholunate ligament, but had developed a degenerative pattern of wrist osteoarthritis.

Appellant cited a June 17, 2011 report from Dr. Obinwanne F.C. Ugwonal, a Board-certified orthopedic surgeon, as supporting her claim. Dr. Ugwonal diagnosed chronic right wrist arthritis and scapholunate ligament tear likely aggravated by her fall at work on December 7, 2008. He stated that appellant's fall did not likely cause her scapholunate ligament tear or arthritis, but aggravated the preexisting condition.

Appellant mentioned a February 4, 2012 report from Dr. John I. Foster, III, a Board-certified orthopedic surgeon, which is not included in the record, and a September 1, 2012 report from an orthopedic surgeon, Dr. Plas T. James, addressing her back condition.

By decision dated March 14, 2014, OWCP declined to reopen appellant's claim for reconsideration on the grounds that her request was untimely filed and failed to establish clear evidence of error.

On March 28, 2014 appellant corresponded with the Regional Director of OWCP, contending that all her requests for reconsideration were timely. She disagreed with the prior denials of her claim and again requested reconsideration. In a letter to appellant dated April 18, 2014, OWCP stated, "Since your most recent letter requested reconsideration, your case will be assigned to a senior claims examiner."

On April 30, 2014 OWCP issued a decision declining to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration received on February 18, 2014 was untimely and that the evidence presented in support of the reconsideration request did not show clear evidence of error. It noted that the issue of whether appellant sustained a scapholunate ligament tear, due to her December 7, 2008 employment injury, had not been formally denied and that a formal decision was required before this issue could be reviewed.

## LEGAL PRECEDENT

Under section 8128(a) of FECA<sup>4</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 that “An application for reconsideration must be sent within one year of the date of [OWCP’s] decision for which review is sought.”<sup>5</sup> In *Leon D. Faidley, Jr.*,<sup>6</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>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 be manifest on its face that OWCP committed an error.<sup>9</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>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 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>13</sup> The Board makes an independent determination of

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> 41 ECAB 104, 111 (1989).

<sup>7</sup> 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, *supra* note 7.

<sup>11</sup> *See Leona N. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

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>

### ANALYSIS

In response to appellant's February 8, 2014 reconsideration request, received by OWCP on February 18, 2014, OWCP issued two nonmerit decisions denying appellant's request on the grounds that they were untimely filed and failed to establish clear evidence of error. The only decision properly before the Board on this appeal is the April 30, 2014 decision, as it was issued within 180 days of the filing of this appeal.<sup>15</sup>

The Board finds that the April 30, 2014 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute abuse of discretion. The most recent merit decisions in this case are the March 29, 2012 decisions denying appellant's claims for periods of disability due to her accepted employment injury. Appellant's February 8, 2014 reconsideration request was received on February 18, 2014, almost two years after the March 29, 2012 decisions and, thus, her request is untimely.

In her untimely request for reconsideration, appellant argued that the medical opinion evidence in the record established that her claim should be accepted for the additional condition of scapholunate ligament tear with arthritis entitling her to additional periods of disability compensation. In support of her claim, appellant referenced medical reports included in the record and previously reviewed by OWCP. While the reports of Drs. McCollam, Howell, and Ugwonali support that appellant's employment-related fall may have aggravated her underlying arthritis and thus possibly resulted in additional periods of disability, these reports are not of sufficient probative value to shift the weight of the evidence in favor of the claimant. Dr. McCollam merely stated that appellant had sustained an exacerbation of a preexisting problem without explaining whether this exacerbation was permanent or temporary and without provide a period of disability as a result of this exacerbation. This limited medical opinion is not sufficient to show clear evidence of error.

Dr. Howell presented conflicting opinions of whether appellant's employment incident resulted in an exacerbation of her underlying arthritis. When he did opine that her fall exacerbated her arthritis and that appellant remains symptomatic after the exacerbation, he did not provide medical reasoning and did not provide a specific period of disability due to this exacerbation. Due to these deficiencies, Dr. Howell's reports are not sufficient to establish clear evidence of error on the part of OWCP.

Dr. Ugwonali diagnosed chronic right wrist arthritis and scapholunate ligament tear likely aggravated by appellant's fall at work on December 7, 2008. His report is not of sufficient probative value to establish clear evidence of error as his report is couched in speculative terms noting that her ligament tear was "likely" aggravated by her fall at work. The Board has held

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<sup>14</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

<sup>15</sup> *See* 20 C.F.R. § 501.3(e).

that medical opinions that are speculative or equivocal in character diminish the probative value of the medical opinion.<sup>16</sup> As this report is of diminished probative value it cannot establish clear evidence of error on the part of OWCP.

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>17</sup>

### **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.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief 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>16</sup> A.G., Docket No. 12-659 (issued August 22, 2012); *D.D.*, 57 ECAB 734, 738 (2006).

<sup>17</sup> *D.G.*, 59 ECAB 455 (2008).