

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

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**J.G., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Camarillo, CA, Employer**

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**Docket No. 16-0835  
Issued: August 8, 2016**

*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 15, 2016 appellant filed a timely appeal from a January 21, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between December 3, 2014, the most recent merit OWCP decision, and 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 the claim.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant contends that her request for reconsideration was timely filed.

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

<sup>2</sup> On appeal, appellant submitted new evidence. The Board, however, is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *D.B.*, Docket No. 12-1653 (issued March 26, 2013).

## **FACTUAL HISTORY**

On August 4, 2014 appellant, then a 55-year-old city mail carrier, filed an occupational disease claim (Form CA-2) alleging that the pain in her lower back, shoulder, neck, thumb, wrist, forearm, and hands was caused by carrying heavy trays, pushing a cart with heavy mail, casing mail, and shuffling the mail in her hand at work.

In an August 22, 2014 letter, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

OWCP received medical evidence from Dr. Charles Adams, an attending Board-certified family practitioner. A September 3, 2014 work restriction summary form report indicated that appellant could return to modified-duty work with restrictions through September 17, 2014. A September 5, 2014 work restriction summary form advised that appellant was temporarily totally disabled through September 17, 2014. In an attending physician's report (Form CA-20), attending physician's supplemental report (Form CA-20a), and industrial work status report dated September 8, 2014, Dr. Adams noted an August 1, 2014 date of injury and advised that repetitive motion caused pain in appellant's arms, shoulders, neck, and lower back. He reported findings on examination and diagnosed low back pain with bilateral sciatica, bilateral shoulder tendinitis, and right and left wrist tenosynovitis. In the September 8, 2014 Form CA-20 report, Dr. Adams responded "yes" that appellant's injury was consistent with a work-related injury based on her history and physical examination. He placed her on modified activity from September 3 to 17, 2014. In the September 8, 2014 Form CA-20a report, Dr. Adams advised that appellant was totally disabled from September 5 to 17, 2014 due to incapacitating injury or pain.

In a September 11, 2014 work status report, Dr. Marinor I. Torres, a family practitioner, placed appellant off work from September 5 to 30, 2014. She reported that she was unable to perform any kind of work due to her current left shoulder and low back pain. Dr. Torres listed her physical restrictions. She concluded that appellant could return to work at full capacity on October 1, 2014. In a September 26, 2014 work status report, Dr. Torres placed appellant off work from October 1 to 31, 2014 due to her current left shoulder and low back pain and reiterated her physical restrictions.

On September 22, 2014 appellant described the employment duties she believed caused her claimed conditions. She indicated that she performed these activities from 7:30 a.m. to 9:30 a.m. or 9:45 a.m., five days a week. These activities included lifting and flats, unwrapping flats, pulling down mail from cases, bending to transfer trays and arrange parcels, pulling and pushing heavy metal bins, pushing and pulling the hand brakes in appellant's truck, entering, and exiting her vehicle to deliver mail to customers. Appellant described the development of her claimed conditions beginning in 2011. She stated that she first experienced pain in her shoulders, arms, wrists, and lower back. Appellant took Aleve for her pain. On August 1, 2014 she had severe pain in the stated areas. Appellant claimed that she had never been diagnosed with or sustained an injury to her hand, arm, or wrist.

In a December 3, 2014 decision, OWCP denied appellant's claim. It found that the medical evidence of record did not contain a rationalized medical opinion to establish a causal relationship between her medical conditions and the accepted factors of federal employment.

By appeal request form and letter dated December 1, 2015, received on December 7, 2015, appellant requested reconsideration. She reiterated the nature of her duties and advised that she had submitted medical evidence. In support of her request, appellant resubmitted Dr. Adams' September 8, 2014 Form CA-20a report.

The new evidence submitted by appellant included a September 5, 2014 lumbosacral x-ray report completed by Dr. Donald J. Flanagan, a Board-certified radiologist. Dr. Flanagan provided an impression of vertebral bodies that were normal in height and alignment, mild degenerative changes of the vertebral bodies and articular facets, and well-preserved, symmetric, and maintained intervertebral disc spaces. There was no soft tissue abnormality. There was a sclerosis of the articular facet at L5 on the right that was most likely a benign process. Dr. Flanagan advised that if there was evidence of malignancy, then further evaluation would be warranted.

In a September 3, 2014 progress note and February 12, 2015 Form CA-20 report, Dr. Adams provided appellant's history and findings on examination. He reiterated his diagnoses of low back pain with bilateral sciatica, bilateral shoulder tendinitis, and right and left wrist tenosynovitis. Dr. Adams again responded "yes" that appellant's injury was consistent with a work-related injury based on her history and physical examination. In the February 12, 2015 Form CA-20 report, he noted that she had been placed on modified duty at work and home from September 3 to 17, 2014. In State of California workers' compensation request for authorization forms dated September 3, 2014, Dr. Adams sought treatment authorization for appellant's diagnosed bilateral wrist condition.

In a September 3, 2014 progress note, a nurse noted appellant's medical history and diagnoses of low back pain with bilateral sciatica, bilateral shoulder tendinitis, and right and left wrist tenosynovitis.

In a July 27, 2015 progress note, Dr. Genevieve E. Moya Viamonte, a Board-certified family practitioner, provided examination findings and assessed left shoulder impingement syndrome. She advised that her assessment was consistent with a work injury from repetitive heavy lifting. Dr. Moya Viamonte reported that appellant's injury improved while off work and worsened when she returned to work.

In a January 21, 2016 decision, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.<sup>3</sup>

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<sup>3</sup> 20 C.F.R. § 10.607(a) (2011).

Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>4</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 evidence of error. It is not enough to merely 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. To show clear evidence of error, the evidence submitted 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>6</sup>

OWCP procedures note 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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>7</sup> The Board makes an independent determination of whether a claimant has submitted, clear evidence of error on the part of OWCP.<sup>8</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for a merit review of her claim. OWCP regulations<sup>9</sup> and procedures<sup>10</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues,<sup>11</sup>

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<sup>4</sup> *Id.* at § 10.607(b) (2011); *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>5</sup> *See Alberta Dukes*, 56 ECAB 247 (2005).

<sup>6</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

<sup>8</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>9</sup> 20 C.F.R. § 10.607(a); *see supra* note 5.

<sup>10</sup> Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4 (October 2011); *see Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>11</sup> *See Robert F. Stone*, 57 ECAB 292 (2005).

including any merit decision by the Board and any merit decision following action by the Board.<sup>12</sup> Appellant has requested reconsideration of OWCP's December 3, 2014 merit decision which denied her occupational disease claim because the medical evidence of record was insufficient to establish that her medical conditions were caused by the accepted employment factors. She had one year from the date of the December 3, 2014 decision to make a timely request for reconsideration. Appellant's request for reconsideration was received by OWCP on December 7, 2015. As her request for reconsideration was received more than one year after the December 3, 2014 merit decision, the Board finds that it was untimely filed.

The Board also finds that appellant has not demonstrated clear evidence of error by OWCP. The issue is medical in nature and, on reconsideration, appellant resubmitted Dr. Adams' September 8, 2014 Form CA-20a report. OWCP had previously considered this evidence and in submitting this document, she did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying her claim for compensation. The resubmission of evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision.

Appellant submitted additional medical evidence on reconsideration. Dr. Adams' September 3, 2014 progress note and Form CA-20 and February 12, 2015 Form CA-20a reports reiterated his prior diagnoses of low back pain with bilateral sciatica, bilateral shoulder tendinitis, and right and left wrist tenosynovitis. He also reiterated his opinion on causal relationship by responding "yes" that appellant's injury was consistent with a work-related injury based on her history and physical examination. A mere checkmark or affirmative notation in response to a form question on causal relationship is not sufficient to establish a claim.<sup>13</sup> Further, Dr. Adams did not explain with medical rationale how the performance of appellant's accepted work duties caused the diagnosed conditions.<sup>14</sup> The Board finds, therefore, that this evidence of record does not raise a substantial question concerning the correctness of OWCP's decision. Dr. Adams' state workers' compensation authorization forms which requested authorization for medical treatment of appellant's diagnosed bilateral wrist condition do not establish clear evidence of error as they do not provide a rationalized medical opinion stating that the diagnosed condition was caused by the accepted employment factors.<sup>15</sup>

Dr. Moya Viamonte's July 27, 2015 progress note found that appellant's diagnosed left shoulder impingement syndrome was consistent with a work-related injury that involved repetitive heavy lifting. While this progress note offers some support for causal relationship, the Board has held that the term clear evidence of error is intended to represent a difficult standard.

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<sup>12</sup> See *E.C.*, Docket No. 13-1937 (issued February 6, 2014); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4(a) (October 2011).

<sup>13</sup> See *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>14</sup> See *Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value). See also, *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

<sup>15</sup> See *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

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>16</sup> The Board finds, therefore, that Dr. Moya Viamonte's progress note is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in denying her occupational disease claim.

Dr. Flanagan's September 5, 2014 diagnostic test results found that appellant had various lumbar conditions, but did not address whether the diagnosed conditions were caused by the accepted employment factors.<sup>17</sup> Consequently, this report does not raise a substantial question as to the correctness of OWCP's decision or shift the weight in favor of appellant's claim.

The September 3, 2014 progress note from a nurse is not probative medical evidence. A nurse is not a physician as defined under FECA.<sup>18</sup> Thus, this evidence does not shift the weight in favor of appellant to demonstrate clear evidence of error on the part of OWCP in the issuance of its December 3, 2014 decision.

On appeal, appellant contends that her request for reconsideration was timely filed. As discussed above, the evidence demonstrates that her reconsideration request was received by OWCP after the one-year time period had elapsed.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>16</sup> *D.G.*, 59 ECAB 455 (2008); see Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

<sup>17</sup> *Supra* note 15.

<sup>18</sup> 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law); *L.D.*, 59 ECAB 648 (2008) (a nurse practitioner is not a physician as defined under FECA). See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2016  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board