



On appeal appellant acknowledges that his request for reconsideration was untimely, but contends that the request was untimely because a medical facility failed to provide him with medical documentation he had requested in a timely manner. He further contends that the medical evidence submitted in support of his request for reconsideration established that he sustained a recurrence of disability.

### **FACTUAL HISTORY**

On March 11, 2008 appellant, then a 51-year-old letter carrier, filed an occupational disease claim (Form CA-2) under OWCP File No. xxxxxx255 for a right shoulder torn rotator cuff.<sup>3</sup> He claimed that he first became aware of his condition and realized its relationship to his federal employment on November 9, 2001.

OWCP accepted the claim for sprain of the right shoulder, unspecified site, and sprain of the right shoulder and upper arm, rotator cuff. It authorized right arthroscopic repair of a massive tear through a previously altered surgical field (right) and arthroscopic biceps tenodesis performed on March 4, 2009. Appellant stopped work at the employing establishment on March 4, 2009.<sup>4</sup>

In a March 31, 2009 decision, OWCP denied appellant's claim for compensation for leave without pay from June 19 to September 21, 2008. It found that the medical evidence of record was insufficient to establish that his claimed disability for work was caused by his accepted employment injuries.

On March 21, 2014 appellant filed a recurrence of disability claim (Form CA-2a) alleging a new period of disability which commenced on December 27, 2013 while he was sitting on a couch. He asserted that he experienced a cramp in his neck and shoulder area. Appellant alleged that his right shoulder had hurt since his injury on November 9, 2001. He indicated that he had no injuries since his March 2009 surgery. On the claim form, appellant stated that he had never returned to work and the employing establishment noted that he had retired.<sup>5</sup>

In a July 14, 2014 decision, OWCP denied appellant's claim for a recurrence of disability, finding that the medical evidence of record did not establish that he was disabled due to a worsening of his accepted work-related conditions without an intervening cause.

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<sup>3</sup> On September 30, 2009 appellant filed a claim under OWCP File No. xxxxxx808 for a left shoulder injury, accepted for a left shoulder and rotator cuff sprain. OWCP authorized benefits, including surgical authorizations for rotator cuff repairs. Appellant received supplemental wage-loss payments for periods between March 11, 2008 and August 24, 2013. He was placed on the periodic compensation rolls for total disability on August 25, 2013 and continued receiving such compensation at the time of the filing of the present appeal. OWCP administratively combined this file with the instant case assigned File No. xxxxxx255, with the latter serving as the master file.

<sup>4</sup> The record indicates that appellant had a right arthroscopic glenohumeral debridement, extensive and mini open repair of completer rotator cuff avulsion performed on December 14, 2001.

<sup>5</sup> The record indicates that appellant retired from the employing establishment and received benefits from the Office of Personnel Management. Effective August 24, 2011, appellant elected FECA benefits under File No. xxxxxx808.

OWCP received a May 19, 2014 letter from Dr. Eduardo I. Garcia, a pain medicine specialist, who noted appellant's history of injury and medical background. Dr. Garcia opined that it was undeniable that appellant had a severe recurrence in pain, spasms, loss of range of motion, and weakness to his right shoulder and right upper extremity, which were directly related to his November 9, 2001 work-related injury, without intervening cause.

On September 10, 2014 appellant requested reconsideration of the July 14, 2014 decision. He submitted a July 31, 2014 report from Dr. Mool P. Nigum, a Board-certified neurologist, who noted appellant's history of injury and medical, family, and social background. Dr. Nigum reported findings and diagnosed status post arthroscopic repair of the right shoulder, right shoulder impingement syndrome, and right shoulder arthralgia. He opined that appellant had a worsening of his right shoulder internal derangement and right rotator cuff tear directly related to his original November 9, 2001 employment injury.

In a December 10, 2014 decision, OWCP denied modification of its July 14, 2014 decision. It found that the medical evidence submitted was insufficient to establish that appellant sustained a recurrence of disability as of December 27, 2013 causally related to his accepted employment injuries.

In an appeal request form dated February 19, 2015 and received on February 24, 2015, appellant again requested reconsideration. In a February 25, 2015 statement, he indicated that he was a retired postal employee. Appellant described his former work duties and claimed that since February 11, 2014 his right shoulder pain (aggravated preexisting right shoulder pain) was constant and had worsened. He sought medical treatment and claimed that he was unable to perform any hobbies due to his injury.

In a January 29, 2015 report, Dr. Nigum noted that he examined appellant and advised that his accepted right shoulder sprain and right rotator cuff sprain should be expanded to include the diagnoses of postsurgical right shoulder, right shoulder rotator cuff tear, right shoulder labrum tear, right shoulder biceps tendon dislocation, and right shoulder internal derangement. He reiterated his prior opinion that appellant sustained a recurrence of his original November 9, 2001 right shoulder injury. Dr. Nigum noted that his opinion was based on a March 24, 2014 right shoulder magnetic resonance imaging (MRI) scan and arthrogram.

A March 24, 2014 right shoulder arthrogram report from Dr. John Wright, a Board-certified radiologist, provided an impression of large rotator cuff tear, postsurgical changes, and superior labral tear.

By decision dated May 22, 2015, OWCP denied modification of its December 10, 2014 decision finding that Dr. Nigum's report was insufficiently rationalized to establish that appellant's right shoulder conditions and claimed disability were causally related to his accepted employment injuries. The decision informed appellant that any request for reconsideration had to be made within one year of that decision.

OWCP received daily notes from appellant's physical therapists which addressed the treatment of appellant's left shoulder pain from February 25 to September 20, 2016.

In prescriptions dated March 25 and August 22, 2016, Dr. Ian J. Reynolds, a Board-certified orthopedic surgeon, ordered continued rehabilitation for appellant's sprain of the left rotator cuff capsule and strain of muscle, fascia, and tendon of the long head of biceps, left arm.

In an appeal request form and letter dated November 2, 2016 and received on November 22, 2016, appellant requested reconsideration of the May 22, 2015 decision. He submitted an April 6, 2016 right shoulder MRI scan report from Dr. Larry Hurdiss, a Board-certified radiologist. Dr. Hurdiss found that extensive tearing of the supraspinatus tendon and the anterior margin of the infraspinatus tendon was evident with marked retraction and significant atrophy of the supraspinatus muscle belly. He also found significant superior subluxation of the humeral head with a moderate, one centimeter, inferiorly directed osteophyte of the proximal head of the humerus. Dr. Hurdiss reported extensive postsurgical changes were present with multiple tracks within the greater tuberosity from prior orthopedic anchors. In a May 4, 2016 right shoulder MRI scan report, he found re-tearing of the supraspinatus tendon with marked retraction of the torn tendon in the superior subluxation of the humeral head. Dr. Hurdiss also found contrast material that extended directly through the torn rotator cuff into the subdeltoid and subacromial bursae and extended proximally over the muscle belly of the moderately atrophic supraspinatus muscle. In a May 4, 2016 addendum report, he amended his prior conclusion, noting that an arthrogram of the right shoulder demonstrated a moderate amount of direct extravasation of contrast material through a torn rotator cuff into the subdeltoid and subacromial bursae.

In an August 25, 2016 progress note, Dr. James D. Jackson, Jr., a general surgeon, provided a history of appellant's injury and medical treatment. He noted his persistent complaints of right shoulder pain, weakness, and loss of motion and strength. Dr. Jackson discussed findings on physical examination and provided an impression that appellant had continuing significant pain, loss of motion, and weakness of the right shoulder due to his work-related repetitive job duties. He advised that his right shoulder disability would not have occurred, but for the above-mentioned mechanism of injury. Dr. Jackson indicated that appellant had numerous MRI scan and arthrograms, which documented rotator cuff tears, all of which were comparable to the original injury on November 9, 2001. He also indicated that appellant's prior physicians, two of whom were orthopedic surgeons, documented a right shoulder diagnosis. Dr. Jackson related that his formal diagnosis was right rotator cuff tear. He opined that appellant had sustained a recurrence of his accepted November 9, 2001 right shoulder injury due to a material worsening and continued repetitive and persistent use of the shoulder during the performance of his work-related duties. Dr. Jackson maintained that this was documented by evaluations performed by orthopedic surgeons and MRI scan, which included arthrograms, dating from March 2014 to 2016.

In prescriptions dated April 7 and October 3, 2016, Dr. Reynolds again ordered continued rehabilitation for appellant's previously diagnosed left shoulder conditions. Daily notes signed by appellant's physical therapists addressed the treatment of appellant's left shoulder pain from September 20 to December 1, 2016.

In a January 26, 2017 decision, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

## LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>6</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>7</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>8</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>9</sup> To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>10</sup> that is positive, precise, and explicit, and that manifests on its face that OWCP committed an error.<sup>11</sup> The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated 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>12</sup>

## ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations<sup>13</sup> and procedures<sup>14</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of OWCP's most recent merit

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<sup>6</sup> 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term clear evidence of error is intended to represent a difficult standard).

<sup>10</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

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

<sup>12</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>13</sup> 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

<sup>14</sup> Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.1602.4 (October 2011); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

decision. The most recent merit decision was OWCP's May 22, 2015 decision. Appellant had one year from the date of that decision to make a timely request for reconsideration. Since OWCP did not receive his request until November 22, 2016, it was filed outside the one-year time period. As appellant's November 22, 2016 request for reconsideration was submitted more than one year after the May 22, 2015 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.<sup>15</sup>

The Board has reviewed the record and finds that the evidence submitted in the untimely request for reconsideration does not raise a substantial question as to the correctness of OWCP's last merit decision and is therefore insufficient to demonstrate clear evidence of error. The underlying issue in appellant's claim is medical in nature with respect to a claimed recurrence of disability causally related to his employment injuries. The Board notes that the term clear evidence of error is intended to represent a difficult standard.<sup>16</sup> Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.<sup>17</sup> It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.<sup>18</sup>

Appellant submitted Dr. Jackson's August 25, 2016 progress note in which he opined that he sustained a recurrence of disability due to his accepted right shoulder employment injury. Dr. Jackson reported findings and diagnosed a right shoulder rotator cuff tear. He advised that appellant's disability would not have occurred, but for the performance of his repetitive job duties. Dr. Jackson maintained that the worsening of the accepted injury was documented by appellant's prior physicians and diagnostic test results. As previously noted, even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.<sup>19</sup> While Dr. Jackson's opinion is generally supportive of causal relationship, it does not demonstrate clear error on the part of OWCP in rendering its May 22, 2015 decision.<sup>20</sup> His progress note is insufficient as he did not provide a sufficiently rationalized opinion regarding the causal relationship between appellant's right shoulder condition and the accepted employment injuries.<sup>21</sup> Thus, the Board finds that Dr. Jackson's report does not raise a substantial question concerning the correctness of OWCP's decision.

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<sup>15</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>16</sup> Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 10.

<sup>17</sup> See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

<sup>18</sup> See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

<sup>19</sup> *Supra* note 17.

<sup>20</sup> *K.T.*, Docket No. 16-0677 (issued June 16, 2016).

<sup>21</sup> *Willa M. Frazier*, 55 ECAB 379 (2004) (medical conclusions unsupported by rationale are of little probative value).

Appellant also submitted Dr. Hurdiss' April 6 and May 4, 2016 MRI scan and arthrogram reports in which the physician addressed his right shoulder conditions. The reports do not raise any error in the underlying OWCP's May 22, 2015 denial of appellant's recurrence of disability claim.<sup>22</sup> Additionally, Dr. Reynolds' prescriptions dated March 25 to October 3, 2016 for continued rehabilitation for appellant's diagnosed left shoulder conditions do not raise a substantial question as to the correctness of OWCP's decision as they do not address the relevant issue of causal relationship between the claimed recurrence of disability and the accepted right shoulder conditions.<sup>23</sup>

Appellant submitted daily notes from his physical therapists. Physical therapists are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.<sup>24</sup> Consequently, these daily notes are insufficient to demonstrate clear error by OWCP with respect to the underlying medical issue.

The Board finds that OWCP properly found that appellant's November 22, 2016 request for reconsideration failed to demonstrate clear evidence of error. It therefore properly denied appellant's reconsideration request.

On appeal appellant acknowledges that his request for reconsideration was untimely filed, but contends that this was because a medical facility failed to provide him with medical documentation in a timely manner. The May 22, 2015 decision contained clear instructions that any request for reconsideration had to be made within one year of that decision. The Board finds that appellant was aware of OWCP's requirement that reconsideration requests must be made within one year of the decision to be timely.<sup>25</sup> As appellant did not submit his reconsideration request within one year of the May 22, 2015 decision and failed to demonstrate clear evidence of error on the part of OWCP, the Board finds that OWCP properly denied his request.

Appellant further contends on appeal that the medical evidence submitted in support of his request for reconsideration established a recurrence of disability. For the reasons set forth above, the Board finds that the evidence submitted in support of appellant's untimely request for reconsideration was insufficient to *prima facie* shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of OWCP's May 22, 2015 decision denying his recurrence of disability claim.

### CONCLUSION

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

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<sup>22</sup> *M.N.*, *supra* note 18.

<sup>23</sup> *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).

<sup>24</sup> 5 U.S.C. § 8101(2); *J.M.*, 58 ECAB 448 (2007); *G.G.*, 58 ECAB 389 (2007); *David P. Sawchuck*, 57 ECAB 316, 322 n.11 (2006); *Allen C. Hundley*, 53 ECAB 551 (2002).

<sup>25</sup> *J.N.*, Docket No. 14-0034 (issued March 7, 2014).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 26, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2017  
Washington, DC

Christopher J. Godfrey, 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