



## **FACTUAL HISTORY**

On April 23, 2014 appellant, then a 41-year-old diagnostic radiologic technologist, filed a traumatic injury claim (Form CA-1) alleging that she injured her lower back and right hip area on April 13, 2014 while assisting a patient from a stretcher onto a radiology table. She notified the employing establishment of her claimed injury on April 23, 2014, and she stopped working the following day. Appellant resumed her regular duties on April 25, 2014. The employing establishment controverted the claim because of the delayed notification of injury, explaining that its policies/procedures required employees to report injuries as soon as possible.

According to appellant's supervisor, appellant stated that on April 13, 2014 she injured herself while moving a patient from a litter to the x-ray table. The supervisor further noted that on April 17, 2014 appellant stated that she strained herself moving a patient onto the computerized axial tomography (CAT) scan table. On April 21, 2014 appellant called in sick due to a sore back, and on April 22, 2014 she reported her injury to her supervisor. The following day, April 23, 2014, appellant's supervisor escorted her to employee health and to the human resources workers' compensation office.

Dr. Joshua D. Hottenstein, a Board-certified family practitioner, examined appellant on April 24, 2014. He provided an April 24, 2014 duty status report (Form CA-17) with clinical findings of sacroiliac (SI) joint tenderness. Appellant reportedly injured herself on April 13, 2014 when "pushing/lifting/moving patient on sheet to table." Dr. Hottenstein indicated that she was currently able to resume her full-time regular work. He also provided an April 25, 2014 attending physician's report (Form CA-20) with a diagnosis of sacroiliac sprain. Dr. Hottenstein reported that approximately 10 days prior, appellant was "lifting/pushing patient on sheet to table" and she experienced pain later that day. He attributed her sacroiliac sprain to the described employment activity, explaining that the pain began in the evening after pushing/lifting patient. Dr. Hottenstein further remarked that it is always possible to develop chronic pain from an acute injury. His treatment included anti-inflammatory medication, a muscle relaxer, and therapy. Dr. Hottenstein indicated that appellant was totally disabled on April 21, 2014, and that she could resume her regular duties on April 22, 2014.

An April 25, 2014 x-ray revealed a normal sacrum and coccyx.

OWCP also received a May 7, 2014 physical therapy initial evaluation. The report included a history of injury on April 13, 2014 when appellant was assisting a patient from a gurney onto the x-ray table, and in the process she reached across the gurney and lifted the patient's buttocks and pushed him/her forward onto the x-ray table. Appellant reportedly noted progressive pain and discomfort following the incident. The physical therapy report additionally noted that appellant injured herself on April 17, 2014 pulling a patient from a CAT scan table onto a gurney with the assistance of a nursing supervisor. This later incident "significantly exacerbated" appellant's pain and discomfort.

On May 9, 2014 appellant returned to Dr. Hottenstein for a follow-up examination. At that time, Dr. Hottenstein diagnosed SI joint dysfunction and lumbar spine sprain. He noted that this work-related injury occurred on April 13, 2014 while "moving/lifting patient on sheet." Dr. Hottenstein also reported that appellant had no previous injuries in this area. Additionally,

he noted that she missed work on four occasions between April 21 and May 7, 2014 due to pain. Dr. Hottenstein advised appellant to continue with her medications and physical therapy (12 sessions). He estimated that it may take two to six weeks for her to recover, and months before she came close to 100 percent.

In a May 13, 2014 attending physician's report (Form CA-20), Dr. Hottenstein diagnosed SI joint inflammation, and checked the box marked "no" in response to the question of whether he believed the diagnosed condition was caused or aggravated by an employment activity. He noted that appellant was partially disabled from work during the period May 13 through November 13, 2014, and imposed work restrictions that included no lifting over 20 pounds, no sitting or standing more than 30 minutes at a time, and shifts over eight hours a day. Dr. Hottenstein also provided a May 13, 2014 duty status report (Form CA-17).

Dr. Hottenstein examined appellant again on May 22, 2014. He noted, among other things, that her right SI joint pain had now spread to the right lateral hip. Dr. Hottenstein diagnosed SI joint inflammation, and continued to impose work restrictions.

Appellant also submitted a June 11, 2014 supplemental statement describing the patient-related lifting incidents that occurred on April 13 and 17, 2014. She also provided information regarding the timing of her notification about the work-related back/hip injuries.

By decision dated June 12, 2014, OWCP denied appellant's traumatic injury claim as she had not established a medical diagnosis in connection with the established injury or event(s). Thus, fact of injury was not established.

On July 1, 2014 appellant's then-counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 17, 2015.

OWCP received additional evidence, which included physical therapy treatment records dated June to September 2014, a July 17, 2014 lumbar magnetic resonance imaging (MRI) scan that was "Unremarkable," a July 29, 2014 MRI scan of the pelvis, which revealed normal SI joints, and an October 16, 2014 right hip MRI scan that similarly revealed normal SI joints and normal femoral heads.<sup>2</sup>

OWCP also received recent treatment records from Geisinger Health System, which included a December 2, 2014 neurosurgery history and physical report prepared by Michael T. Hatrak, a certified registered nurse practitioner. Appellant had a follow-up neurosurgery evaluation on January 13, 2015, at which time, Dr. Mauricio Campos-Benitez, a neurosurgeon, examined her and diagnosed chronic SI joint pain and right piriformis syndrome. Appellant was reportedly not interested in surgery, and was advised to continue receiving SI joint injections. With respect to her piriformis syndrome, Dr. Campos-Benitez recommended physical therapy and injections. On February 3, 2015 appellant was seen by Dr. Jolly L. Ombao, who is Board-certified in both anesthesiology and pain medicine. Appellant's active diagnoses included SI joint inflammation and chronic right SI joint pain. Dr. Ombao diagnosed sacroiliitis and

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<sup>2</sup> There was also evidence of uterine fibroids and a minimal fluid signal near the insertion of the right gluteus medius tendon on the greater trochanter.

piriformis syndrome. He recommended right buttock trigger point and SI joint injections. The December 2, 2014, January 13, and February 3, 2015 treatment records all noted an April 2014 history of injury when appellant lifted and/or moved a patient onto a CAT scan table.

By decision dated May 7, 2015, the hearing representative affirmed the June 12, 2014 decision. She noted that apart from numerous references to SI joint pain, the medical records lacked a definitive diagnosis and a well-reasoned medical opinion supporting causal relationship. Consequently, the hearing representative found that appellant had not met her burden of proof to establish an injury as alleged.

On May 18, 2015 appellant's then-counsel requested reconsideration of the hearing representative's May 7, 2015 decision. He also submitted a July 11, 2014 report from Dr. Mohammed S. Shakil, a Board-certified orthopedic surgeon, who diagnosed prolapsed lumbar intervertebral disc and sacroiliac joint somatic dysfunction.

OWCP took no action with respect to counsel's May 12, 2015 request for reconsideration.

On May 10, 2016 appellant again requested reconsideration. She submitted additional medical records, which included work restrictions from Dr. Shakil dated October 23, December 18, 2014, January 6 and March 5, 2015. Appellant's various diagnoses included trochanter bursitis, right sacroiliitis, right SI joint dysfunction, and right buttocks/SI joint, with reported trigger point injections. She also submitted February 18, 2015 follow-up treatment records from Dr. Ombao, who diagnosed sacroiliitis and myofascial muscle pain.

OWCP also received an April 1, 2015 report/letter from Dr. Hottenstein who advised that he had treated appellant for an SI joint inflammation/sprain injury that occurred at work on April 13, 2014. Dr. Hottenstein noted that appellant "reports the injury occurred at work ... lifting a patient on a sheet," and soon afterward she began to have pain in the right sacroiliac joint area. He also noted that appellant's x-rays and MRI scans of the lumbar spine and pelvis were unremarkable. Additionally, appellant's neurological examination was normal, except for tenderness near and around the right SI joint. Dr. Hottenstein further explained that appellant consulted with a neurosurgeon, who did not recommend any surgical intervention. He also noted that she had undergone physical therapy with minimal to slight improvement. Lastly, Dr. Hottenstein reported that appellant had seen a pain management specialist, who performed multiple injections which helped temporarily. In conclusion, he noted that appellant's course of improvement and recovery was very slow, and by September 2014 her pain had greatly improved, only to worsen again one to two months later.

In an August 8, 2016 decision, OWCP denied further merit review because appellant's May 10, 2016 request was untimely filed and failed to demonstrate clear evidence of error.

## LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>4</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>5</sup> OWCP will consider an untimely request for reconsideration only if the request demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit decision.”<sup>6</sup> The request must establish on its face that such decision was erroneous.<sup>7</sup> Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>9</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>10</sup>

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<sup>3</sup> This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application.” 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>6</sup> 20 C.F.R. § 10.607(b).

<sup>7</sup> *Id.* To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>8</sup> 20 C.F.R. § 10.608(b).

<sup>9</sup> *Id.* at § 10.606(b)(3).

<sup>10</sup> *Id.* at § 10.608(a), (b).

### ANALYSIS

OWCP initially denied appellant's traumatic injury claim by decision dated June 12, 2014 as she had not established a medical diagnosis in connection with the established injury or event(s) and, therefore, fact of injury was not established. In a May 7, 2015 decision, OWCP's hearing representative affirmed the June 12, 2014 decision. Appellant had one year from the May 7, 2015 merit decision to timely request reconsideration.<sup>11</sup> In its August 8, 2016 decision, OWCP noted that it received appellant's request for reconsideration more than one year after the last merit decision dated May 7, 2015. Because appellant's request was untimely filed, OWCP applied the clear evidence of error standard in determining whether to undertake further merit review of the claim. It ultimately concluded that appellant had not demonstrated clear evidence of error, and thus, denied further merit review of the claim.

The Board finds that OWCP erred in determining that appellant's request for reconsideration was untimely filed. The record reveals that appellant's then-counsel initially requested reconsideration on May 18, 2015. Counsel's request was also accompanied by new medical evidence. However, OWCP failed to address counsel's timely request for reconsideration, and in the process, effectively denied appellant the opportunity to obtain further merit review of her claim before the Board.<sup>12</sup> Consequently, the Board shall set aside the August 8, 2016 nonmerit decision, and remand the case for further merit review pursuant to 20 C.F.R. § 10.606.

### CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration as untimely filed and failing to demonstrate clear evidence of error.

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<sup>11</sup> *Id.* at § 10.607(a).

<sup>12</sup> *See* Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.7a.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 8, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further consideration consistent with this decision.

Issued: June 15, 2017  
Washington, DC

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

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

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