

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

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**T.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
South Wales, NY, Employer**

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**Docket No. 17-0318  
Issued: March 29, 2017**

*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  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 28, 2016 appellant filed a timely appeal from a June 7, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated March 6, 2015, 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 over the merits of this case.<sup>2</sup>

**ISSUE**

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

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

<sup>2</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its February 9, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore the Board lacks jurisdiction to review this additional evidence on appeal. 20 C.F.R. § 501.2(c)(1).

On appeal appellant contends that his request for reconsideration was timely filed based on tracking documents from the U.S. Postal Service.

### **FACTUAL HISTORY**

On January 20, 2015 appellant, then a 62-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he slipped on icy steps on January 14, 2015 injuring his neck, lower back, right arm, and shoulder. An employing establishment customer, at whose residence the incident occurred, reported that he heard appellant fall and helped him up. Appellant advised the customer that he would likely be sore the next day, but would continue with his route.

Appellant submitted notes dated January 26, and 30, 2015 from Dr. David F. Ratliff, a Board-certified orthopedic surgeon, diagnosing a right shoulder condition.

In a February 3, 2015 letter, OWCP noted that when appellant's claim was received it appeared to be for a minor injury that resulted in minimal or no lost time from work. It administratively approved a limited amount of medical expenses without formally considering the merits of the claim. OWCP informed appellant of the additional factual and medical evidence needed to establish his claim and allowed him 30 days to respond.

Dr. Priscilla Dale, a Board-certified internist, examined appellant on January 25 and February 12, 2015. She noted that appellant had slipped on stairs at work on January 14, 2015 while delivering a package. Appellant injured his neck, right shoulder, and lower back. He reported that he was holding onto the stair railing when he fell and pulled his shoulder. Dr. Dale diagnosed right shoulder joint pain, cervicalgia, sprains and strains of the neck, and back contusion. She checked a box marked "yes" indicating that the incident appellant described was the competent medical cause of his injury.

In a February 6, 2015 note, Dr. Frederick B. McAdam, a Board-certified physiatrist, reported that appellant slipped on icy steps, landing on his back hitting his head. Appellant experienced immediate neck, low back, and right shoulder pain. Dr. McAdam examined appellant and diagnosed back pain, neck pain, shoulder pain, lumbar stenosis, rotator cuff sprain/strain, right shoulder degenerative joint disease, cervical spondylosis, osteoarthritis of the knees and hip, ossification of the posterior longitudinal ligament in the cervical region, and ankylosing spondylitis. He checked a box marked "yes" to the question of whether the incident appellant described was the competent medical condition of his injuries.

Appellant completed a factual statement on February 18, 2015 and noted that while he was descending steps he slipped and fell down two to three steps hurting his neck, lower back, and right shoulder. He noted that, as he slipped, his body turned and he struck his head causing his neck injury.

By decision dated March 6, 2015, OWCP denied appellant's traumatic injury claim, finding that he had failed to submit rationalized medical evidence establishing causal relationship between his diagnosed conditions and the accepted employment injury.

Following the March 6, 2015 decision, appellant submitted additional medical evidence. Dr. Dale completed a note on January 19, 2015 opining that appellant had sustained a workers' compensation injury as he fell down stairs at work on January 14, 2015 while delivering a package. Appellant injured his neck, right shoulder, and lower back. He noted that he pulled his right shoulder when he was holding onto the railing and falling. Dr. Dale diagnosed shoulder joint pain, cervicalgia, neck sprains and strains, and back contusion. She checked the box marked "yes" to the question of whether the incident appellant described was the competent medical cause of his injury.

Dr. Ratliff completed a January 28, 2015 form report provided by the State of New York's Workers' Compensation Board. He noted that appellant fell down stairs and injured his right shoulder on January 14, 2015. Dr. Ratliff diagnosed rotator cuff sprain and strain. He checked a box marked "yes" to the question of whether the incident that appellant described was the competent medical cause of his injury. In a March 9, 2015 form report, Dr. Ratliff opined that appellant sustained a right shoulder injury on January 14, 2015 associated with a fall at work. He diagnosed right shoulder pain. Dr. Ratliff again checked the box marked "yes" to indicate that the incident that appellant described was the competent medical cause of his injury.

On December 24, 2015 Dr. McAdam completed a form report diagnosing lumbago, cervicalgia, pain in the shoulder joint, and lumbosacral spondylosis. He also checked the box marked "yes" to the question of whether he was of the opinion that appellant's incident was the competent medical cause of his injury. Appellant submitted treatment notes from his physical therapist and from physician assistants.

Appellant's request for reconsideration of OWCP's March 6, 2015 decision was received by OWCP on March 10, 2016. In support of this request, he submitted additional medical evidence, notes from physical therapy, notes from a physician assistant and a note dated February 29, 2016 from Dr. McAdam opining that appellant's condition was the result of his January 14, 2015 work accident. An undated note from Dr. McAdam described appellant's lower back pain, as well as his right arm and shoulder pain. He noted that appellant slipped and fell on icy steps after delivering a parcel. Dr. McAdam reported, "While holding onto railing with right arm, slipped and fell with sufficient force to tear right rotator cuff. As he continued down steps on back injuring lower back while slipping on steps. Further down the steps the patient's body spun around hitting his head on house and pushing his head into his neck. Patient is over 300 pounds and had sufficient force to do injury."

By decision dated June 7, 2016, OWCP denied appellant's request for reconsideration of the merits, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>3</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>4</sup> This section vests OWCP with discretionary authority to determine whether

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

it will review an award for or against compensation.<sup>5</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request.<sup>6</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>7</sup>

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>8</sup> OWCP's procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>11</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>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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>14</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 substantial question as to the correctness of OWCP's decision.<sup>15</sup> The Board must make an independent

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<sup>5</sup> *Id.* at 768; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>6</sup> 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016). G.F., Docket No. 15-1053 (September 11, 2015).

<sup>7</sup> *Supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

<sup>8</sup> *Supra* note 4 at 770.

<sup>9</sup> See *supra* note 6 at Chapter 2.1602.5 (February 2016).

<sup>10</sup> *Supra* note 4.

<sup>11</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>12</sup> *Jesus D. Sanchez*, *supra* note 5 at 968.

<sup>13</sup> *Supra* note 11.

<sup>14</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

determination of 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>16</sup>

## ANALYSIS

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

OWCP found in its March 6, 2015 decision that appellant had failed to meet his burden of proof to establish his traumatic injury claim as he had failed to submit medical evidence sufficient to establish causal relationship between the accepted employment incident and his diagnosed conditions. Appellant requested reconsideration through a letter received by OWCP on March 10, 2016. As noted above, a timely reconsideration request must be received by OWCP within one year of the merit decision. Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees' Compensation System (iFECS)).<sup>17</sup> If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.<sup>18</sup> Because appellant's reconsideration request was not received until March 10, 2016, it was untimely filed.

As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP. The Board finds that the reconsideration request and the evidence do not demonstrate clear evidence of error in this case. In support of his untimely request for reconsideration, appellant submitted additional medical evidence from Drs. McAdam, Ratliff, and Dale. These physicians submitted new reports which continued to support a causal relationship between appellant's condition and his employment. Dr. McAdam's undated report noted that due to appellant's weight his slip and fall while holding a hand rail generated sufficient force to cause a rotator cuff tear. While this evidence supports appellant's claim, it is insufficient to demonstrate clear evidence of error which is intended to be a difficult standard. The Board has held that evidence is insufficient to demonstrate clear evidence of error even if it is of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error.<sup>19</sup> In order to demonstrate clear evidence of error, the evidence 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.<sup>20</sup> The medical evidence submitted by appellant does not have sufficient probative value to shift the weight of the evidence in favor of appellant.

Appellant also submitted documents from his physical therapist and physician assistants. These notes are immaterial as physical therapists and physician assistants are not considered

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<sup>16</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>17</sup> *Supra* note 6 at Chapter 2.1602.4(b) (February 2016).

<sup>18</sup> *R.Y.*, Docket No. 16-1301 (issued December 15, 2016); *T.E.*, Docket No. 16-0574 (issued August 18, 2016).

<sup>19</sup> *D.G.*, 59 ECAB 455 (2008).

<sup>20</sup> See *supra* note 15.

physicians under FECA.<sup>21</sup> Their reports and opinions do not constitute probative medical evidence to establish error by OWCP.<sup>22</sup>

On appeal appellant disagrees with OWCP's regulations and contends that his reconsideration request should have been received by OWCP in a timely manner.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 29, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>21</sup> R.S., Docket No. 15-0988 (issued August 12, 2015) .

<sup>22</sup> 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).