



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts of the case set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 19, 2012 appellant, then a 56-year-old mail carrier, filed an occupational disease and claim for compensation (Form CA-2) alleging that she sustained a right shoulder injury causally related to repetitive right arm movements in her job duties. In a letter dated July 9, 2012, she stated she had been a city carrier until October 23, 2010, when she stopped working due to an alleged August 23, 2010 employment injury to her back.<sup>3</sup> Appellant stated that in 2010 she experienced shoulder pain and she discussed her job duties.

In a report dated July 18, 2012, Dr. Mark Barnhard, an osteopath, provided a history of an August 23, 2010 employment incident involving an onset of low back pain after pulling a lever. As to the right shoulder, he reported that appellant developed a gradual onset of pain in July 2010, but did not see a physician until September 2011. Dr. Barnhard indicated that appellant was given an injection in her shoulder by a physician assistant in October 2011. He provided results on examination and diagnosed lumbar facet arthropathy and right shoulder rotator cuff tendinopathy, stable.

By decision dated October 16, 2012, OWCP denied appellant's claim as she had not established the factual component of her claim. It indicated that appellant had referred to a second opinion report from Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, but this was a referral for his back injury claim and Dr. Swartz did not state appellant had a work-related shoulder injury.<sup>4</sup> OWCP found the evidence did not establish an employment-related injury.

On October 11, 2013 appellant requested reconsideration and submitted a September 27, 2013 report from Dr. Jacob Tauber, a Board-certified orthopedic surgeon. Dr. Tauber provided a history and noted appellant's job duties. He provided results on examination and diagnosed right rotator cuff tear. Dr. Tauber stated that appellant carried out extensive strenuous and repetitive motion duties in the course of her employment, noting appellant's job duties of retrieving and casing mail. He stated that she had a rotator cuff tear and the mechanism of injury was a "classic repetitive motion due to her impingement." Dr. Tauber concluded that appellant's injury should be considered work related.

By decision dated December 19, 2013, OWCP reviewed the case on its merits and modified the October 16, 2012 decision to reflect a denial based on another basic element. It found the medical evidence was insufficient to establish an injury causally related to the accepted employment factors.

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<sup>2</sup> Docket No. 14-1192 (issued October 17, 2014).

<sup>3</sup> The record indicates that appellant filed a traumatic injury claim for injury on August 23, 2010.

<sup>4</sup> The record contains a May 26, 2011 report from Dr. Swartz, who noted that appellant reported pain in her right shoulder and appellant stated that it was a repetitive strain injury.

Appellant appealed to the Board on April 28, 2014. The Board affirmed the December 19, 2013 OWCP decision on October 17, 2014.<sup>5</sup> The Board found that the medical evidence of record was insufficient to establish a right shoulder injury causally related to factors of her federal employment.

On September 15, 2015 appellant again requested reconsideration. She submitted a September 11, 2015 letter, arguing that the medical evidence contained rationalized medical opinions. Appellant asserted that she had “additional medical reports” and an updated magnetic resonance imaging (MRI) scan.

By letter dated October 2, 2015, OWCP noted that no additional medical evidence had been received, and requested that appellant submit any additional evidence within 20 days. On October 14, 2015 it received a six-page facsimile (fax) transmission, which included appellant’s September 11, 2015 letter. No additional medical evidence was received.

By decision dated October 28, 2015, OWCP denied appellant’s request for reconsideration of the merits of the claim, under 5 U.S.C. § 8128(a) as she had not met any of the requirements for merit review.

On November 3, 2015 OWCP received a fax transmission that included a report dated April 7, 2015 from Dr. Tauber. Dr. Tauber provided results on examination and opined that appellant had an employment-related shoulder condition. A memorandum of telephone call dated November 5, 2015 indicated that appellant asserted that she had attempted to submit medical evidence, but the fax transmission did not go through for some reason. The memorandum indicated that appellant was advised to request reconsideration.

On February 22, 2016 appellant again requested reconsideration of her claim. In a letter dated November 5, 2015, she again argued the medical evidence was sufficient to establish the claim.

By decision dated May 19, 2016, OWCP reviewed the merits of the claim and denied modification of its prior merit decision. It found that if a reconsideration request included new and relevant evidence, or an arguable case for error, a merit review should be conducted. In reviewing the history of the case, OWCP found that the October 28, 2015 decision had denied the claim as there was insufficient evidence to support causal relationship.

### **LEGAL PRECEDENT**

5 U.S.C. § 8128(a) provides that OWCP may review an award for or against compensation upon application by an employee or on its own motion. The employee shall exercise her right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>6</sup>

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> 20 C.F.R. § 10.605 (1999). The regulations provide that OWCP may, on its own motion and without regard to whether there is new evidence, review an award for or against payment of compensation. 20 C.F.R. § 10.610.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by it within one year of the date of OWCP's decision for which review is sought.

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoument hearing decisions.<sup>7</sup> Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.<sup>8</sup>

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>9</sup> The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>10</sup>

### ANALYSIS

In the present case, OWCP received appellant's request for reconsideration on February 22, 2016.

The May 19, 2016 decision applied a standard for timely requests and found it was sufficient to review the merits of the claim.<sup>11</sup>

20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought. A right

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.a (February 2016).

<sup>8</sup> *Id.* at Chapter 2.1602.4b (February 2016).

<sup>9</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>10</sup> *Supra* note 7 at Chapter 2.1602.5(a) (October 2011).

<sup>11</sup> Under 20 C.F.R. § 10.606(b), for a timely reconsideration request, a claimant is entitled to a merit review if the request shows that OWCP erroneously applied or interpreted a specific point of law, advances a new and relevant legal argument, or submits relevant and pertinent new evidence.

to reconsideration within one year accompanies any subsequent merit decision on the issues,<sup>12</sup> including a Board decision.<sup>13</sup>

In the May 19, 2016 decision, OWCP described the October 28, 2015 decision as a merit review. If the October 28, 2015 decision was a merit review, appellant would have one year from that date to timely request reconsideration. The October 28, 2015 decision however, denied a review of the merits as appellant had not submitted any medical evidence in support of her September 15, 2015 request for reconsideration and failed to meet the criteria for reopening the merits of her claim.<sup>14</sup>

The last merit decision in this case was the Board's October 17, 2014 decision. Because appellant's reconsideration request was received on February 22, 2016, more than one year after the October 17, 2014 decision, it was untimely filed. As an untimely reconsideration request, the proper standard of review is clear evidence of error.

The Board therefore finds that the case should be remanded to OWCP for proper review of the February 22, 2016 reconsideration request under the clear evidence of error standard.<sup>15</sup> After such review, OWCP should issue an appropriate decision.

### CONCLUSION

The Board finds that OWCP improperly denied appellant's February 22, 2016 reconsideration request under 5 U.S.C. § 8128(a).

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<sup>12</sup> *Id.*

<sup>13</sup> *See supra* note 7.

<sup>14</sup> Even if appellant had submitted a reconsideration request on November 3, 2015, when she submitted medical evidence, such a request would have been received more than one year after the October 17, 2014 Board decision.

<sup>15</sup> *T.E.*, Docket No. 16-0574 (issued August 18, 2016); *A.B.*, Docket No. 15-0521 (issued June 13, 2016); *R.J.*, Docket No. 15-1797 (issued April 7, 2016); *W.L.*, Docket No. 15-0842 (issued January 14, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 19, 2016 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: May 16, 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