



## **FACTUAL HISTORY**

On January 12, 2015 appellant, then a 50-year-old medical support assistant, filed a traumatic injury claim (Form CA-1) alleging that, at 6:21 a.m. on January 8, 2015, she slipped and fell on ice and rocks in the parking lot of the Rapid City Community Based Outpatient Clinic injuring her lower back, left knee, and left foot. Appellant's supervisor indicated that her tour of duty began at 6:30 a.m. and that she was not in the performance of duty at the time her injury occurred. She further indicated that the clinic building was leased property.

Dr. Lee Hanson, an internist, examined appellant at the employing establishment and diagnosed low back strain and multiple contusions. He noted that she had fallen on ice on January 8, 2015. Appellant underwent back x-rays on January 9, 2015 which did not demonstrate fracture, scoliosis, spondylolisthesis, or disc space narrowing.

Dr. Jaceza Barker, a family practitioner, completed a form report on January 8, 2015 diagnosing lumbar strain as well as foot and hand contusion. Appellant also submitted a series of form reports and notes from Dr. Daniel T. Lecy, a chiropractor, diagnosing cervical, thoracic, and lumbar sprains and subluxations from January 9 through June 26, 2015. Dr. Lecy reviewed x-rays taken on January 9, 2015 at the employing establishment and found rotation subluxation at L4 on the left. He described appellant's history of injury as slipping and falling on ice at work on January 8, 2015. Dr. Lecy noted that she landed on her lower back in some landscaping, while her knee landed on the curb, and her arm twisted as she tried to control the landing.

Appellant submitted reports from Dr. Jared C. Shippee, a podiatrist, dated January 28, and May 6, 2015 diagnosing capsulitis and tendon trauma in the left foot. Dr. Shippee noted that she slipped on ice on January 8, 2015 and fell. Appellant braced herself with her left arm and she hit on her left knee and left first metatarsophalangeal joint (MPJ).

In a letter dated June 15, 2015, OWCP requested additional factual and medical evidence from appellant and the employing establishment to determine if her injury occurred in the performance of duty. It noted that her claim initially appeared to be for a minor injury that resulted in minimal or no lost time from work and that payment of a limited amount of medical expenses was administratively approved. OWCP reopened appellant's claim for consideration because she requested additional medical treatment.

On July 10, 2014 appellant noted that on January 8, 2015 at approximately 6:30 a.m. she slipped and fell on ice in the parking lot of her work building. She injured her left foot, left knee, hand, and lower back. Appellant noted that she was required to park in that parking lot and that employees did not pay for parking.

By decision dated July 20, 2015, OWCP denied appellant's traumatic injury claim finding that she had not submitted sufficient medical opinion evidence to establish causal relationship between her accepted employment incident and the claimed employment injury.

On October 27, 2015 appellant requested both a review of the written record from OWCP's Branch of Hearings and Review and reconsideration from OWCP. She had undergone lumbar and left foot and ankle magnetic resonance imaging (MRI) scans on September 1 and

October 14, 2015, respectively. Appellant's lumbar MRI scan demonstrated minimal early degenerative changes of the lumbar spine. Her left foot MRI scan demonstrated degenerative changes in the joints and partial tearing of the medial capsule of the first metatarsal joint.

Appellant submitted additional notes from Dr. Lecy dated June 16 through September 2, 2015, which diagnosed closed dislocations of the cervical, thoracic, and lumbar vertebra, as well as sprain of the foot, knee, and leg. Dr. Lecy continued to rely on the January 9, 2015 x-rays.

In a letter dated October 29, 2015, OWCP requested that appellant clarify her appeal request. On November 2, 2015 appellant again requested both a review of the written record and reconsideration. She responded to OWCP on December 28, 2015 and requested reconsideration of the July 20, 2015 decision.

In a January 15, 2016 decision, OWCP denied modification of appellant's traumatic injury claim finding that she failed to submit medical evidence sufficient to establish causal relationship between her diagnosed condition and her accepted employment incident.

On November 1 and 4, and December 7 2016, Dr. Dale R. Anderson, an orthopedic surgeon, examined appellant's left knee due to crunching and grinding with flexion and extension. On March 8, 2017 he reported her continuing bilateral knee pain.

Appellant provided a detailed description of her January 8, 2015 incident on December 19, 2016. She noted that, as she opened the rear door of her car, she started sliding backwards on snow and ice. Appellant tried to turn her body to the left to catch herself. Her knee hit the packed ice and snow on the curb and her left palm hit the landscaping rocks as well as the ice and snow. The tip of appellant's foot became wedged under the ice and snow hyperextending her foot. She asserted that this caused impingement capsulitis arthritis and a tear in the tendon and required fusion of her left foot.

Appellant underwent an additional lumbar MRI scan on December 27, 2016 which demonstrated minimal early degenerative changes of the lumbar spine. Dr. Edward L. Seljeskog, a Board-certified neurosurgeon, examined her on December 28, 2016 due to low back pain. He opined that appellant's problem developed in January 2015 when she fell on some ice and twisted her back. Dr. Seljeskog noted that she continued to experience back discomfort without any real clear cut radiculopathy. He diagnosed lumbar degenerative disc disease with low back pain.

Dr. Kent E. Renaud, a podiatrist, examined appellant on December 29, 2015 and noted that she reported that her foot was jammed up into some snow and ice when she fell. He diagnosed osteoarthritis of the left foot, sprained tarsometatarsal ligament, and chronic left first MPJ pain and degeneration following an injury.

On January 11, 2016 appellant underwent left first MPJ fusion due to pain and arthritis.

In a note dated January 4, 2017, Dr. Shippee opined that it was plausible that her left foot findings on MRI scan could be a result from her fall. He noted that the trauma to the first MPJ could result in hyperextension and tearing of the joint capsule as well as the flexor tendons.

On March 17, 2017 Dr. Peter E. Vonderau, a physiatrist, noted that appellant fell in January 2015 and sustained low back and left foot injuries. He diagnosed bilateral L5-S1 radiculopathies.

Appellant requested reconsideration on April 10, 2017. In an accompanying letter, she again described her employment incident on January 8, 2015. Appellant reported that she continued to receive medical treatment and requested wage-loss compensation for lost time from work.

By decision dated April 14, 2017, OWCP denied appellant's report for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.

### **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 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 the "received date" in the Integrated Federal Employee's Compensation System (iFECS).<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> 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.<sup>8</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 the claimant has demonstrated clear evidence of error.<sup>9</sup> OWCP's procedures state that OWCP will

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<sup>3</sup> 5 U.S.C. § 8128(a).

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

<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 6 at Chapter 2.1602.4(a) (February 2016).

<sup>9</sup> *Supra* note 4 at 770.

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 demonstrates clear evidence of error on the part of OWCP.<sup>10</sup>

Clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake.<sup>11</sup> To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>12</sup> The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>13</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</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>16</sup> To demonstrate 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>17</sup>

The Board must make an independent determination of whether a claimant has demonstrated 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>18</sup>

### ANALYSIS

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.

The most recent merit decision of OWCP is dated January 15, 2016. As appellant requested reconsideration of this decision on April 10, 2017, more than one year after the

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<sup>10</sup> See *A.J.*, Docket No.17-0302 (issued June 26, 2017); *supra* note 6 at Chapter 2.1602.5 (February 2016).

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* note 5.

<sup>13</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>14</sup> *Jesus D. Sanchez*, *supra* note 5 at 968.

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>17</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>18</sup> *Nancy Marciano*, 50 ECAB 110 (1998).

January 15, 2016 decision, the request for reconsideration is untimely filed.<sup>19</sup> Consequently, she must demonstrate clear evidence of error by OWCP in denying her traumatic injury claim.<sup>20</sup>

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in issuing its January 15, 2016 decision. Appellant did not submit the necessary positive, precise, and explicit evidence manifesting on its face that OWCP committed an error.

Following the January 15, 2016 OWCP merit decision, appellant submitted additional medical evidence addressing the issue of causal relationship between her diagnosed conditions and the January 8, 2015 employment incident. Appellant submitted medical reports from Drs. Renaud and Vonderau diagnosing medical conditions and mentioning her January 8, 2016 fall. However, these reports do not address the central issue in appellant's claim, the causal relationship between her employment injury and her diagnosed conditions, as they do not clearly describe any causal relationship between the injury and the diagnosed condition. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>21</sup> For these reasons, these reports fail to demonstrate clear evidence of error on the part of OWCP.<sup>22</sup>

Appellant submitted two reports addressing causal relationship between her diagnosed conditions and the employment incident. In his January 4, 2017 report, Dr. Shippee opined that it was plausible that her left foot findings on MRI scan could be a result from her fall. He noted that the trauma to the first MPJ could result in hyperextension and tearing of the joint capsule as well as the flexor tendons. Dr. Shippee did not offer a clear opinion that appellant's left foot condition was causally related to the January 8, 2015 employment incident. An award of compensation may not be based on surmise, conjecture, or speculation.<sup>23</sup> Dr. Seljeskog on December 28, 2016 diagnosed lumbar degenerative disc disease. While he opined that appellant's back condition developed in January 2015 when she fell on some ice and twisted her back, this note is not sufficient to establish causal relationship between her back condition and her employment incident as he did not explain how or why the diagnosed degenerative condition arose. Furthermore, under the clear evidence of error standard, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate 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>24</sup>

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<sup>19</sup> 20 C.F.R. § 10.607.

<sup>20</sup> *Supra* note 9.

<sup>21</sup> *Supra* note 4.

<sup>22</sup> *S.G.*, Docket No. 17-0175 (issued June 15, 2017).

<sup>23</sup> *D.W.*, Docket No. 16-0639 (issued August 5, 2016); *D.U.*, Docket No. 10-0144 (issued July 27, 2010); *L.D.*, Docket No. 09-1503 (issued April 15, 2010); *D.I.*, 59 ECAB 158 (2007); *Daniel O. Vasquez*, 57 ECAB 559 (2006); *Robert Broome*, 55 ECAB 339 (2004); *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>24</sup> *Supra* note 17.

The Board therefore finds that neither Dr. Shippee's January 4, 2017 report nor Dr. Seljeskog's December 28, 2016 report demonstrate clear evidence of error on the part of OWCP.

**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** April 14, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 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