



pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.<sup>3</sup>

### **ISSUE**

The issue is whether OWCP properly denied appellant's October 1, 2015 request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> On December 22, 2005 appellant, then a 49-year-old lead transportation security screener, sustained an injury in the performance of duty. She was attempting to move a bin from behind a screener to prevent her from falling over the bin. As appellant leaned across the machine exit ramp, she was hit by the next bag exiting the machine. The bag struck her right upper arm/shoulder. OWCP initially accepted appellant's traumatic injury claim (Form CA-1) for right shoulder sprain/strain, cervical sprain/strain, and displaced cervical intervertebral disc in OWCP File No. xxxxxx192. The claim was subsequently expanded to include right shoulder adhesive capsulitis, right shoulder osteoarthritis, brachial neuritis/radiculitis, and lumbar spinal stenosis. Appellant also sustained a work-related injury on March 22, 2006, which OWCP accepted for neck sprain, bilateral upper arm/shoulder sprain, and bilateral rotator cuff sprain under OWCP File No. xxxxxx511.<sup>5</sup>

On June 12, 2008 appellant underwent OWCP-approved right shoulder arthroscopy. She received wage-loss compensation for temporary total disability. OWCP placed her on the periodic compensation rolls effective July 6, 2008. On October 30, 2008 appellant underwent left shoulder arthroscopy.

On February 3, 2009 appellant returned to work in a part-time limited-duty capacity. She worked four hours per day and OWCP paid her for four hours of wage-loss compensation per day. OWCP also paid intermittent wage-loss compensation for medical appointments and physical therapy. Appellant's then treating physician, Dr. Karen M. Perl, continued to find her capable of performing limited-duty work.<sup>6</sup>

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The record on appeal contains evidence received after OWCP issued its December 29, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Thus, the Board is precluded from reviewing this evidence. 20 C.F.R. § 501.2(c)(1).

<sup>4</sup> Docket No. 10-2113 (issued July 6, 2011) (the Board affirmed in part and set aside in part OWCP's July 13, 2010 overpayment determination).

<sup>5</sup> OWCP administratively combined OWCP File No. xxxxxx511 with OWCP File No. xxxxxx192, and designated OWCP File No. xxxxxx192 as the master file.

<sup>6</sup> Dr. Perl specializes in pain medicine, as well as physical medicine and rehabilitation.

On June 1, 2010 appellant returned to work full time with restrictions in the position of lead transportation security officer.

On August 11, 2010 appellant rejected a limited-duty assignment as a lead transportation security officer set to begin August 15, 2010. She stopped work on August 17, 2010.

In an August 18, 2010 letter, the employing establishment requested that OWCP determine the suitability of the offered employment position. It noted that the only change from the limited-duty assignment that was issued on April 18, 2010, which appellant signed on June 1, 2010, was the shift/hours of duty which were changed due to operational needs.

By letter dated September 17, 2010, OWCP notified appellant that the duties and physical requirements of the offered position were suitable and in accordance with her medical limitations provided by Dr. Perl in her report of January 19, 2010, and that the position remained available to her.<sup>7</sup> Appellant was notified that if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to 5 U.S.C. § 8106(c)(2), her right to compensation for wage-loss compensation and schedule award benefits would be terminated. She was afforded 30 days to respond.

In response, appellant submitted an October 14, 2010 letter in which she alleged that she did not “abandon” her job. Rather, she alleged that she was told to sign out and leave. Medical reports, diagnostic tests, and physical therapy notes were also submitted along with a request to authorize Dr. Perl as appellant’s treating physician, which OWCP previously approved.

In a February 18, 2011 letter, OWCP evaluated the evidence submitted by appellant and indicated that she had not provided a valid reason for refusing to accept the offered position. Appellant was afforded 15 additional days to accept the position or her entitlement to wage-loss compensation and schedule award benefits would be terminated.

On March 7, 2011 the employing establishment confirmed that the offered position was still available and that appellant had yet to return to work.

By decision dated March 8, 2011, OWCP terminated appellant’s wage-loss compensation and schedule award benefits, effective August 17, 2010, as she refused suitable work. It found that none of the reasons she provided or the medical evidence submitted were considered valid reasons or probative evidence to support her abandonment of suitable work.

On February 27, 2012 OWCP received appellant’s February 20, 2012 request for reconsideration by her then-representative, along with additional evidence.

By decision dated May 25, 2012, OWCP denied modification of its March 8, 2011 decision. It found that the weight of the medical evidence established that, at the time the job offer was made, appellant was capable of performing the modified position. Further, when appellant was notified of the position’s suitability on September 17, 2010, she had the burden of proof to show that her refusal to work in the offered position was justified.

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<sup>7</sup> In her January 19, 2010 report, Dr. Perl released appellant to work full time and light duty with restrictions.

On May 10, 2013 OWCP received appellant's appeal request form dated May 2, 2013 requesting reconsideration along with additional medical evidence.

By decision dated May 23, 2013, OWCP denied modification of its May 25, 2012 decision. It noted that the medical evidence of record indicated that at the time of the decision appellant was successfully working in the offered light-duty position for over two months when she stopped working. There was no rationalized medical evidence to support a material change in her condition during the period in question.

On January 8, 2014 OWCP expanded appellant's claim to include right shoulder adhesive capsulitis, right shoulder osteoarthritis, brachial neuritis/radiculitis, and lumbar spinal stenosis.

On May 22, 2014 appellant's representative, requested reconsideration and submitted additional evidence.

By decision dated September 26, 2014, OWCP denied modification of its May 23, 2013 decision. It noted that any change in appellant's stated work limitations or deterioration of a medical condition after the March 8, 2011 decision terminating compensation under section 8106(c)(2) would not have any effect on the prior decision.

On October 1, 2015 OWCP received appellant's September 24, 2015 request for reconsideration. Appellant submitted the appeal request form that accompanied OWCP's September 26, 2014 decision. In a separate letter, also dated September 24, 2015, she argued that OWCP relied upon the records from Dr. Perl in finding the position suitable, but appellant had not been seen by Dr. Perl for nearly eight months from the time of OWCP's 30-day letter. Appellant also noted that she had requested in January 2010 to be released from Dr. Perl's care, which OWCP ultimately authorized in September 2010. She indicated that, in June 2014, the Office of Personnel Management (OPM) approved her for disability.

Medical reports and diagnostic testing dated September 3, 2014 through December 9, 2015 were also received. In a September 21, 2015 report, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, indicated that appellant stopped work on August 17, 2010 and he became her treating physician on September 20, 2010. He indicated that he had recommended that she be off work because of cervical radicular symptoms with numbness and tingling down her right shoulder and bilateral shoulder weakness. Dr. Shade indicated that, due to bio-mechanics utilized by appellant's arms, shoulders, and neck, she would be unable to perform the job duties of a Travel Document Checker which consists of, but is not limited to, reaching, pushing, pulling, and lifting. He noted that the findings contained in the June 24, 2010 electromyogram (EMG) and indicated that the testing showed that she suffered from comprehensive neurological, musculoskeletal issues prior to her stopping work on August 17, 2010. Dr. Shade opined, based on that EMG testing and his medical expertise, that appellant was unable to perform the August 17, 2010 and March 21, 2011 job offers.

In progress reports of April 16, May 14, and November 25, 2015, Dr. Shade provided an assessment of cervical herniated nucleus pulposus, multilevel (3) cervical spinal stenosis, bilateral impingement syndrome -- surgically treated, right shoulder acromioclavicular osteoarthritis, right rotator cuff tear, right shoulder adhesive capsulitis shoulder, left carpal tunnel

syndrome by EMG, depression/anxiety, and chronic pain syndrome. He indicated that appellant had secondary emotional conditions directly related to her December 22, 2005 employment injury and impeded her ability to recover. Dr. Shade also opined that she continued to require mental and physical medical care as a result of the work-related injury which left her temporarily totally disabled. He noted that the accepted conditions were still present and appellant would be at risk to herself and to the employing establishment if she returned to work. Dr. Shade noted that her medical disability retirement was pending. He further opined that OWCP File No. xxxxxx511, for an accepted bilateral shoulder condition, should be reopened for appellant's left shoulder conditions. In a February 10, 2015 report, Dr. Shade opined that her accepted conditions should be upgraded to include cervical radiculopathy and left shoulder impingement.

By decision dated December 29, 2015, OWCP denied appellant's latest request for reconsideration as it 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>8</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>9</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>10</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>11</sup> The request must establish on its face that such decision was erroneous.<sup>12</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>13</sup>

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<sup>8</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>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP 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>11</sup> *Id.* at § 10.607(b).

<sup>12</sup> *Id.* To demonstrate 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 demonstrate 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>13</sup> 20 C.F.R. § 10.608(b).

## ANALYSIS

The last merit decision in appellant's claim was dated September 26, 2014. OWCP denied modification of its prior decision finding that appellant refused an offer of suitable work. Appellant had one year from the September 26, 2014 merit decision to timely request reconsideration. The last day of the one-year filing period fell on a weekend. Therefore, appellant had until Monday, September 28, 2015 to timely request reconsideration.<sup>14</sup> Because her request for reconsideration was not received by OWCP until October 1, 2015, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in terminating compensation pursuant to 5 U.S.C. § 8106(c)(2).<sup>15</sup>

The Board finds that appellant's untimely request for reconsideration fails to demonstrate clear evidence of error on the part of OWCP. On March 8, 2011 OWCP made a determination that she had refused an offer of suitable work and terminated wage-loss compensation and schedule award benefits, effective August 17, 2010. Subsequently, it denied multiple requests for reconsideration of this decision, finding that the evidence was insufficient to modify the prior termination of compensation benefits which occurred pursuant to 5 U.S.C. § 8106(c)(2).

In support of her October 1, 2015 request for reconsideration, appellant submitted medical reports and diagnostic testing dated September 3, 2014 through December 9, 2015. In a September 21, 2015 report, Dr. Shade noted that he became her treating physician on September 20, 2010. He recommended that appellant be off work because of cervical radicular symptoms with numbness and tingling down her right shoulder and bilateral shoulder weakness. Dr. Shade indicated that, due to bio-mechanics utilized by her arms, shoulders, and neck, she would be unable to perform the job duties of a travel document checker and that the June 24, 2010 EMG showed that she suffers from a comprehensive neurological, musculoskeletal issues prior to her stopping work on August 17, 2010. He opined, based on that EMG testing and his medical expertise, that appellant was unable to perform the August 17, 2010 and March 21, 2011 job offers.

While Dr. Shade's report is generally supportive of appellant's inability to work the offered position, it does not demonstrate clear error on the part of OWCP in its suitable work determination. It fails to raise a substantial question concerning the correctness of OWCP's decision at the time that it was issued.<sup>16</sup> Dr. Shade's progress reports, as well as the other medical evidence and diagnostic testing submitted, also fail to raise a substantial question concerning the correctness of OWCP's decision at the time that it was issued.

To demonstrate clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. Clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in terminating appellant's compensation for refusal of suitable

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<sup>14</sup> See *supra* note 10 at Chapter 2.1602.4 (February 2016).

<sup>15</sup> *Supra* note 11; see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>16</sup> *R.R.*, Docket No. 14-1272 (issued October 15, 2014).

work. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's determination. Thus, the evidence is insufficient to demonstrate clear evidence of error.

Appellant argued that it was error to rely upon Dr. Perl's opinion regarding her ability to work as her report was at least eight months old when OWCP issued its 30-day letter regarding job suitability. She indicated that, in January 2010, she requested authorization to change treating physicians, which OWCP subsequently approved. Appellant also claimed that OWCP had reprimanded Dr. Perl her handling of appellant's case. The Board finds that appellant's complaints and arguments pertaining to OWCP's determination that the offered job was suitable based upon the report by Dr. Perl are insufficient to *prima facie* shift the weight and raise fundamental questions as to the correctness of OWCP's decision to terminate compensation pursuant to 5 U.S.C. § 8106(c)(2).<sup>17</sup>

Appellant also argued before OWCP and on appeal that OWCP did not take into consideration that OPM had rendered her medically disabled. As to her contentions regarding disability determinations by OPM, the Board notes that findings of other administrative agencies are not determinative of her level of disability under FECA. It is well established that decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are pursuant to different statutes, which have varying standards for establishing eligibility for benefits.<sup>18</sup> Accordingly, the Board finds that the arguments and evidence submitted by appellant are insufficient to demonstrate clear evidence of error.

### 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.

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<sup>17</sup> *F.K.*, Docket No. 08-0526 (issued August 18, 2008) (The Board found that since the new physician's reports offered no new evidence on the issue of whether OWCP properly terminated appellant's compensation benefits because the claimant refused an offer of suitable work, they were insufficient to raise a substantial question as to the correctness of OWCP's decision and did not demonstrate clear evidence of error).

<sup>18</sup> *A.C.*, Docket No. 11-1388 (issued January 5, 2012); *Andrew Fullman*, 57 ECAB 574 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 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