



and fell sustaining injuries from her head down the right side of her body to her lower leg while in the performance of duty. On the reverse side of the claim form, appellant's supervisor checked a box marked "yes," indicating that his knowledge of the facts regarding the injury agreed with the statements of the employee.

Along with the claim, OWCP received treatment notes dated March 18 and 25, 2014 from a physician assistant who placed her off work until March 25, 2014. It received additional notes and a duty status report (Form CA-17) from the physician assistant dated April 8, 2014.

OWCP also received treatment notes from Dr. John Szajenko, Board-certified in physical medicine and rehabilitation. They included an April 9, 2014 note and duty status report (Form CA-17) in which he diagnosed cervicalgia, neck and low back pain, and paresthesia/numbness.

On May 12, 2014 appellant filed a claim for compensation (Form CA-7) for leave without pay taken from May 5 to 10, 2014.<sup>2</sup>

By letter dated May 20, 2014, OWCP noted that appellant's claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and that her claim was administratively handled to allow a limited amount of medical payments. However, appellant's claim was now being reopened because the medical bills exceeded \$1,500.00. OWCP informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days. It also explained that pain was a symptom and not a valid diagnosis.

In a June 4, 2014 report, Dr. Szajenko recommended that appellant return to work with restrictions.

OWCP also received physical therapy reports and an evaluation dated March 14, 18, 20, 21, 24, 25, 28, and 31, April 2, 7, 8, 10, 14, 16, and 18, 2014.

By decision dated June 23, 2014, OWCP denied appellant's claim, finding that she had not established the medical component of fact of injury. It found that the evidence did not demonstrate a claimed medical condition or history of her condition causally related to established work-related events.<sup>3</sup>

Appellant disagreed with the decision and requested a review of the written record by an OWCP hearing representative.

OWCP received reports from Dr. Szajenko dated April 9, June 3, 11, and 12, and July 3 and 12, 2014, as well as copies of his prior reports. Dr. Szajenko continued to describe pain such as lumbago and cervicalgia. He diagnosed low back pain, cervicalgia, paresthesia, numbness, and radiculitis.

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<sup>2</sup> In a memorandum of telephone call dated May 14, 2014, appellant advised OWCP that she had been off work since the injury date and was still in pain.

<sup>3</sup> OWCP found that no actual medical diagnosis was provided by a physician in conjunction with the injury.

A March 14, 2014 x-ray of the right hip read by Dr. Stephen R. Pavlock, a diagnostic radiologist, revealed no evidence of acute fracture/dislocation. A March 14, 2014 x-ray of the right shoulder read by Dr. Pavlock revealed acromioclavicular (AC) joint degenerative changes, without evidence of acute fracture/dislocation. A May 14, 2014 cervical spine x-ray read by Dr. Pavlock, revealed anterior fusion changes at C5 through C7 with old, incompletely healed C6 spinous process fracture and moderate degenerative changes at C4-5 with no evidence of acute fracture or alignment.

A May 27, 2014 magnetic resonance imaging (MRI) scan read by Dr. Michael P. Bartlett, a diagnostic radiologist, revealed findings which included mild degenerative changes at L5-S1. A June 27, 2014 MRI scan of the cervical spine read by Dr. Bartlett revealed slight degenerative changes of the cervical spine, no focal disc herniation, or spinal canal stenosis with otherwise natural foraminal narrowing, which was more pronounced to the right at the C3-4 and C4-5 levels. A June 27, 2015 MRI scan of the lumbar spine read by Dr. Bartlett revealed findings to include stable relatively mild degenerative changes at the L5-S1 disc level.

OWCP received physical therapy notes from March 12 to September 2, 2014.

In a July 10, 2014 statement, appellant indicated that, on March 13, 2014, and was off work since March 15, 2014. She noted that on July 7, 2014 she was performing limited duty for four hours a day, and using sick leave for two hours until she used her sick and annual leave.

In a July 16, 2014 report, Dr. Naheed Rizvi, a Board-certified internist, explained that appellant was initially seen by a physician assistant who diagnosed cervicalgia, low back pain, paresthesia, and concussion. He noted that she related that she fell on ice and aggravated her right hip, right shoulder, back, neck, and head.

In a separate report also dated July 14, 2014, Dr. Szajenko advised that he first saw appellant on April 8, 2014 for complaints of pain due to a work-related injury that occurred on March 12, 2014. He opined that he believed the fall caused symptoms of radiculopathy and a symptomatic exacerbation of underlying degenerative changes. Dr. Szajenko continued to submit reports. Dr. Charlotte Yang, a Board-certified family practitioner, also treated appellant for low back pain and submitted reports.

In an August 12, 2014 report, Dr. Kamal Sadjadpour, a Board-certified neurologist, noted that appellant's history of injury included a fall on ice in March when she fell backwards and hit her head and right shoulder. He examined appellant and found: persistent neck pain and headache; carpal tunnel syndrome; persistent low back pain; and cervical spondylosis with cervical fusion. Dr. Sadjadpour also treated her on September 30, 2014 and recommended a gradual transition from part-time to full-time activity.

In an August 8, 2014 statement, Roland Crane, noted that he witnessed the incident, including appellant's fall, while appellant was attempting to deliver mail at his house.

In a letter dated September 29, 2014, counsel for appellant requested that appellant's request for a review of the written record be changed to a request for a telephonic hearing.

September 22, 2014 electromyography (EMG) scan studies read by Dr. Surendra Kaul, a Board-certified neurologist, revealed evidence of bilateral carpal tunnel syndrome, mild ulnar neuropathy, and lumbar radiculopathy.

By decision dated February 27, 2015, OWCP's hearing representative affirmed the June 23, 2014 decision. She explained that appellant had not established fact of injury as none of the medical evidence submitted established a clear diagnosis as a result of the claimed event. The hearing representative explained that multiple symptoms were listed. Furthermore, the symptoms existed prior to the event, and it was unclear which specific medical injury occurred as a result of the event claimed in the instant claim. The hearing representative also explained that, if she should establish fact of injury, she would also need to provide reasoned medical evidence from a physician to explain how the claimed event caused or contributed to a diagnosed condition.

On March 11, 2016 appellant requested reconsideration and submitted additional evidence. Appellant argued that Dr. Szajenko provided a clear diagnosis and opinion advising that he believed that the fall caused symptoms of radiculopathy and a symptomatic exacerbation of underlying degenerative changes. She also argued that another valid diagnosis was paresthesia and OWCP did not develop her claim. Appellant argued that her claim should not have been denied on the basis that fact of injury was not established. She also provided a new report from Dr. Szajenko and indicated that his report established causal relationship.

In a report dated February 19, 2018, Dr. Szajenko noted that he had been involved in the treatment of appellant since her initial visit in his office on April 9, 2014. He explained that he clearly understood that appellant had a prior history of a cervical spine injury and a history of underlying cervical fusion back in 2000. Dr. Szajenko explained that, while she was off work, she eventually returned. He related that appellant had some chronic symptomatology, but it was not limiting her from a functional stand point. Dr. Szajenko noted that on March 13, 2014 she slipped and fell which resulted in new pain symptoms. He related that the MRI scan from June 2014 revealed postsurgical changes as well as degenerative changes, but no acute pathology. Dr. Szajenko advised that she had fortunately demonstrated considerable improvement was now working with restrictions. He diagnosed cervical spondylosis with temporary aggravation caused by a fall that occurred while working.

OWCP also received additional treatment notes dating from October 22, 2014 to July 16, 2015 from Dr. Szajenko.

OWCP also received copies of reports previously of record.

By decision dated October 19, 2016, OWCP denied appellant's request for reconsideration, finding that as it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>4</sup> This discretionary authority, however, is subject to certain restrictions. For

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<sup>4</sup> See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>8</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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>9</sup> To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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 appellant and raise a substantial question as to the correctness of OWCP's decision. The Board makes an independent 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>10</sup>

### ANALYSIS

The Board finds that, in its October 19, 2016 decision, OWCP properly determined that appellant's reconsideration request was untimely filed. It rendered its last merit decision regarding whether appellant met her burden of proof to establish a traumatic injury on February 27, 2015. As appellant's reconsideration request was received on March 11, 2016, more than one year after

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

<sup>7</sup> *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (February 2016) (the term "clear evidence of error" is intended to represent a difficult standard).

<sup>9</sup> *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

<sup>10</sup> *Id.*

the February 27, 2015 merit decision, it was, therefore, untimely filed. Therefore, appellant must demonstrate clear evidence of error by OWCP in its February 27, 2015 decision.<sup>11</sup>

The Board further finds that appellant's untimely reconsideration request failed to demonstrate clear evidence of error. Appellant argued on reconsideration that Dr. Szajenko provided clear diagnoses of cervicalgia, paresthesia, and concussion and opined that the fall caused symptoms of radiculopathy and a symptomatic exacerbation of underlying degenerative changes. She also contended that OWCP did not properly develop her claim. Appellant also provided a new report from Dr. Szajenko dated February 19, 2016 to support that she established causal relationship. Appellant noted that her claim should not have been denied on the basis that a medical condition had not been diagnosed in connection with the accepted incident. While the Board notes that appellant is correct in noting that Dr. Szajenko's medical reports contained diagnoses, the hearing representative also denied the claim as the evidence of record did not contain a reasoned opinion on whether and how the accepted employment incident caused or contributed to the medical diagnoses. While Dr. Szajenko reported findings and an opinion on causal relationship, the Board notes that OWCP procedures provide that the term clear evidence of error is intended to represent a difficult standard. Appellant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.<sup>12</sup>

Thus, the Board finds that these arguments are not 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. These arguments, therefore, do not demonstrate clear evidence of error.

OWCP also received copies of previously submitted medical reports. However, this evidence does not manifest on its face that OWCP committed an error.

Consequently, appellant has not met her burden to demonstrate clear evidence of error on the part of OWCP such that it erred in denying merit review. The Board, therefore, finds that in accordance with its internal guidelines and with Board precedent that OWCP properly performed a limited review of appellant's argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration.<sup>13</sup>

On appeal appellant argues that her medical diagnoses were of record when the claim was denied on the medical aspect of fact of injury. However, these arguments are not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP's decision. The Board notes that the medical

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<sup>11</sup> 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

<sup>12</sup> *D.G.*, 59 ECAB 455 (2008).

<sup>13</sup> *Nancy Marciano*, 50 ECAB 110 (1998).

evidence included diagnoses of sciatica as well as evidence of preexisting bilateral carpal tunnel syndrome, mild ulnar neuropathy and lumbar radiculopathy. However, the reports did not provide a specific diagnosis or reasoned opinion from a physician on whether and how any diagnosed condition was caused or contributed to by the claimed event. As explained, the evidence does not demonstrate clear evidence of error and does not require a merit review of the case.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 2018  
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