



## **FACTUAL HISTORY**

On August 31, 2006 appellant, then a 53-year-old boatswain's mate, filed a traumatic injury claim (Form CA-1) alleging that, while at sea on December 26, 1994, he tripped on a cable, fell, and broke his left hip in the performance of duty. A handwritten claim form filled in by appellant indicated that he was off work from December 26, 1994 to August 1, 1995.

By development letter dated November 7, 2006, OWCP informed appellant of the type of evidence needed to support his traumatic injury claim. Appellant was afforded 30 days to submit the necessary evidence. The employing establishment was also asked to submit any medical evidence in its possession relative to this claim.

In a November 17, 2006 statement, appellant indicated that following the December 26, 1994 injury, he experienced pain in his left hip, shoulder, and back, and a sprained left wrist.<sup>2</sup> He forwarded an unsigned operative note dated January 23, 1995. This indicated that Dr. Ralph J. Venuto, a Board-certified orthopedic surgeon, performed open reduction and internal fixation of a fractured left hip, cervical neck, at Hoag Memorial Hospital in Newport Beach, California.

In an August 29, 2001 letter to counsel, Dr. Dominic Tse, appellant's attending Board-certified orthopedic surgeon indicated that appellant had been reassessed on July 5, 2001 after two months of continuing education at a school for seamanship in Maryland. Dr. Tse related that appellant had returned to sea duty without restrictions, but noted that appellant was still experiencing discomfort in his neck, left hip, and both wrists. He continued that appellant would like to consider surgery of the left hip in the near future for removal of hardware, which was a persistent source of his symptoms.

By decision dated December 8, 2006, OWCP denied appellant's claim, finding that appellant had submitted insufficient medical evidence to establish that an employment injury occurred on December 26, 1994 as alleged.

On February 26, 2007 appellant requested reconsideration.

In a January 10, 2006 report, Dr. Tse noted that appellant had been under his care since 1989 for various musculoskeletal concerns. He described appellant's current complaint of persistent left hip pain caused by an injury that occurred 12 years previously when he fell in a ship's cargo tank, causing a fracture of his left hip. Dr. Tse indicated that the fracture was surgically repaired with hardware placement and that caused hardware-related left hip bursitis. He continued that appellant had a subsequent injury on December 23, 2000 that aggravated his left hip bursitis and that he noted seeing appellant on July 26, 2002 mainly for neck pain, but indicated that hip motion was restricted at that time, and post-traumatic osteoarthritis of the left hip was evident. A left hip examination on January 10, 2007 demonstrated painful hip motion with muscle atrophy present, and x-rays showed loss of cartilage space and intact hardware. Dr. Tse advised that definitive treatment of advancing symptomatic degenerative arthritis would be a total left hip arthroplasty. He found appellant no longer fit for sea duty. On an undated attending physician's

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<sup>2</sup> Appellant also indicated that he had additional workers' compensation cases for upper extremity and foot injuries before OWCP, including OWCP File No. xxxxxx802. The instant case was adjudicated under File No. xxxxxx583.

report (Form CA-20) Dr. Tse checked a form box marked “yes,” indicating that appellant’s condition was employment related caused by a mechanical fall.<sup>3</sup>

By decision dated May 1, 2007, OWCP modified the December 8, 2006 decision, finding the December 26, 1994 incident was established as having occurred as alleged. It continued to deny the claim, however, noting that the medical evidence of record did not contain a reasoned opinion explaining how the accepted work incident caused a left hip fracture or appellant’s current left hip condition. OWCP further noted that there was no evidence of record to indicate that appellant sought immediate medical treatment on board the ship after the December 26, 1994 incident.

On February 5, 2008 appellant requested reconsideration. He related that he was given immediate medical attention aboard the ship on December 26, 1994. Appellant was subsequently sent to a doctor in Hawaii and was then sent to Hoag Memorial Hospital in California for surgery. Appellant indicated that an employing establishment injury report, ship deck log, and pay record had been forwarded to OWCP in February 2007, and he maintained that Dr. Tse’s opinion established his claim.<sup>4</sup>

Appellant forwarded a September 5, 2007 report in which Dr. Tse noted treating him that day. Dr. Tse reported that appellant was shipped back to California where he had surgery with multiple pin fixation. He indicated that one pin caused hardware-induced bursitis and opined that appellant’s real problem was left hip osteoarthritis, which would require left total hip arthroplasty with removal of the painful retained hardware.

By decision dated February 29, 2008, OWCP denied modification of its May 1, 2007 decision. It noted that the record contained insufficient medical evidence contemporaneous with the December 26, 1994 employment incident.

In November 2008, appellant’s then counsel forwarded a September 12, 2008 report from Dr. Tse.<sup>5</sup> Appellant telephoned OWCP on November 26, 2008 asking if the report had been received. He was told that it had been received, and that he should pursue the appeal rights found in the February 29, 2008 decision.<sup>6</sup>

In the September 12, 2008 report, Dr. Tse described the December 26, 1994 employment injury, indicating that surgery with multiple pin fixation was subsequently performed. He noted appellant’s current complaints of pain and stiffness, with limited left hip motion on examination. Dr. Tse opined that there was direct causation between appellant’s work duties and the left hip

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<sup>3</sup> Dr. Tse also reported that appellant had several upper extremity surgeries that were employment related.

<sup>4</sup> A copy of the documents listed, including the injury report, are not found in this OWCP case record, File No. xxxxxx583.

<sup>5</sup> At that time appellant was represented by David F. Vincent, Esquire.

<sup>6</sup> In correspondence dated May 27, 2009, OWCP informed counsel that, as it had not received a formal reconsideration request, the claim remained denied.

fracture, based on his review of history, physical examination findings, medical record review, and medical reasoning.

On October 25, 2016 appellant filed a recurrence claim (Form CA-2a). He indicated that the injury occurred on December 26, 1994 and the date of recurrence was September 16, 2016 when his left hip pain became unbearable.

Appellant attached a bilateral hip x-ray report dated October 6, 2016 that demonstrated previous left hip fracture fixation with three percutaneous screws, moderate-to-severe superolateral joint space loss, and an aspherical underlying femoral head-neck junction with spurring compatible with femoroacetabular impingement on the left, and moderate osteoarthritis of the right hip. In a form report dated October 25, 2016, Dr. Tse advised that appellant was unfit for duty. In correspondence dated October 28, 2016, he reported that appellant had been seen by him sporadically since 1989. Dr. Tse described the October 6, 2016 x-ray report and again described appellant's left hip surgery. He diagnosed post-traumatic symptomatic left hip moderate-to-severe osteoarthritis, left hip hardware-related trochanteric bursitis, and moderate right hip osteoarthritis. Dr. Tse opined that appellant's condition had slowly deteriorated over the years such that it affected his activities of daily living, and that definitive treatment was total hip arthroplasty and removal of the painful hardware. He noted that appellant had a number of additional musculoskeletal issues and was treated for upper extremity conditions by a hand surgeon, and that he treated appellant for his hip condition caused by a left hip fracture that occurred at work in December 1994. Dr. Tse related that appellant had been unable to work since April 2014 due to his various medical conditions and that his hip condition would continue to advance.

By letter dated November 22, 2016, OWCP informed appellant that, as his case had been denied, it could not consider a recurrence claim. It advised him to follow the appeal rights attached to his previous decision.<sup>7</sup>

On December 21, 2016 appellant requested a review of the written record before an OWCP hearing representative. He referenced the November 22, 2016 information letter. In correspondence dated December 19, 2016, received by OWCP on December 27, 2016, appellant maintained that Dr. Tse's opinion was sufficient to establish entitlement. He indicated that OWCP paid for his hospital bill, and, at present, he needed corrective left hip surgery.<sup>8</sup>

By decision dated January 11, 2017, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record of its reconsideration decision dated February 29, 2008. It noted that he was not entitled, as a matter of right, to a review by the Branch because he had previously requested reconsideration, and informed him that his case could be addressed by requesting reconsideration with OWCP's district office.

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<sup>7</sup> At that time appellant was represented by Alan J. Shapiro, Esquire.

<sup>8</sup> There is no indication in this record that OWCP paid for a 1995 hospital bill.

On January 31, 2017 appellant forwarded information he had provided to the Branch of Hearings and Review to OWCP's district office. He indicated that he had been instructed to do this and attached the January 11, 2017 decision.

On September 12, 2017 appellant forwarded an appeal request form indicating that he was requesting reconsideration. He indicated that he had previously requested reconsideration in January 2017 and maintained that Dr. Tse's reports were sufficient to establish his claim. Appellant enclosed copies of previous OWCP decisions and Dr. Tse's reports dated January 10, 2007 and September 12, 2008.

By decision dated September 15, 2017, OWCP found that, as appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error, his request for reconsideration was denied.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>9</sup> When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.<sup>10</sup> Timeliness is determined by the document receipt date, as indicated by the "received date" in OWCP's Integrated Federal Workers' Compensation System.<sup>11</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted OWCP under section 8128 of FECA.<sup>12</sup>

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrated clear evidence of error.<sup>13</sup> OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.<sup>14</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which 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

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<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

<sup>11</sup> Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

<sup>12</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>13</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>14</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.5(a) (February 2016).

evidence of error. It is not enough to merely 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. To demonstrate clear evidence of error, the evidence submitted 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>15</sup>

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>16</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>17</sup>

### ANALYSIS

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.

The only decision before the Board is the September 15, 2017 decision in which OWCP denied appellant's request for reconsideration because the request was untimely filed and failed to demonstrate clear evidence of error. Appellant requested reconsideration regarding denial of his traumatic injury claim. The Board finds that, as more than one year has elapsed between the most recent merit decision on this issue, the February 29, 2008 decision denying his claim, and appellant's requests for reconsideration received by OWCP on January 31 and September 12, 2017, his request for reconsideration was untimely.<sup>18</sup>

The Board also finds that appellant failed to demonstrate clear evidence of error. In his reconsideration requests, appellant maintained that the reports of Dr. Tse were sufficient to establish his claim and submitted a January 10, 2006 report that had previously been reviewed by OWCP. In newly submitted reports dated September 12, 2008 and October 28, 2016, Dr. Tse merely reiterated his prior recitations regarding appellant's claimed left hip injury.

The underlying merit issue in this case is whether appellant met his burden of proof to establish an employment injury caused by an accepted December 26, 1994 employment incident. Other than an unsigned operative report dated January 25, 1995, the record contains no medical evidence contemporaneous with this incident. OWCP had previously reviewed Dr. Tse's reports dated January 10, 2006 and September 5, 2007. Dr. Tse indicated that he had treated appellant

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<sup>15</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>16</sup> Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>17</sup> *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>18</sup> 20 C.F.R. § 10.607(a).

since 1989, but he did not submit any treatment notes and did not identify a 1994 employment injury until his January 10, 2006 report.

The term “clear evidence of error” is intended to represent a difficult standard and the argument provided here is not the type of positive, precise, and explicit evidence, which manifested on its face, that OWCP committed an error.<sup>19</sup> Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>20</sup>

As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of the February 29, 2008 OWCP decision, appellant has not established that OWCP committed error.<sup>21</sup>

The Board, therefore, finds that, in accordance with Board precedent, OWCP properly performed a limited review of the argument and evidence submitted by appellant with his January 31 and September 12, 2017 reconsideration requests to ascertain whether this demonstrated clear evidence of error in its September 17, 2017 decision. OWCP correctly determined that it did not, and thus properly denied appellant’s untimely request for merit reconsideration on that basis.<sup>22</sup>

On appeal appellant generally asserts that his claim should be accepted based on the reports of Dr. Tse, his attending Board-certified orthopedic surgeon. As explained above, the Board does lack jurisdiction to review the merits of this case.<sup>23</sup>

### 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>19</sup> *Robert G. Burns, supra* note 15.

<sup>20</sup> *E.D.*, Docket No. 16-0708 (issued January 17, 2017).

<sup>21</sup> *P.S.*, Docket No. 17-1707 (issued February 9, 2018).

<sup>22</sup> 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).

<sup>23</sup> 20 C.F.R. §§ 501.2(c), 501.3

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board