



## **FACTUAL HISTORY**

On October 5, 2009 appellant, then a 64-year-old entry specialist, filed a traumatic injury claim (Form CA-1) alleging that on September 24, 2009 she developed low back pain while lifting boxes from the floor in the performance of duty. She stopped work on October 7, 2009. OWCP accepted the claim for aggravation of preexisting congenital lumbar spondylosis at L2-3 and L3-4. Appellant returned to full-time, limited-duty work on November 23, 2009. She retired on December 16, 2011.

In a May 17, 2010 report, Dr. Andrew I. Sumich, a Board-certified physiatrist, diagnosed right L3 radiculopathy with secondary right L3-4 disc herniation. He opined that appellant reached maximum medical improvement (MMI) and had a permanent disability of three percent.

In a June 20, 2010 permanent impairment worksheet, Dr. Sumich noted that appellant had right leg L3 radiculopathy.

On April 28, 2011 appellant filed a Form CA-7 claiming a schedule award.

In a May 2, 2011 letter, OWCP advised appellant of the information required from a medical physician to determine an impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>2</sup> for any part of the back. Appellant was provided a list of questions to provide to the physician and a lower extremity permanent impairment worksheet. She was accorded 30 days to submit the requested information. Appellant did not respond.

By decision dated July 19, 2011, OWCP denied appellant's schedule award claim. It found that there was no medical evidence of record sufficient to establish permanent impairment of appellant's lower extremities caused by her accepted lumbar spine condition.

On September 16, 2011 OWCP received appellant's request for reconsideration. In support of her request, appellant submitted a July 27, 2011 report, an August 15, 2011 work capacity evaluation (Form OWCP-5c), and an August 15, 2011 lower extremity impairment worksheet from Dr. Sumich. In his July 27, 2011 report, Dr. Sumich opined that appellant had reached MMI. In his July 27 and August 2, 2011 reports, he opined that appellant had two percent permanent impairment of the back.

By decision dated October 24, 2011, OWCP denied appellant's request for reconsideration without merit review. It found that the evidence submitted failed to include any description of the clinical findings in the lower extremities that would be attributable to a specific spinal nerve root injury arising from the September 24, 2009 work injury.

OWCP authorized June 30, 2014 lumbar surgery.

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

On December 28, 2016 OWCP expanded the acceptance of the claim to include lumbar radiculopathy, left- and right-sided sciatica, bilateral quadriceps (thigh) muscle wasting and atrophy, and bilateral knee localized edema.

On June 6, 2017 OWCP received appellant's June 2, 2017 request for reconsideration of its July 19, 2011 decision. In an undated statement, appellant related her medical course. She noted that one leg was shorter than the other, that she had problems with her knees and legs after the work injury, and that she had to get orthotics, which OWCP paid for, but they did not pay for her shoes. Appellant stated that she had back surgery, but her leg and knee continued to hurt and she developed pain in her right hip. She advised that OWCP did not pay for the magnetic resonance imaging (MRI) scan of her knee and did not authorize her to see an orthopedist for her knee and hip conditions.

With her request, appellant submitted multiple medical reports from various physicians from 2010 through 2016, which documented her back condition, leg length discrepancy, and knee conditions/issues. Included in the reports were requests for orthotics and MRI scans of the knees. Return to work notes were also submitted.

By decision dated June 9, 2017, OWCP denied appellant's request for reconsideration. It found that her request was untimely filed and failed to demonstrate clear evidence of error. OWCP requested that appellant submit a new Form CA-7 once she obtained sufficient medical evidence in accordance with the sixth edition of the A.M.A., *Guides*.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>4</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>5</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>6</sup> The request must establish on its face that such decision was erroneous.<sup>7</sup> Where a request is

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<sup>3</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] own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's 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. For decisions issued on or after June 1, 1987 through August 28, 2011, the request for reconsideration must be "mailed" to OWCP within one year of OWCP's decision for which review is sought. *Id.* at Chapter 2.1602.4e.

<sup>6</sup> *Id.* at § 10.607(b).

<sup>7</sup> *Id.*

untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error.<sup>10</sup> 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 establish clear evidence of error.<sup>11</sup> 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.<sup>12</sup>

### ANALYSIS

OWCP issued a merit decision with respect to a schedule award dated July 19, 2011. Appellant submitted a request for reconsideration that was received on June 6, 2017. When the underlying compensation issue is a schedule award, an initial question is whether the claimant is requesting reconsideration of the prior decision or claiming an increased schedule award. Even if appellant has requested reconsideration, if there is new and relevant evidence with respect to an increased permanent impairment, then a claimant may be entitled to a merit decision on the issue,<sup>13</sup> but when a claimant does not submit any relevant evidence with respect to an increased schedule award, then OWCP may properly determine that appellant has filed an application for reconsideration of a schedule award decision.<sup>14</sup> Herein, appellant did not submit any relevant evidence with respect to an increased permanent impairment and; therefore, OWCP properly considered her submission as an application for reconsideration.

In its June 9, 2017 decision, OWCP properly determined that appellant failed to file a timely application for review. Appellant had one year from the July 19, 2011 decision to timely request reconsideration.<sup>15</sup> Her June 6, 2017 request for reconsideration postdated OWCP's merit decision by approximately six years. Because her request was untimely filed, appellant must demonstrate clear evidence of error of OWCP's decision of the July 19, 2011 schedule award decision.

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<sup>8</sup> 20 C.F.R. § 10.608(b).

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>12</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>13</sup> See *Linda T. Brown*, 51 ECAB 115 (1999).

<sup>14</sup> See *W.J.*, Docket No. 12-1746 (issued February 5, 2013).

<sup>15</sup> 20 C.F.R. § 10.607(a).

The Board finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in issuing its July 19, 2011 decision. Appellant did not submit the type of positive, precise, and explicit evidence manifesting on its face that OWCP committed an error with regard to the denial of her schedule award. The medical evidence submitted did not provide an impairment rating based on the sixth edition of the A.M.A., *Guides* or a date of MMI. Appellant also did not submit evidence establishing that the denial of a schedule award was clearly erroneous.<sup>16</sup> As such, it does not raise a substantial question regarding the degree of appellant's permanent impairment. Appellant's statement, which was not medical evidence, also does not establish that the previous denial of a schedule award was clearly erroneous.<sup>17</sup>

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's July 19, 2011 decision. Accordingly, OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment

### **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>16</sup>*J.M.*, Docket No. 15-1634 (issued September 16, 2016); *see also K.D.*, Docket No. 15-0524 (issued August 3, 2015).

<sup>17</sup> *J.M.*, *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 9, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2018  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board