

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.C., Appellant**

**and**

**U.S. POSTAL SERVICE, WHITEHAVEN POST  
OFFICE, Memphis, TN, Employer**

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**Docket No. 18-1659  
Issued: December 2, 2019**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 27, 2018 appellant filed a timely appeal from a February 28, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 8, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

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

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 6, 2015 appellant, then a 59-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 27, 2015 he pulled a muscle lose from his hip when ascending stairs while in the performance of duty. He stopped work on August 4, 2015.

By decision dated September 28, 2015, OWCP denied appellant's claim as he failed to factually establish the occurrence of the alleged employment incident. Appellant requested reconsideration. By decision dated December 21, 2015, OWCP modified its September 28, 2015 decision, finding that he had factually established the occurrence of the alleged employment incident, but had failed to submit medical evidence sufficient to support that he had sustained a medical condition causally related to the accepted work factor.

Appellant again requested reconsideration. By decision dated April 8, 2016, OWCP vacated its December 21, 2015 decision, finding that the medical evidence established that he sustained a repetitive motion injury to his hip. By separate decision dated April 8, 2016, it accepted the claim for a strain of the muscle, fascia, and tendon of the right hip. OWCP noted that the medical evidence supported that appellant had sustained a right hip injury due to repetitive motion over a two-week period, and thus converted his claim to an occupational disease.<sup>2</sup>

By separate decision dated April 8, 2016, OWCP denied appellant's claim for continuation of pay (COP) for the period August 4 to September 17, 2015. It found that, under 20 C.F.R. § 10.220(a), he was not entitled to COP as it had accepted his claim for an occupational disease rather than for a traumatic injury.

On August 2, 2016 appellant requested reconsideration of the April 8, 2016 decision denying COP. By decision dated September 6, 2016, OWCP denied his request for reconsideration as he had not submitted evidence or raised an argument sufficient to warrant further merit review under 5 U.S.C. § 8128(a). It noted that the only evidence submitted was a duplicate medical report.

On November 30, 2017 appellant again requested reconsideration of OWCP's April 8, 2016 decision denying COP. He asserted that he had not experienced any hip problems until he felt a pop in his right hip going up stairs when carrying a parcel while in the performance of duty.

By decision dated February 28, 2018, OWCP denied appellant's request for reconsideration, finding that 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>3</sup> This discretionary authority, however, is subject to certain restrictions. For

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<sup>2</sup> A traumatic injury is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

<sup>3</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019).

instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>4</sup>

Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System.<sup>5</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>6</sup>

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>7</sup> Its 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, if the claimant's application for review demonstrates "clear evidence of error" on the part of OWCP.<sup>8</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

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

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<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>6</sup> *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *L.A.*, Docket No. 19-0471 (issued October 29, 2019).

<sup>8</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

<sup>9</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>10</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

<sup>11</sup> *J.W.*, *supra* note 9.

OWCP's regulations<sup>12</sup> and procedures<sup>13</sup> establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>14</sup> The most recent merit decision was OWCP's April 8, 2016 decision, which denied appellant's claim for COP. As appellant's request for reconsideration was not received until November 30, 2017, more than one year after the issuance of OWCP's last merit decision of April 8, 2016, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its April 8, 2016 decision.<sup>15</sup>

In support of his untimely request for reconsideration, appellant contended that he had not experienced any problems with his right hip until he felt a pop while carrying a parcel up stairs. OWCP, however, found that the medical evidence supported that he had sustained a right hip condition due to repetitive work factors occurring over the course of two weeks. The underlying issue of the case is whether OWCP erred in denying appellant's request for COP based on its finding that the medical evidence supported that he had sustained an occupational disease rather than a traumatic injury. This question is medical in nature and must be addressed by medical evidence.<sup>16</sup> In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>17</sup> The Board finds that appellant has not submitted any evidence to demonstrate clear evidence of error in OWCP's April 8, 2016 decision.

On appeal appellant asserted that his hip problems began after an incident climbing stairs. As set forth above, however, this contention is insufficient to raise a substantial question that OWCP erred in its April 8, 2016 decision.<sup>18</sup> OWCP thus properly found that appellant's request for reconsideration failed to demonstrate clear evidence of error.<sup>19</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>12</sup> 20 C.F.R. § 10.607(a); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>13</sup> *Supra* note 5 at Chapter 2.1602.4 (February 2016).

<sup>14</sup> *J.W.*, *supra* note 9; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>15</sup> 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

<sup>16</sup> *See D.V.*, Docket No. 19-0588 (issued August 5, 2019).

<sup>17</sup> *See M.W.*, Docket No. 17-0892 (issued May 21, 2018).

<sup>18</sup> *D.V.*, *supra* note 16.

<sup>19</sup> *See J.D.*, Docket No. 18-1765 (issued June 11, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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