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

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| **S.C., Appellant** | ) | |
| **and** | ) | **Docket No. 18-0126** |
| | ) | **Issued: May 14, 2019** |
| **U.S. POSTAL SERVICE, POST OFFICE, Hobe Sound, FL, Employer** | ) | |

*Appearances*:
*Capp Taylor, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On October 23, 2017 appellant, through counsel, filed a timely appeal from an April 26, 2017 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 14, 2016, to the filing of

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.[3]

## ***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.

## ***FACTUAL HISTORY***

On October 10, 2014 appellant, then a 40-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, while in the performance of duty on October 5, 2014, she picked up a heavy parcel, which started to fall out of her hand. When she tried to catch it, she pulled her back. Appellant did not stop work.

In a separate statement dated October 7, 2014, appellant indicated that she injured her back when she tried to lift a box on October 6, 2014. She explained that the box was heavier than she thought and when she tried to pick it up it slipped. Appellant noted that she then tried to avoid dropping it and that was when she felt pain. She explained that the incident occurred on Monday around 12:50 p.m. on her delivery route, but she did not report the incident that same day because she did not think that there was a serious injury until she woke up the following morning with sharp pains radiating up her back.

In support of her claim, appellant submitted an October 7, 2014 discharge instruction form from Dr. Dwight G. Dawkins, Board-certified in family practice, which noted back pain and injury with prescription for narcotic medication. She also submitted a State of Florida workers' compensation report for a work-related injury. The form included bending and lifting restrictions.

OWCP also received reports dated October 13 and November 3, 2014 from Dr. Daniel Husted, a Board-certified orthopedic surgeon, who noted that appellant presented with complaints of lumbar spine pain. Dr. Husted advised that she reported an injury had occurred at work on October 6, 2014. He related that appellant noted that her symptoms began as a result of bending over. Dr. Husted indicated that she described her symptoms as moderate with an aching pain in the lower back and right flank. He advised that appellant's symptoms were aggravated by daily activities. Dr. Husted noted that she also complained of pain in the cervical spine. He diagnosed cervicalgia and opined that appellant had a lifting injury at work on October 6, 2014 with the onset of left-sided neck, trapezial, and thoracic pain and right-sided low back and buttock pain causing her to present to the emergency room. Dr. Husted also assessed low back pain and referred her to physical therapy. On November 3, 2014 the employing establishment executed an authorization

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id*.

for examination and/or treatment (Form CA-16) which authorized appellant to obtain medical treatment.

On November 4, 2014 Dr. Husted placed appellant off work from November 5 through December 5, 2014, until she could be medically cleared.

In a November 14, 2014 report of a lumbar magnetic resonance imaging (MRI) scan, read by Dr. Frederick Hartker, a Board-certified diagnostic radiologist, revealed a right paracentral disc extrusion and annular fissure extending minimally up behind the L1 vertebral body and no nerve root displacement or stenosis of indeterminate age. It also revealed a two- to three-millimeter broad-based left paracentral disc protrusion at L5-S1 and an annual fissure of indeterminate age producing slight displacement of the left S1 nerve root without stenosis.

In a November 24, 2014 report, Dr. Husted noted that he examined appellant in follow up for her lumbar spine injury for which she presented with pain. He diagnosed cervicalgia, displacement of lumbar intervertebral disc, and lumbosacral neuritis. Appellant submitted a series of physical therapy reports dated from October 30 to November 4, 2014.

In a development letter dated December 10, 2014, OWCP advised appellant that when her claim was submitted it appeared to be a minor injury that resulted in minimal or no lost time from work and that, based upon these criteria, the employing establishment had not controverted continuation of pay or challenged the merits of the case, and therefore payment of a limited amount of medical expenses had been administratively approved. It noted that the merits of the claim, however, had not been formally considered. OWCP explained that appellant's claim was being reopened because the medical bills exceeded $1,500.00. It further explained that the evidence submitted was insufficient to establish that she actually experienced the incident or employment factor alleged to have caused the injury and requested that she complete an attached questionnaire. OWCP also noted that appellant needed to submit a comprehensive narrative medical report from her attending physician, as the current record did not include a diagnosis of a medical condition associated with her employment incident. It afforded her 30 days to respond.

OWCP subsequently received a series of physical therapy reports dated November 24 to December 16, 2014, State of Florida workers' compensation reports dated October 12 and December 12, 2014, and an October 10, 2014 authorization for examination and/or treatment (Form CA-16) which was completed by appellant and her supervisor.

OWCP received a copy of the October 13, 2014 report from Dr. Husted in which he noted that appellant reported continued lumbar and cervical spine pain, but was stable. Dr. Husted diagnosed cervicalgia and recommended that she take part in physical therapy. He continued to treat appellant and submitted a December 29, 2014 report in which he diagnosed lumbosacral neuritis.

By decision dated January 21, 2015, OWCP denied appellant's traumatic injury claim finding that fact of injury had not been established as the evidence submitted did not establish that the injury and or event(s) occurred as alleged.

On January 21, 2016 appellant, through counsel, requested reconsideration. Counsel argued that the factual component of appellant's claim was consistent in her statements and the

medical records she had submitted. He also argued that Dr. Husted had sufficiently described the work incident and provided an opinion that the condition was work related. Medical reports already of record were resubmitted.

By decision dated April 14, 2016, OWCP modified the January 21, 2015 decision finding that fact of injury had been established. However, the claim remained denied because the medical evidence of record did not establish that the diagnosed conditions were causally related to the accepted "October 6, 2014" employment incident.

Appellant, through counsel, requested reconsideration on April 17, 2017. In an addendum to his request for reconsideration, counsel enclosed an April 12, 2017 report from Dr. Husted in which he addressed causation, the mechanism of injury, and restrictions.

In the April 12, 2017 report, Dr. Husted noted that appellant was lifting a box on October 6, 2014 when she experienced an onset of neck, trapezial, thoracic, and low back and buttock pain causing her to go to the emergency room. He advised that he initially saw her on October 13, 2014 and that she denied a prior history of back pain. Dr. Husted indicated that appellant noted pain in any persistent position. He explained that he ordered a Medrol Dosepak along with anti-inflammatories and physical therapy. However, appellant's low back pain persisted with activity, including sitting. Dr. Husted also noted that he ordered a lumbar spine MRI scan and that it demonstrated herniations at L1-L2 and L5-S1. He opined that the herniated discs could not be "aged" and that "more likely than not this injury was secondary to lifting boxes at work." Dr. Husted noted no evidence of a degenerative process or a problem that preexisted the injurious event. He therefore concluded that, more likely than not, the diagnosis of herniated disc at L1-L2 and L5-S1 with resultant lumbar radiculopathy was secondary to the lifting incident of October 6, 2014.

By decision dated April 26, 2017, OWCP denied appellant's request for further merit review finding that her request 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.[4] This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[5] Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal

[4] 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[5] 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).[6] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[7]

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.[8] If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.[9]

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 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.[10]

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 (for example, proof that a schedule award was miscalculated). 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.[11] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[12]

## ***ANALYSIS***

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

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[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

[7] *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[9] *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

[10] *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

[11] *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

[12] *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

OWCP's regulations[13] and procedures[14] establish a one-year time limitation for requesting reconsideration, which begins on the date of the last OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[15] The most recent merit decision was OWCP's April 14, 2016 decision which found that the evidence of record was insufficient to establish causal relationship. As her request for reconsideration was not received by OWCP until April 17, 2017, more than one year after the April 14, 2016 decision, the Board finds that it was untimely filed. Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having denied total disability compensation for the period alleged.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. OWCP denied her traumatic injury claim as the medical evidence of record failed to establish a causal relationship between the diagnosed conditions and the accepted October 6, 2014 employment incident.

In her request for reconsideration, counsel indicated that appellant had established the medical component of her claim and submitted an April 12, 2017 report from Dr. Husted. In this report, Dr. Husted provided an opinion on causal relationship concluding that "more likely than not this injury was secondary to lifting boxes at work." He noted that there was no evidence that [appellant's] conditions were a degenerative process or a problem that preexisted the injurious event. Dr. Husted provided his conclusion that, more likely than not, the diagnosis of herniated disc at L1-L2 and L5-S1 with resultant lumbar radiculopathy was secondary to the lifting incident of October 6, 2014. The Board finds that this evidence does not raise a substantial question as to the correctness of OWCP's last merit decision.

Clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is insufficient to demonstrate clear evidence of error.[16] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.[17] As appellant has not submitted such evidence, the Board finds that she has not demonstrated clear evidence of error.

On appeal counsel asserts that the reconsideration request was timely filed. The Board finds, however, that there is no evidence of record as of OWCP's April 26, 2017 decision that supports this assertion.

[13] *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

[14] *Supra* note 5 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[15] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[16] *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

[17] *Nancy Marcano*, 50 ECAB 110 (1998).

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 26, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2019
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