



## **FACTUAL HISTORY**

On October 6, 2016 appellant, then a 43-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that she sprained her right shoulder on October 3, 2016 when she dropped a tray of mail while in the performance of duty. She stopped work on October 4, 2016. Appellant explained that as she attempted to grab the tray, she felt something in her shoulder pop and began to experience pain.

On October 20, 2016 Dr. Alan I. Roth, a physician specializing in orthopedic surgery, described appellant's history of injury and diagnosed right shoulder strain, right shoulder tendinitis, and possible labral tear right shoulder.

On November 17, 2016 Dr. Roth released her to return to work on November 18, 2016 with no restrictions.

In a November 23, 2016 note, Dr. David T. Schulz, an osteopath, diagnosed right shoulder strain and placed appellant on modified-duty work.

On November 28, 2016 OWCP accepted appellant's claim for right shoulder strain.

Appellant subsequently submitted additional medical evidence. In a November 29, 2016 note, Dr. Schulz found tenderness to the supraspinatus and trapezius area and pain with flexion. He found better internal and external rotation with less crepitation. Dr. Schulz reviewed appellant's right shoulder x-ray which revealed no deformities. He found that she could work with the same restrictions he previously provided.

On December 9, 2016 Dr. Schulz found right shoulder tenderness with limited range of motion, and discomfort with rotation. He diagnosed right shoulder strain. Dr. Schulz again found that appellant should continue her work restrictions.

Beginning on December 13, 2016, appellant filed claims for compensation (Form CA-7) for leave without pay (LWOP) commencing November 18, 2016.

In a December 15, 2016 note, Dr. Schulz noted appellant's continued right shoulder pain. He repeated his diagnosis and restrictions and prescribed additional physical therapy. Dr. Schulz examined appellant on December 27, 2016 and found no changes. On January 3, 2017 he found that she had no improvement with additional physical therapy and recommended a right shoulder magnetic resonance imaging (MRI) scan.

In a March 8, 2017 compensation claim development letter, OWCP requested additional medical evidence supporting appellant's claimed period of disability beginning November 18, 2016. It afforded her 30 days for a response.

On March 3, 2017 Dr. Schulz found that appellant had continued pain in her right shoulder as well as problems raising and rotating her shoulder. He noted that she had no new injury and again recommended an MRI scan.

By decision dated April 11, 2017, OWCP denied appellant's claim for wage-loss compensation for disability commencing November 18, 2016 causally related to her accepted

October 3, 2016 employment injury. It found that Dr. Schulz had not provided medical reasoning in support of her claimed disability.

In a January 19, 2017 note, Dr. Schulz reported appellant's symptoms of increasing pain and popping in the right shoulder with tingling down the arm and into her fingers. He continued to diagnose right shoulder strain and again recommended an MRI scan.

On March 24, 2017 Dr. Schulz completed a narrative report and noted that when he initially examined appellant her examination was not normal, as she had pain with motion. He found that she had not met any of the physical therapy goals that would have allowed her to work as a mail carrier and prescribed additional physical therapy. Dr. Schulz noted that on January 19, 2017 appellant had reached a plateau with physical therapy and that he had recommended an MRI scan. He opined that she had a possible rotator cuff injury and had not reached maximum medical improvement (MMI).

On June 14 and September 6, 2017 Dr. Schulz continued to support appellant's medical restrictions due to right shoulder pain. He continued to recommend a right shoulder MRI scan.

On October 10, 2017 appellant requested reconsideration of the April 11, 2017 decision. She provided notes dated May 9, 2017 from Tiffany L. Hayes, a nurse practitioner, addressing appellant's right wrist injury.

By decision dated November 30, 2017, OWCP denied modification of its April 11, 2017 decision. It found that Dr. Schulz had not provided the necessary medical evidence explaining how appellant's condition changed or why she was disabled from work beginning November 18, 2016 due to her accepted employment injuries.

On January 22 and December 4, 2018 Dr. Schulz examined appellant due to right shoulder and neck pain. He continued to request an MRI scan.

On March 14, 2019 Dr. Schulz reviewed appellant's right shoulder MRI scan which demonstrated thickness tears of the supraspinatus and infraspinatus tendons with minimal retraction. He diagnosed rotator cuff tear and recommended an orthopedic consult.

In an April 25, 2019 note, Dr. Schulz again diagnosed right rotator cuff tear based on an MRI scan and provided work restrictions of no lifting, pushing, or pulling more than 10 pounds, no climbing, as well as bending and twisting for no more than four hours a day. On April 30, 2019 he explained that when appellant's symptoms did not improve with physical therapy in 2016 he felt that it was likely that she had a rotator cuff tear, but was unable to confirm this until she underwent the recommended MRI scan. Dr. Schulz noted that the diagnosis of strain was continued until the MRI scan showed evidence of a rotator cuff tear. He opined that the mechanism of injury was consistent with the MRI scan findings, and due to the MRI scan evidence, appellant's diagnosis was changed from a strain to a rotator cuff tear.

On May 8, 2019 appellant requested that the acceptance of her claim be expanded to include right rotator cuff tear and to change her attending physician to an orthopedic surgeon.

On May 17, 2019 Dr. James S. Smith, an orthopedic surgeon, examined appellant's right shoulder. He found that she had multiple positive shoulder tests. Dr. Smith diagnosed right chronic full-thickness rotator cuff tear, right shoulder impingement syndrome, and right bicipital

tendinitis. He noted that appellant had an MRI scan confirming the full-thickness rotator cuff tears and impingement. Dr. Smith scheduled appellant for a right shoulder rotator cuff repair, subacromial decompression, and potential biceps tenotomy. He noted that he was hopeful her tendon quality was intact as the tear apparently occurred three years prior.

In a June 14, 2019 note, Dr. Schulz reported that on November 23, 2016 he examined appellant due to right shoulder strain from her accepted October 3, 2016 employment injury and not from a new or recurring injury.

On June 19, 2019 OWCP authorized right arthroscopic rotator cuff repair.

On June 24, 2019 appellant, through counsel, requested reconsideration of the November 30, 2017 decision, asserting that OWCP had erred by finding that appellant had sustained an intervening injury. He provided a copy of her March 13, 2019 right shoulder MRI scan.

On July 3, 2019 appellant again requested reconsideration of the November 30, 2017 decision. She resubmitted Dr. Schulz' June 14, 2019 note.

By decision dated July 10, 2019, OWCP denied appellant's request for consideration of the merits of her claim, 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> OWCP's regulations<sup>4</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>5</sup> Timeliness is determined by the document receipt date, *i.e.* the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.<sup>8</sup> Its procedures provide that OWCP will reopen a claimant's case for merit review,

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<sup>3</sup> 5 U.S.C. § 8128(a); *L.H.*, Docket No. 19-1174 (issued December 23, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

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

<sup>7</sup> *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>9</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>10</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>12</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>13</sup> It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> 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>15</sup> 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>16</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>17</sup>

### ANALYSIS

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

The most recent merit decision was OWCP's November 30, 2017 decision, which denied appellant's claim for wage-loss compensation finding that she had not established employment-related disability commencing November 18, 2016. As appellant's request for reconsideration was not received until June 24, 2019, more than one year after the November 30, 2017 merit decision,

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<sup>9</sup> *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>10</sup> *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *S.T.*, *supra* note 7; *C.V.*, *supra* note 8; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *S.T.*, *supra* note 7; *E.P.*, *supra* note 10; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 10; *C.V.*, *supra* note 8; *Leon J. Modrowski*, *supra* note 8; *Jesus D. Sanchez*, *supra* note 8.

<sup>14</sup> *V.G.*, *supra* note 10; *E.P.*, *supra* note 10; *Leona N. Travis*, *supra* note 12.

<sup>15</sup> *L.B.*, *supra* note 13; *supra* note 10.

<sup>16</sup> *D.G.*, *supra* note 9; *Leon D. Faidley, Jr.*, *supra* note 7.

<sup>17</sup> *C.V.*, *supra* note 8; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for wage-loss compensation.<sup>18</sup>

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision.

OWCP denied appellant claim on a medical basis, *i.e.*, that the medical evidence of record was insufficient to establish that her claimed period of disability was causally related to her accepted right shoulder strain. In support of her untimely request for reconsideration, appellant submitted a series of medical reports from Drs. Schultz and Smith. Neither physician, however, addressed a specific period of disability after November 18, 2016 due to appellant's accepted condition. As such, this evidence does not address the relevant issue.<sup>19</sup>

The Board further notes that the evidence submitted with the untimely request for reconsideration supports that on June 19, 2019 OWCP authorized surgery for appellant's accepted right shoulder condition. However, a surgery authorization alone is insufficient to demonstrate clear evidence of error.

The term "clear evidence of error" is intended to represent a difficult standard, and the medical evidence provided here is not the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its November 30, 2017 decision.<sup>20</sup> Even a detailed, well-rationalized medical report, which would have required further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.<sup>21</sup> It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.<sup>22</sup>

The Board finds that appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying her claim for total disability from work commencing November 18, 2016. Appellant has therefore not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the Board finds that her untimely request for reconsideration failed to demonstrate clear evidence of error.<sup>23</sup>

### **CONCLUSION**

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

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<sup>18</sup> 20 C.F.R. § 10.607(b).

<sup>19</sup> *B.W.*, Docket No. 19-0626 (issued March 4, 2020).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

<sup>21</sup> *E.B.*, Docket No. 18-1091 (issued December 28, 2018); *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

<sup>22</sup> *E.B.*, *id.*; *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

<sup>23</sup> *E.B.*, *id.*; *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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