



## ISSUE

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

## FACTUAL HISTORY

On May 27, 2014 appellant, then a 62-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on January 21, 2014, he sustained injuries to his neck, left arm/hand, lower back, and right lower extremity when the long-life vehicle (LLV) he was operating was struck by a truck while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on April 3, 2014.<sup>3</sup>

A January 22, 2014 employing establishment accident report (PS Form 1769/301) provided specific details regarding appellant's January 21, 2014 work-related motor vehicle accident (MVA).

In an April 4, 2014 note, Dr. Yogesh Kolwadkar, an orthopedic surgeon, stated that appellant should be non-weight-bearing on the right lower extremity for approximately two weeks.

In a June 25, 2014 development letter, OWCP informed appellant of the deficiencies of his claim and requested additional medical evidence. It explained that the then-current record did not include a diagnosis of any condition resulting from his injury. OWCP afforded appellant 30 days to submit the requested medical evidence.

By decision dated July 29, 2014, OWCP denied appellant's claim, finding that he had not submitted medical evidence containing a diagnosis by a qualified physician with regard to the accepted January 21, 2014 employment incident.

In November 2014, OWCP received appellant's May 20, 2014 emergency department treatment records. Dr. Melinda R. Allen, a Board-certified family practitioner, diagnosed lumbar muscle spasm and lumbar radiculopathy. She noted that appellant had presented with lower back pain, knee pain, and neck pain, which had persisted for several weeks, and that he had returned to work three days prior.

On August 27, 2015 appellant requested reconsideration of OWCP's July 29, 2014 decision.

In a February 13, 2015 attending physician's report (Form CA-20), Dr. Traeger Tvedten, a chiropractor, diagnosed degenerative disc disease of the cervical and lumbar spine, noting different symptoms since a January 21, 2014 MVA. He checked a box marked "yes" indicating that

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<sup>3</sup> The employing establishment further noted that appellant was in the performance of duty when injured, and that his injury was caused by a third party. However, it challenged appellant's entitlement to continuation of pay (COP) because of the more than 30-day delay in filing his traumatic injury claim.

appellant's condition was caused or aggravated by the incident, explaining that his symptoms were aggravated after the MVA in a postal vehicle.

By decision dated September 23, 2015, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On December 5, 2016 appellant, through counsel, again requested reconsideration of OWCP's July 29, 2014 decision.<sup>4</sup> He referenced 5 U.S.C. § 8128(a) in support of his motion, and provided additional medical evidence.

A September 13, 2016 magnetic resonance imaging (MRI) scan of appellant's thoracic spine revealed a benign hemangioma in the T1 vertebral body, abnormal signal intensity in the inferior endplate of T3 and superior endplate of T4, and no evidence of disc herniation or central canal stenosis.<sup>5</sup>

In a November 5, 2016 letter, Dr. Robert Legler, a Board-certified internist, opined that appellant's back pathology was very likely exacerbated, if not caused by his past car accident. He explained that while it would have been helpful for appellant to have had a complete workup at the time of the accident to prove causation, nonetheless there was a "good chance" that "the accident was a major player in [appellant's] current clinical presentation."

The Office of Personnel Management (OPM) approved appellant's disability retirement effective January 25, 2019, and he was separated from the employing establishment as of that date.

Along with a letter dated March 4, 2019, counsel resubmitted the request for reconsideration which OWCP previously received on December 5, 2016. He also resubmitted appellant's September 13, 2016 thoracic spine MRI scan and Dr. Legler's November 5, 2016 note.

By decision dated June 14, 2019, 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>6</sup> 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

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<sup>4</sup> The Board notes that counsel captioned his motion as a motion to rescind. Counsel's mere characterization of the request as a motion to rescind under 5 U.S.C. § 8128(a), rather than a request for reconsideration, is found by the Board to be without significance as it cannot circumvent OWCP's discretionary authority to impose a one-year timeframe for requesting reconsideration pursuant to 5 U.S.C. § 8128(a).

<sup>5</sup> The reviewing radiologist noted that the abnormalities at T3-T4 may represent Modic II degenerative changes versus bone bruising secondary to occult fractures. She further commented that these findings were not present on a previous study from 2014.

<sup>6</sup> 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

decision for which review is sought.<sup>7</sup> 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).<sup>8</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>9</sup>

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.<sup>10</sup> If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>11</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>12</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>13</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</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>16</sup> 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.<sup>17</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>18</sup> 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

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<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>9</sup> See *M.E.*, *supra* note 6; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>10</sup> See 20 C.F.R. § 10.607(b); *M.E.*, *supra* note 6; *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>11</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also id.* at § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (February 2016).

<sup>12</sup> *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *see Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> *Id.*; *see also Leona N. Travis*, 43 ECAB 227 (1999).

<sup>14</sup> *J.F.*, *supra* note 12; *J.D.*, *supra* note 12; *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *J.F.*, *supra* note 12; *M.E.*, *supra* note 6; *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>18</sup> See *G.G.*, *supra* note 11.

the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>19</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>20</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.

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations<sup>21</sup> and procedures<sup>22</sup> 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.<sup>23</sup> The most recent merit decision was OWCP's July 29, 2014 decision. As appellant's request for reconsideration was not received by OWCP until December 5, 2016, more than one year after the July 29, 2014 decision, the Board finds that it was untimely filed. Because his request was untimely, he must demonstrate clear evidence of error on the part of OWCP in having denied his traumatic injury claim.

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 his traumatic injury claim, finding that he had not submitted medical evidence including a diagnosis by a qualified physician in connection with the accepted January 21, 2014 employment incident.

With his request for reconsideration, appellant submitted a letter from Dr. Legler dated November 5, 2016 and the results of an MRI scan of appellant's thoracic spine taken on September 13, 2016. This evidence does not show that OWCP erred in its July 29, 2014 decision at the time it was issued. Dr. Legler's letter contained neither a firm diagnosis, nor reference to the specific date of injury claimed by appellant. While the diagnostic report of September 13, 2016 includes diagnoses, it also did not contain any reference to the specific date of injury. As noted above, 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, does not demonstrate clear evidence of error.<sup>24</sup> Neither Dr. Legler's November 5, 2016 letter nor the diagnostic report of September 13, 2016 demonstrate clear evidence of error on the part of OWCP in its last merit decision.

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<sup>19</sup> *J.F.*, *supra* note 12; *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

<sup>20</sup> *See M.E.*, *supra* note 6; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>21</sup> 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

<sup>22</sup> *Supra* note 8 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>23</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>24</sup> *J.F.*, *supra* note 12; *J.S.*, *supra* note 19; *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

Clear evidence of error is intended to represent a difficult standard. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>25</sup> As appellant has not submitted such evidence, the Board finds that he has not demonstrated clear evidence of error.

**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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 14, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>25</sup> *Supra* note 17.