



## **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 January 13, 2017 appellant, then a 44-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on December 12, 2016 when he experienced back pain upon standing following a mission flight while in the performance of duty. He initially stopped work on January 23, 2017. On March 29, 2017 OWCP accepted this claim for aggravation of intervertebral lumbar disc disorders with radiculopathy.

On December 19, 2016 appellant underwent lumbosacral spine x-rays at the request of Dr. Allan H. Tissenbaum, a Board-certified orthopedic surgeon, which demonstrated mild degenerative changes in his back with no close disc space narrowing. Beginning on January 23, 2017 appellant's chiropractor, Dr. Peter Peduzzi, indicated that appellant was totally disabled through March 27, 2017. On January 24, 2017 appellant underwent a lumbar magnetic resonance imaging (MRI) scan, which demonstrated desiccation of disc material at L4-5 and L5-S1 and multilevel disc bulges, facet degenerative arthropathy, and ligament hypertrophy with no significant compromise of the spinal canal or neural foramen.

In a form report dated March 14, 2017, Dr. Gerard Werries, a Board-certified orthopedic surgeon, diagnosed intervertebral disc disorders with radiculopathy and indicated that appellant was partially disabled from March 14 through approximately April 25, 2017. He noted that appellant's work status was to be determined at the April 25, 2017 appointment. In a form note of even date, Dr. Werries diagnosed lumbar spondylosis with radiculopathy and reported that appellant could return to work on March 14, 2017. He opined that appellant was unable to perform the duties of an air marshal and provided work restrictions on lifting more than 25 pounds. Dr. Werries indicated that appellant could occasionally bend, climb stairs, crawl, squat, reach, push, pull, grasp, and perform both fine manipulation and repetitive motion. He found appellant should not climb ladders.

Beginning on March 17, 2017 appellant filed claims for compensation (Form CA-7) requesting leave without pay (LWOP) from March 12 through July 22, 2017.

On April 12, 2017 Dr. David Dechellis, an osteopath, performed a lumbar epidural steroid injection.

On April 24, 2017 the employing establishment offered appellant a limited-duty position providing reception desk duties. It reoffered him this position on May 17, 2017.

In a May 9, 2017 narrative and form reports, Dr. Werries diagnosed intervertebral disc disorders with lumbar radiculopathy and indicated that appellant's work restrictions had not changed.

In a May 22, 2017 development letter, OWCP requested additional evidence supporting that appellant was totally disabled from March 12, 2017. It afforded him 30 days for a response.

In a May 24, 2017 letter, the employing establishment offered appellant a light-duty position as a federal air marshal performing the duties of a ground-based administrative employee. The physical requirements included lifting up to 25 pounds, occasional bending, climbing stairs, crawling, squatting, reaching, pushing, pulling, grasping, fine manipulation, and repetitive motion. The position included reception desk duties such as answering telephones, e-mails, greeting guests, and light reception work with no defensive measures or firearms training. The employing establishment afforded him until May 30, 2017 to respond to the offer.

On May 25, 2017 Dr. Peduzzi indicated that appellant could not perform the duties of the offered light-duty position and that he was not cleared for any light-duty work at this time. He indicated that appellant could only sit, stand, or drive as necessary to attend medical appointments or limited errands for less than 30 minutes.

Through a May 30, 2017 e-mail, the employing establishment noted that appellant had submitted medical evidence that he was totally restricted from duty, including limited duty. It requested additional medical documentation as appellant had previously been released to perform limited duty with restrictions.

In a May 30, 2017 note, Dr. Werries indicated that appellant could perform light-duty work including answering the telephone while seated, using a computer while seated, greeting visitors and signing for light deliveries, and performing other light duties within the scope of his limitations as listed on an OWCP-5. He completed a form report of even date and indicated that appellant could perform sedentary duty.

On June 5, 2017 Dr. John William Bookwalter, a Board-certified neurosurgeon, examined appellant and diagnosed lumbar radiculopathy. He noted that appellant experienced lumbar pain after standing from a seated position on an airplane on December 12, 2016. Dr. Bookwalter completed a June 15, 2017 form report and indicated by checking a box marked "yes" that appellant's condition was caused or aggravated by an employment activity noting that appellant sustained a work injury on the job. In a narrative report of even date, he opined that appellant had sustained a likely aggravation of degenerative disc disease on December 12, 2016. Dr. Bookwalter indicated that appellant was totally disabled beginning June 5, 2017 and directed appellant to undergo right lower extremity electrodiagnostic testing. On June 20, 2017 appellant underwent electrodiagnostic studies which were normal with no polyneuropathy, no right lower extremity radiculopathy, plexopathy, or peripheral mononeuropathy.

On July 11, 2017 Dr. Werries found that appellant could not return to modified duty and recommended a functional capacity evaluation. He diagnosed lumbar spondylosis and restricted appellant's use of firearms. In a narrative report of even date, Dr. Werries noted that appellant denied recurrent trauma or progressive neurological deficits. He reported that appellant had a normal gait, could perform heel and toe walking and that both lower extremities were neurovascularly intact. Dr. Werries diagnosed intervertebral disc disorders with radiculopathy, in the lumbar region.

By decision dated July 25, 2017, OWCP denied appellant's claim for disability for the period April 30, 2017 and continuing as causally related to his accepted January 13, 2017 employment injury.

On June 29, 2017 Dr. Bookwalter reviewed appellant's diagnostic studies and found no evidence of radiculopathy. He opined that appellant had aggravated his lumbar degenerative disc disease and perhaps facet arthropathy. Dr. Bookwalter found that appellant could perform light duty.

On September 25, 2017 appellant accepted a light-duty position performing reception desk duties.

On July 27, 2018 appellant requested reconsideration of the July 25, 2017 OWCP decision. He alleged that the employing establishment and nurse had made an error on one of Dr. Werries' March 14, 2017 reports to indicate that he could return to work on that date. Appellant reported that he utilized continuation of pay from January 23 through March 6, 2017. He resubmitted Dr. Werries' March 14, 2017 form report noting that it indicated that he was totally disabled through April 25, 2017. Appellant also resubmitted Dr. Werries' April 25, 2017 form report which provided his work restrictions.

By decision dated August 2, 2018, OWCP denied appellant's request for reconsideration finding 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>4</sup> This discretionary authority, however, is subject to certain restrictions.<sup>5</sup> OWCP's regulations<sup>6</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>7</sup> Timeliness is determined by the document receipt date, the received date in OWCP's 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>

When an application for review 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>10</sup> OWCP 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

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<sup>4</sup> 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>7</sup> *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

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

<sup>9</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>10</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).

claimant's application for review demonstrates clear evidence of error on the part of OWCP.<sup>11</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>12</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>13</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>14</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>15</sup> It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.<sup>16</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>17</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>18</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>19</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's July 27, 2018 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The most recent merit decision was OWCP's July 25, 2017 decision, which denied appellant's total disability claim for the period beginning April 30, 2017. OWCP received his request for reconsideration on July 27, 2018, which was outside the one-year

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<sup>11</sup> *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>12</sup> *V.G.*, *supra* note 6; *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *S.T.*, *supra* note 9; *see C.V.*, *supra* note 10; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>14</sup> *S.T.*, *supra* note 9; *see E.P.*, *supra* note 12; *Pasquale C. D Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>15</sup> *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 6; *see C.V.*, *supra* note 10; *Leon J. Modrowski*, *supra* note 10; *Jesus D. Sanchez*, *supra* note 10.

<sup>16</sup> *V.G.*, *supra* note 6; *see E.P.*, *supra* note 12; *Leona N. Travis*, *supra* note 14.

<sup>17</sup> *L.B.*, *supra* note 15; *V.G.*, *supra* note 6; *see E.P.*, *supra* note 12; *Nelson T. Thompson*, *supra* note 12.

<sup>18</sup> *D.G.*, *supra* note 11; *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>19</sup> *C.V.*, *supra* note 10; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

time limit. Consequently, appellant has the burden of proof to demonstrate clear evidence of error by OWCP in denying his claim for compensation.

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. Appellant resubmitted Dr. Werries March 14 and April 25, 2017 form reports. He contended that Dr. Werries did not intend to release him to return to light-duty work on March 14, 2017 as the two reports of that date are inconsistent regarding his ability to work. OWCP denied appellant's claim as he failed to establish that he was totally disabled on or after April 30, 2017 due to his accepted employment injury. The conflicting reports from Dr. Werries regarding the extent of appellant's disability from March 14 through approximately April 25, 2017 do not address the specific period denied by OWCP and do not provide medical reasoning addressing whether or not appellant was totally disabled during the period claimed. As such, this evidence does not address the relevant issue.<sup>20</sup> The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error in its July 25, 2017 decision.<sup>21</sup> Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.<sup>22</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>23</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 his claim for total disability beginning April 30, 2017. 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 the request failed to demonstrate clear evidence of error.<sup>24</sup>

### CONCLUSION

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

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<sup>20</sup> *R.A.*, Docket No. 18-0370 (issued November 7, 2019); *F.R.*, Docket No. 09-0575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

<sup>22</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>23</sup> *E.B.*, *id.*; *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

<sup>24</sup> *E.B.*, *id.*; *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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