



## **FACTUAL HISTORY**

On April 10, 2002 appellant, then a 52-year-old aircraft electrician, filed a traumatic injury claim (Form CA-1) alleging that he injured his left shoulder that day when he turned a rotor while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx643 and accepted the claim for a left rotator cuff strain. By decision dated May 17, 2004, it granted appellant a schedule award for 15 percent permanent impairment of the left upper extremity due to the left upper extremity.

On January 11, 2005 appellant filed an occupational disease claim (Form CA-2) alleging that, on or before December 14, 2014, he sustained bilateral knee conditions due to factors of federal employment, including repetitive climbing on and off of aircraft, kneeling, and squatting. OWCP assigned that claim OWCP File No. xxxxxx422 and accepted it for aggravation of bilateral patellar chondromalacia. On April 18, 2005 appellant underwent authorized arthroscopic repair with debridement and excision of a suprapatellar plica on April 18, 2015 and authorized arthroscopic debridement of the right knee on May 27, 2005.<sup>2</sup> OWCP subsequently expanded its acceptance of the claim to include lateral meniscal derangement, bilaterally; bilateral osteoarthritis; and bilateral traumatic arthropathy of the lower extremities.

On July 18, 2005 appellant filed an occupational disease claim (Form CA-2) alleging a right rotator cuff tear due to factors of his federal employment. OWCP assigned that claim OWCP File No. xxxxxx325 and, on September 14, 2005 accepted it for right rotator cuff syndrome and degenerative changes of the acromioclavicular joint. On October 24, 2005 appellant underwent authorized arthroscopic right rotator cuff repair and subacromial decompression.

On January 9, 2007 appellant filed another occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome and a cervical disc condition causing double crush syndrome due to factors of his federal employment. OWCP assigned that claim OWCP File No. xxxxxx185 and accepted it for bilateral carpal tunnel syndrome and a cervical spine sprain with intervertebral disc involvement.

On April 12, 2007 OWCP administratively combined OWCP File Nos. xxxxxx325, xxxxxx422, xxxxxx185, and xxxxxx643, with the latter serving as the master file.

On June 11, 2007 appellant underwent an authorized anterior cervical discectomy and fusion of C5 to C7. On September 14, 2007 he underwent an authorized left carpal tunnel release. Appellant returned to full-time, regular-duty work on November 13, 2007.

OWCP subsequently received medical evidence, including a July 18, 2006 report, wherein Dr. Robert Q. Lewis, a Board-certified orthopedic surgeon, noted that appellant's neck and left

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<sup>2</sup> By decision dated December 12, 2005, OWCP granted appellant a schedule award for five percent permanent impairment of the right lower extremity and five percent permanent impairment of the left lower extremity. By decision dated July 9, 2014, it granted him a schedule award for an additional 20 percent permanent impairment of the left lower extremity.

arm became symptomatic three weeks earlier. In an August 4, 2006 report, Dr. Lewis diagnosed left-sided C7 radiculopathy.

In an April 5, 2007 report, Dr. Mathew T. Alexander, a Board-certified neurosurgeon, diagnosed a C6 syrinx secondary to C5-6 and C6-7 disc herniations, causing chronic compression.

By decision dated February 12, 2009 under OWCP File No. xxxxxx325, OWCP granted appellant a schedule award for 15 percent permanent impairment of his right upper extremity. By decision dated May 13, 2009 under OWCP File No. xxxxxx185, it granted appellant a schedule award for an additional 11 percent permanent impairment of the left upper extremity.<sup>3</sup>

On December 1, 2011 appellant underwent an authorized left knee arthroscopy with removal of loose body. He underwent an authorized total left knee arthroplasty on June 26, 2013.

On March 20, 2014 under OWCP File No. xxxxxx185, appellant filed a notice of recurrence (Form CA-2a) for additional medical treatment commencing March 7, 2014.

In a development letter dated March 28, 2014, OWCP informed appellant of the deficiencies of his recurrence claim. It advised him of the type of additional evidence needed and afforded him 30 days to provide the necessary evidence.

In response, appellant submitted a May 13, 2014 statement, noting that he had a chronic, dull pain problem after cervical fusion, worsened by a subsequent fall. He also provided a May 7, 2014 report by Dr. John M. Borkowski, a Board-certified orthopedic surgeon specializing in spine surgery, who noted that appellant had done well after cervical fusion until he fell a few times and subsequently developed severe neck pain and arm numbness.

By decision dated May 20, 2014 under OWCP File No. xxxxxx185, OWCP denied appellant's recurrence claim as the medical evidence of record was insufficient to demonstrate a material change in or worsening of the accepted conditions.

On September 8, 2014 appellant requested reconsideration. In a September 3, 2014 letter, he asserted that his cervical spine pain had begun to worsen prior to several falls while recovering from the authorized total left knee arthroplasty. Appellant submitted reports from Dr. Borkowski dated from July 22 to November 5, 2014 noting a gradual symptomatic increase following cervical fusion, with marked symptoms following several falls. He noted evidence of degenerative changes above the level of the prior fusion with evidence of a syrinx. Dr. Borkowski opined that it was likely appellant had adjacent level disease associated from having a spinal fusion.

By decision dated February 26, 2015, OWCP denied modification of the May 20, 2014 decision, as the medical evidence of record was insufficient to establish a spontaneous worsening of the accepted conditions.

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<sup>3</sup> Appellant retired from federal employment effective March 31, 2011.

On May 25, 2018 appellant underwent an authorized partial right meniscectomy, and a cortisone injection and aspiration of the left knee.

On May 21, 2019 appellant requested reconsideration of OWCP's February 26, 2015 decision. He contended that he had not returned to his date-of-injury job as he had been promoted to a work leader position, which no longer required him to repair aircraft. Appellant noted that, since February 26, 2015, he sustained a myocardial infarction with multiple stent placement, a total knee arthroplasty with multiple femoral artery stents, and femoral artery replacement.

In support of his request, appellant submitted additional medical evidence. A May 2, 2014 cervical magnetic resonance imaging (MRI) scan demonstrated multilevel disc bulges, postoperative changes from C5 to C7, anterior interbody fusion with plate and screws from C5-6 and C6-7, and a cervical cord syrinx at C6 and C6-7.

In a May 21, 2014 report, Dr. Michael E. Tschickardt, Board-certified in pain medicine, diagnosed cervical post-laminectomy syndrome, lumbosacral spondylosis without myelopathy, and cervical stenosis.

OWCP also received a September 15, 2015 report by Lisa Ruiz, a physician assistant.

In a September 25, 2017 report, Dr. Davin Cordell, a Board-certified orthopedic surgeon, diagnosed cervicalgia, status post cervical fusion, and left-sided cervical radiculopathy. In an October 9, 2017 report, he recommended a left C5 nerve block.

An October 3, 2017 cervical MRI scan demonstrated status post anterior fusion from C5 to C7, multilevel diffuse disc bulges C2-3 to C4-5, and a syrinx and/or myelomalacia of the lower cervical spinal cord.

In an October 24, 2017 report, Dr. Gabriel Lopez, Board-certified in pain medicine, diagnosed cervical post-laminectomy syndrome, cervical degenerative disc disease, cervical radiculopathy, and chronic neck pain. He performed a series of epidural injections through October 3, 2018.

By decision dated September 16, 2019, OWCP denied appellant's May 21, 2019 request for reconsideration of the February 26, 2015 decision, 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>4</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 decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date (*i.e.*,

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<sup>4</sup> 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).

<sup>5</sup> 20 C.F.R. § 10.607(a).

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 request demonstrates clear evidence that OWCP’s most recent merit decision was in error.<sup>8</sup> OWCP’s procedures provide that it 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 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. 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. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>12</sup>

### ANALYSIS

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

<sup>7</sup> *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).

<sup>8</sup> 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).

<sup>9</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also *id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

<sup>10</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

<sup>12</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

OWCP's regulations<sup>13</sup> and procedures<sup>14</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>15</sup> The most recent merit decision was the February 26, 2015 denial of modification of the May 20, 2014 decision denying a March 7, 2014 recurrence claim. As appellant's request for reconsideration was not received by OWCP until May 21, 2019, more than one year after the February 26, 2015 decision, it was untimely filed.<sup>16</sup> Consequently, he must demonstrate clear evidence of error by OWCP in denying the recurrence claim.<sup>17</sup>

In support of his untimely request for reconsideration, appellant argued that the medical evidence of record established the claimed worsening of his accepted conditions on March 7, 2014. He submitted pain management reports dated from May 21, 2014 to October 24, 2017 by Drs. Cordell, Lopez, and Tschickardt, noting cervical disc degeneration and status post cervical fusion. Appellant also provided imaging studies of the cervical spine, and a September 15, 2015 report by a physician assistant. However, these reports do not raise a substantial question concerning the correctness of the February 26, 2015 merit decision, which denied his recurrence claim.

The Board has held that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence that on its face shows that OWCP made an error.<sup>18</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>19</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>20</sup> The medical reports submitted on reconsideration are therefore insufficient to demonstrate clear evidence of error in the February 26, 2015 decision, denying his claim for a recurrence commencing March 7, 2014.<sup>21</sup>

The Board thus finds that appellant has not raised an argument or submitted positive, precise, and explicit evidence that manifests on its face that OWCP committed an error in the

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<sup>13</sup> *F.N.*, Docket No. 18-1543 (issued March 6, 2019); 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

<sup>14</sup> *Supra* note 6 at Chapter 2.1602.4 (February 2016); *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>15</sup> *J.W.*, *supra* note 10; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>16</sup> 20 C.F.R. § 10.607(b); *see L.A.*, *supra* note 14; *Debra McDavid*, 57 ECAB 149 (2005).

<sup>17</sup> *Id.*; *see also R.T.*, Docket No. 19-0604 (issued September 13, 2019).

<sup>18</sup> *G.B.*, Docket No. 19-1762 (issued March 10, 2020).

<sup>19</sup> *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *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>20</sup> *T.C.*, *id.*, *E.B.*, *id.*; *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

<sup>21</sup> *Id.*

denial of his claim. Appellant has therefore not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's February 26, 2015 decision.<sup>22</sup> Thus, the Board finds that the untimely request for reconsideration fails to demonstrate clear evidence of error.<sup>23</sup>

On appeal, appellant's contention pertains to the merits of appellant's claim, which as noted above are not before the Board on the present appeal.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 28, 2020  
Washington, DC

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

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

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

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<sup>22</sup> See *J.V.*, Docket No. 18-0963 (issued February 13, 2020); *S.P.*, Docket No. 17-1708 (issued February 23, 2018).

<sup>23</sup> See *J.D.*, Docket No. 18-1765 (issued June 11, 2019).