

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

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C.G., Appellant )

and )

U.S. POSTAL SERVICE, LOGISTICS & )  
DISTRIBUTION CENTER, Tampa, FL, )  
Employer )  
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**Docket No. 21-0443**  
**Issued: November 3, 2021**

*Appearances:*  
*Wayne Johnson, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 2, 2021 appellant, through counsel, filed a timely appeal from an August 11, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision dated January 21, 2016 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## 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

This case has previously been before the Board.<sup>3</sup> The facts and circumstances set forth in the prior Board decisions and order are incorporated herein by reference. The relevant facts are as follows.

On February 18, 2009 appellant, then a 34-year-old mail handler operator, filed a traumatic injury claim (Form CA-1) alleging that on February 9, 2009 she injured her left arm and low back when hooking up a tow motor to a bulk mail cart while in the performance of duty. OWCP assigned this claim OWCP File No. xxxxxx098 and accepted it for lumbar, left shoulder, and arm strain.<sup>4</sup>

In a letter dated December 7, 2012, OWCP noted that, under OWCP File No. xxxxxx258, appellant would receive wage-loss benefits on the periodic rolls, effective December 16, 2012.

On December 4, 2014 OWCP referred appellant to Dr. Jonathan Black, Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated January 13, 2015, Dr. Black concluded that her accepted conditions of lumbar, cervical and left shoulder strains had resolved and that she no longer had any residuals or disability causally related to her accepted employment injuries.

In a March 18, 2015 decision, OWCP terminated appellant's wage-loss compensation and medical benefits for OWCP File Nos. xxxxxx098, xxxxxx258, and xxxxxx723, effective March 18, 2015. It found that the weight of the medical evidence rested with the opinion of Dr. Black who opined that she had no employment-related residuals or disability due to her accepted conditions.

On August 3, 2015 appellant requested reconsideration. By decision dated October 8, 2015, OWCP denied modification. On November 2, 2015 appellant requested reconsideration. By decision dated January 21, 2016, OWCP denied modification.

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<sup>3</sup> *Order Remanding Case*, Docket No. 20-0051 (issued June 29, 2020); Docket No. 15-0303 (issued January 14, 2016); Docket No. 14-0315 (issued May 21, 2014), *petition for recon. denied*, Docket No. 14-315 (issued December 1, 2014).

<sup>4</sup> On September 17, 2013 OWCP administratively combined OWCP File Nos. xxxxxx098, xxxxxx264, and xxxxxx723. OWCP File No. xxxxxx098 was designated as the master file. Under OWCP File No. xxxxxx258, OWCP accepted that appellant sustained cervical and lumbosacral strains on June 9, 2011 while pushing an automated mail cart. Under OWCP File No. xxxxxx723, it accepted that appellant sustained neck, left shoulder, and upper arm strains on March 31, 2009 while pulling a heavy tray of mail off a pallet of heavy letter trays.

On May 29, 2016 appellant requested reconsideration. By decision dated June 7, 2016, OWCP denied reconsideration of the merits of her claim.

On March 19, 2019 appellant again requested reconsideration. In support of her request, she submitted a Form CA-17 dated March 7, 2018, wherein Dr. Richard M. Blecha, a Board-certified orthopedic surgeon, noted her diagnosis of degenerative disc disease and related that she could return to work that day with restrictions.

A January 15, 2019 magnetic resonance imaging (MRI) scan of appellant's left shoulder revealed moderate acromioclavicular joint osteoarthritis, similar to prior, and small low-grade partial thickness articular surface subscapularis tendon tear. An MRI scan of her lumbar spine of the same date showed mild L3-4, L4-5, and L5-S1 degenerative changes without significant stenosis.

In a February 13, 2019 report, Dr. Robert C. Nucci, a Board-certified orthopedic surgeon, noted that appellant was seen for cervical, lumbar, and left shoulder and arm pain. He noted that she had related a history of three work injuries. Dr. Nucci related that appellant's physical examination findings included positive left shoulder impingement. He diagnosed cervicalgia, cervical ligaments sprain, other specified cervical and lumbar dorsopathies, left shoulder pain, left shoulder impingement syndrome, low back pain, sciatica lumbar ligaments sprain, and lumbosacral intervertebral disc displacement. In a Form CA-17 of even date, Dr. Nucci diagnosed cervical, lumbar, and shoulder strain and related that appellant could return to work for 15 to 30 hours per week with restrictions.

A cervical MRI scan dated February 21, 2019 demonstrated C3-4 and C4-5 disc herniations, C5-6 disc bulge, and C6-7 anterior disc bulge.

In a February 26, 2019 report, Dr. G. Jason Hunt, an osteopath specializing in orthopedics, provided examination findings and diagnosed left shoulder impingement syndrome and left elbow ulnar neuritis.

In a March 6, 2019 report, Dr. Dario A. Grisales, a physician specializing in anesthesiology and pain medicine, reported that appellant was seen for complaints of neck, shoulder, and low back pain. Physical examination findings were detailed. Dr. Grisales diagnosed chronic pain syndrome, low back pain, lumbosacral spondylosis without myelopathy or radiculopathy, sacral and sacrococcygeal region spondylosis without myelopathy or radiculopathy, sacroiliitis, lumbosacral intervertebral disc disorders with radiculopathy, lumbar region intervertebral disc disorders with radiculopathy, cervicalgia, C4-5 cervical disc disorder with radiculopathy, left shoulder pain, left upper arm and shoulder muscles, fascia, and tendons strain, left shoulder bursitis, and left shoulder muscle contracture.

Appellant also resubmitted medical evidence previously of record.

By decision dated April 10, 2019, OWCP denied appellant's March 19, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found that it was unnecessary to address the medical evidence submitted with the reconsideration request.

On October 7, 2019 appellant filed an appeal with the Board. By decision dated June 29, 2020, the Board set aside the April 10, 2019 decision, finding that OWCP failed to properly explain its findings in its decision, in contradiction to 20 C.F.R. § 10.126. The Board remanded the case for an appropriate decision on appellant's request for reconsideration, including findings of fact and a clear statement of reasons explaining its disposition.

By decision dated August 11, 2020, OWCP again denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It reviewed the evidence submitted on reconsideration and explained that the evidence received with her March 19, 2019 reconsideration request was not of sufficient probative value to raise a substantial question as to the correctness of OWCP's last merit decision dated January 21, 2016 denying modification of the November 2, 2015 decision terminating her compensation benefits.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>5</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>6</sup> The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.<sup>7</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>8</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted to OWCP under section 8128(a) of FECA.<sup>9</sup>

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.<sup>10</sup> OWCP's regulations and 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(a), if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>11</sup>

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<sup>5</sup> See 5 U.S.C. § 8128(a); *C.H.*, Docket No. 21-0264 (issued June 22, 2021); *L.H.*, Docket No. 19-1174 (issued December 23, 2019).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (February 2016).

<sup>8</sup> *Id.* at Chapter 2.1602.4(b) (February 2016).

<sup>9</sup> See *C.H.*, *supra* note 5; *R.L.*, Docket No. 18-0496 (issued January 9, 2019).

<sup>10</sup> See 20 C.F.R. § 10.607(b); *C.H.*, *id.*; *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

<sup>11</sup> *Id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

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 which 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 demonstrate 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 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>17</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>18</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.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the timeliness of appellant's March 19, 2019 reconsideration request as the Board considered the evidence relative to this issue in its June 29, 2020 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP, under section 8128 of FECA.<sup>19</sup>

Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in its January 21, 2016 merit decision.

In his March 7, 2018 Form CA-17 report, Dr. Blecha diagnosed degenerative disc disease and noted appellant's work restrictions. As degenerative disc disease was not an accepted

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<sup>12</sup> *C.H.*, *supra* note 5; *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> *M.C.*, Docket No. 20-1515 (issued June 23, 2021); *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> *M.C.*, *id.*; *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, Docket No. 19-0038 (issued June 18, 2019).

<sup>15</sup> *M.C.*, *id.*; *V.G.*, *id.*; *Leona N. Travis*, *supra* note 13.

<sup>16</sup> *M.C.*, *id.*; *L.B.*, *supra* note 14; *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>17</sup> *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>18</sup> *See C.V.*, *supra* note 12; *George C. Vernon*, 54 ECAB 319 (2003).

<sup>19</sup> *J.C.*, Docket No. 20-1253 (issued May 24, 2021); *E.P.*, Docket No. 20-0898 (issued February 17, 2021); *J.T.*, Docket No. 18-1757 (issued April 19, 2019).

condition in any of appellant's claims, this report does not establish on its face that she had residuals and/or disability causally related to the accepted employment injuries.<sup>20</sup>

Dr. Nucci, in a February 13, 2019 report, diagnosed cervical, lumbar, and shoulder strain and indicated that appellant was capable of working part time with restrictions. While his opinion addressed her ongoing disability, it did not address the cause of her diagnosed conditions and is, therefore, insufficient to demonstrate that OWCP committed an error, nor does it raise a substantial question as to the correctness of OWCP's January 21, 2016 decision.<sup>21</sup> Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>22</sup>

Neither Dr. Hunt in his February 26, 2019, nor Dr. Grisales' March 6, 2019 reports addressed the cause of appellant's currently diagnosed conditions or disability. Thus, their reports are not relevant to the underlying issue of whether she had any continuing residuals or disability causally related to her accepted February 9, 2009 employment injury.<sup>23</sup>

Additionally, the left shoulder, lumbar, and cervical MRI scans also are insufficient to establish that OWCP erred in its denial of appellant's claim for continuing disability.<sup>24</sup> Diagnostic test reports do not raise a substantial question as to the correctness of OWCP's March 15, 2018 decision terminating her compensation benefits or demonstrate clear evidence of error. These reports therefore do not demonstrate clear evidence of error and would not require a review of a case.<sup>25</sup>

In support of her untimely request for reconsideration, appellant also submitted evidence which was previously of record and considered by OWCP. As such, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and thus, these reports are insufficient to discharge her burden of proof.<sup>26</sup>

Appellant has not submitted medical evidence sufficient to shift the weight of the evidence in her favor or raise a substantial question as to the correctness of OWCP's decision. Consequently, the Board finds that she has not demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

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<sup>20</sup> *Supra*, note 13.

<sup>21</sup> *L.N.*, Docket No. 20-0742 (issued October 26, 2020); *C.D.*, Docket No. 19-1462 (issued June 26, 2020).

<sup>22</sup> *Id.*

<sup>23</sup> *Supra* note 14.

<sup>24</sup> *See E.H.*, Docket No. 19-0365 (issued March 17, 2021); *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *G.B.*, Docket No. 13-1260 (issued December 2, 2013); *see also W.R.*, Docket No. 09-2336 (issued June 22, 2010).

<sup>25</sup> *See E.H., id.; D.G., id.; M.C.*, Docket No. 16-1135 (issued September 11, 2017); *G.B., id.*

<sup>26</sup> *See D.L.*, Docket No. 18-1112 (issued January 17, 2020).

**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 August 11, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2021  
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