

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

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<b>Y.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0092</b>
	)	<b>Issued: October 15, 2021</b>
<b>U.S. POSTAL SERVICE, CHURCH STREET</b>	)	
<b>STATION, New York, NY, Employer</b>	)	
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*Appearances:*

*James D. Muirhead, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 21, 2020 appellant, through counsel, timely filed an appeal from an August 24, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated March 13, 2018, to the filing of this

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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 an 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.

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 to review the merits of appellant's case.<sup>3</sup>

### **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 December 8, 2016 appellant, then a 46-year-old city carrier parcel post, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a left shoulder, left pelvic bone, left hand, and right knee injuries when she slipped and fell while in the performance of duty. She stopped work on December 8, 2016 and has not returned.

Following initial development of the claim, OWCP denied the claim by decision dated February 9, 2017, finding that the medical evidence of record was insufficient to establish a firm diagnosis causally related to the accepted employment incident.

Appellant requested reconsideration on December 18, 2017. By decision dated March 13, 2018, OWCP denied modification.

OWCP continued to receive medical evidence.

In a March 23, 2018 note, Dr. Amin Tehrany, a Board-certified orthopedic surgeon, placed appellant out of work until further notice, secondary to surgery on February 23, 2018.

In reports dated May 30 and June 1, 2018, Dr. Billy Ford, a Board-certified anesthesiologist, diagnosed cervical sprain, herniated cervical intervertebral disc, lumbar spine strain, herniated lumbar intervertebral disc, cervical radiculopathy, lumbar radiculopathy, and lumbar facet syndrome. In August 3, 2018 reports, he noted that appellant received a lumbar epidural steroid injection and intraoperative lumbar epidurography.

In reports dated May 31, 2018, and March 19 and April 30, 2019, Dr. Demetrios Mikelis, an internist, noted that appellant was seen for complaints of back pain and lower neck pain. He diagnosed herniated cervical intervertebral disc, cervical nerve root impingement, herniated lumbar intervertebral disc, and bilateral lumbosacral nerve root lesions. Dr. Mikelis requested authorization for spinal fusion and laminectomy at level L4-5. He saw appellant on July 11 and

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

<sup>3</sup> The Board notes that OWCP received additional evidence following the August 24, 2020 decision. However, the *Board's Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

November 12, 2019 and advised that appellant was status post-spinal fusion and laminectomy and anterior lumbar interbody fusion at L4-5.

Dr. Sebastian Lattuga, a Board-certified orthopedic surgeon, in a February 4, 2019 report, noted that appellant was seen for complaints of back pain and lower neck pain. He diagnosed herniated cervical intervertebral disc, cervical nerve root impingement, herniated lumbar intervertebral disc, and bilateral lumbosacral nerve root lesions. In a June 3, 2019 treatment note, Dr. Lattuga diagnosed status anterior cervical discectomy and fusion and post-posterior spinal fusion and laminectomy, and recommended physical therapy and chiropractic treatment.

OWCP received chiropractic reports from October 6, 2017 to August 21, 2019.

OWCP also received a February 4, 2019 report from a physician assistant, physical therapy reports dating from December 8, 2016 to August 23, 2019, and a copy of a notice of grievance from appellant to the employing establishment.

On September 5, 2019 appellant, through counsel, requested reconsideration. Counsel argued that appellant's claim originally was denied as she had not established fact of injury and was subsequently denied as she had not established causal relationship. He argued that she had submitted sufficient medical evidence to establish that she sustained a severe injury to several parts of her body and that it was clear error to deny the claim or to fail to further develop the evidence by sending appellant and her medical record for a second opinion examination.

By decision dated September 10, 2019, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It explained that she failed to present a clear argument or evidence in support of an error committed by OWCP. OWCP did not address the medical evidence.

On November 4, 2019 appellant, through counsel, filed a timely appeal from the September 10, 2019 decision. By order dated July 7, 2020, the Board found that the case was not in posture for decision because OWCP failed to make findings regarding the evidence submitted in support of the reconsideration request. The Board remanded the case to OWCP to consider all the evidence submitted at the time of the September 10, 2019 decision, to be followed by an appropriate decision on whether appellant demonstrated clear evidence of error.<sup>4</sup>

By decision dated August 24, 2020, OWCP noted that all of the evidence received at the time of the September 19, 2019 decision was considered. It denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's

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<sup>4</sup> Docket No. 20-0205 (issued July 7, 2020).

decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS).<sup>6</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>7</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 request demonstrates clear evidence of error.<sup>8</sup> OWCP’s regulations and 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(a), if the claimant’s request demonstrates clear evidence of error on the part of OWCP.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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 evidence of error on the part of OWCP.<sup>12</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>13</sup>

OWCP’s procedures further provide that the term clear evidence of error is intended to represent a difficult standard.<sup>14</sup> The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued,

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<sup>5</sup> 20 C.F.R. § 10.607(a).

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

<sup>7</sup> See *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

<sup>8</sup> 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

<sup>9</sup> *Id.*; *supra* note 6 at Chapter 2.1602.5(a).

<sup>10</sup> 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>11</sup> See *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>12</sup> *B.W.*, *supra* note 10.

<sup>13</sup> *Id.*; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>14</sup> *Supra* note 6 at Chapter 2.1602.5(b).

would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>15</sup>

### ANALYSIS

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

OWCP's procedures provide that a request for reconsideration must be received within one year of the date of OWCP's decisions for which review is sought.<sup>16</sup> The last merit decision was dated March 13, 2018. Appellant had one year from the date of that decision, *i.e.*, March 13, 2019, to request reconsideration. As the request for reconsideration was not received by OWCP until September 5, 2019, more than one year after the issuance of the March 13, 2018 decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in its March 13, 2018 decision.<sup>17</sup>

Following the March 13, 2018 decision, appellant submitted a March 23, 2018 note from Dr. Tehrany and reports dated May 30, June 1, and August 3, 2018 from Dr. Ford who diagnosed cervical sprain, herniated cervical intervertebral disc, lumbar spine strain, herniated lumbar intervertebral disc, cervical radiculopathy, lumbar radiculopathy, and lumbar facet syndrome, and noted that appellant received a lumbar epidural steroid injection and intraoperative lumbar epidurography.

Additionally, OWCP received reports dated May 31, 2018, March 19, April 30, July 11, and November 12, 2019 from Dr. Mikelis, who diagnosed herniated cervical intervertebral disc, cervical nerve root impingement, herniated lumbar intervertebral disc, and bilateral lumbosacral nerve root lesions. Dr. Mikelis requested authorization for spinal fusion and laminectomy at level L4-5 and treated appellant following the procedure. Dr. Lattuga also saw appellant on February 4 and June 3, 2019, diagnosed herniated cervical intervertebral disc, cervical nerve root impingement, herniated lumbar intervertebral disc, bilateral lumbosacral nerve root lesions, status anterior cervical discectomy and fusion and post posterior spinal fusion and laminectomy, and recommended physical therapy and chiropractic treatment.

None of these medical reports provided an opinion on causal relationship. Therefore, this evidence is insufficient to shift the weight of the evidence and raise a substantial question as to the correctness of OWCP's decision that she failed to demonstrate causal relationship between her medical conditions and the accepted employment incident.<sup>18</sup>

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<sup>15</sup> *G.B.*, *supra* note 11; *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

<sup>16</sup> 20 C.F.R. § 10.607(b).

<sup>17</sup> *Id.*; *see R.T.*, Docket No. 19-0604 (issued September 13, 2019); *Debra McDavid*, 57 ECAB 149 (2005).

<sup>18</sup> *See T.T.*, Docket No. 19-1624 (issued October 28, 2020); *S.C.*, Docket No. 18-0126 (issued May 14, 2016); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016).

OWCP also received chiropractic reports from October 6, 2017 to August 21, 2019, a February 4, 2019 report from a physician assistant, and physical therapy reports dating from December 8, 2016 to August 23, 2019. The Board has held that reports from a chiropractor, physician assistant, and physical therapist are of no probative value as they do not constitute competent medical evidence.<sup>19</sup> Consequently, these reports are insufficient to demonstrate clear evidence of error by OWCP with respect to the underlying medical issue.

Appellant submitted a copy of a grievance; however, it is of limited probative value as the issue is medical in nature and, therefore, it does not shift the weight of the evidence or raise a substantial question as to the correctness of OWCP's decision.

As noted, the term clear evidence of error is a difficult standard and it is not enough to show that the evidence could be construed to produce a contrary conclusion.<sup>20</sup> None of the evidence submitted by appellant in connection with her untimely reconsideration request manifests on its face that OWCP committed an error in denying her traumatic injury claim. Appellant has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision that she failed to demonstrate causal relationship between her medical conditions and the accepted employment incident.<sup>21</sup> Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.<sup>22</sup>

### CONCLUSION

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

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<sup>19</sup> See *B.R.*, Docket No. 19-0088 (issued August 13, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001). Section 8101(2) of FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2). Furthermore, under section 8101(2) of FECA, the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (nurse practitioners and physical therapists are not considered physicians under FECA); *D.S.*, Docket No. 09-0860 (issued November 2, 2009).

<sup>20</sup> See *M.H.*, Docket No. 20-1386 (issued February 17, 2021); *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

<sup>21</sup> See *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *E.B.*, *id.*

<sup>22</sup> See *E.G.*, Docket No. 20-0974 (issued February 26, 2021); *G.B.*, *supra* note 11; *M.P.*, Docket No. 19-0674 (issued December 16, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2021  
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