



## 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 5, 2012 appellant, then a 50-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 2011 she injured her left shoulder when she pulled a patient up while giving a bed bath in the performance of duty. She stopped work on January 9, 2012, but later returned to modified duty, and then stopped work completely in December 2012. On May 8, 2013 appellant underwent a left shoulder arthroscopy with rotator cuff debridement, subacromial decompression and open distal clavicle excision, performed by Dr. Kevin B. Cleveland, an orthopedic surgeon. Following further development, by decision dated January 31, 2014, OWCP accepted the claim for sprain of left shoulder and upper arm, rotator cuff.

Appellant subsequently submitted claims for compensation (Form CA-7) for disability from work beginning March 1, 2012.

By decision dated May 20, 2014, OWCP denied appellant's claim for compensation for the period "March 1, 2012 to April 14, 2014." It found that the medical evidence of record was insufficient to establish disability during the claimed period due to the accepted left shoulder injury.<sup>4</sup>

On June 25, 2014 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on January 6, 2015. Medical evidence, diagnostic evidence, and physical therapy reports were submitted.

By decision dated March 11, 2015, an OWCP hearing representative affirmed OWCP's May 20, 2014 decision. She found that the contemporaneous medical records failed to provide medical rationale supporting that appellant was disabled from March 1, 2012 through April 14, 2014 causally related to the accepted December 29, 2011 employment injury. The hearing representative also noted that, while appellant had undergone rotator cuff surgery in 2013, it was unclear as to whether the surgery had been approved by OWCP as it was not addressed in the acceptance letter. She advised appellant that she should request a formal decision regarding the procedure and subsequent disability.

On February 21, 2018 appellant, through counsel, requested reconsideration. Counsel indicated that "attached hereto is a June 12, 2013 letter from Dr. Oakley Jordan [an internist,] opining that [appellant] had a rotator cuff tear that was related to her at-work injury. In an August 11, 2013 letter, Dr. Jordan review[ed] the [magnetic resonance imaging] MRI findings and further explained how he calculated that the rotator cuff tear was work-related." Copies of Dr. Jordan's June 12 and August 11, 2013 letters were not submitted with the request for reconsideration. The record, however, reflects that both letters are previously of record. In his

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<sup>4</sup> On July 9, 2014 OWCP authorized a appellant's left shoulder arthroscopic surgery.

reports dated June 12 and August 11, 2013, Dr. Jordan related that appellant's left rotator cuff tear was work related. He did not offer an opinion regarding disability.

On March 12, 2012 Dr. Cleveland related appellant's history of injury and noted that she was seen for left shoulder and right wrist pain. He noted appellant's physical examination findings and diagnosed rotator cuff tendinitis and right wrist tendinitis. In a report dated December 6, 2012, Dr. Cleveland related that appellant was seen for complaints of left shoulder and right wrist pain. He recommended that appellant undergo an MRI scan. On May 21, 2013 Dr. Cleveland reported that appellant was seen for continuing left shoulder and right wrist pain. He reviewed an MRI scan of appellant's left shoulder, which revealed left shoulder rotator cuff partial tear. Dr. Cleveland recommended that appellant proceed with rotator cuff debridement, with open Munford. He did not address appellant's disability status. In a May 23, 2013 progress report, Dr. Cleveland related that appellant was seen in follow up of her left shoulder rotator cuff debridement. He noted that he would refer her for physical therapy. Dr. Cleveland did not provide an opinion regarding appellant's disability status.

OWCP also received physical therapy reports dated June 10, July 9, and August 8, 2013.

By decision dated December 23, 2019, OWCP denied appellant's reconsideration request, 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>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> 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>7</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>8</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>9</sup> If a request demonstrates clear evidence of error, it will reopen the case for merit review.<sup>10</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a); *P.J.*, Docket No. 19-1479 (issued May 8, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

<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(b) (February 2016).

<sup>8</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>9</sup> 20 C.F.R. § 10.607(b); *C.M.*, *id.*

<sup>10</sup> *See also id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

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.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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>15</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>16</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>17</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 the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>18</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>19</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed.

OWCP's regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.<sup>20</sup> The last merit decision was dated March 11, 2015. Because appellant's request for reconsideration was received on February 21, 2018, more than one year after the March 11, 2015 merit decision, the Board finds that the request

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<sup>11</sup> *J.S.*, Docket No. 20-0337 (issued July 15, 2020).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *C.D.*, Docket No. 20-0035 (issued October 14, 2020); *J.S.*, *supra* note 11.

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

<sup>16</sup> *Supra* note 11. *See also 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).

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

<sup>18</sup> *See A.R.*, Docket No. 15-1598 (issued December 7, 2015).

<sup>19</sup> *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>20</sup> 20 C.F.R. § 10.607(a).

was untimely filed.<sup>21</sup> Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.<sup>22</sup>

The Board further finds that appellant failed to demonstrate clear evidence of error.

On reconsideration appellant submitted reports from Dr. Jordan. The underlying issue in this case was whether appellant had established that she was disabled from March 1, 2012 until April 14, 2014 causally related to the accepted employment injury. Dr. Jordan's reports, however, did not address the underlying issue of disability. Thus, the Board finds that Dr. Jordan's June 12 and August 11, 2013 reports were insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's decision.

Appellant also submitted physical therapy reports and diagnostic testing results. The Board, however, has held that reports from a physical therapist are of no probative value as they do not constitute competent medical evidence.<sup>23</sup> The Board has further held that diagnostic testing results, standing alone, lack probative value as they do not provide an opinion on causal relationship.<sup>24</sup> Consequently, this evidence was insufficient to demonstrate clear evidence of error by OWCP with respect to the underlying issue.<sup>25</sup>

As the evidence submitted in support of the untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in its March 11, 2015 decision, the Board finds that appellant has not demonstrated clear evidence of error. Accordingly, OWCP properly denied appellant's reconsideration request.

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<sup>21</sup> *Id.* at § 10.607(a).

<sup>22</sup> *See R.T.*, Docket No. 20-0298 (issued August 6, 2020).

<sup>23</sup> 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) (physical therapists are not considered physicians under FECA).

<sup>24</sup> *See W.M.*, Docket No. 19-1853 (issued May 13, 2020); *L.F.*, Docket No. 19-1905 (issued April 10, 2020).

<sup>25</sup> *See Y.B.*, Docket No. 21-0092 (issued October 15, 2021).

**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 December 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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