

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

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<b>L.J., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0282</b>
	)	<b>Issued: May 26, 2023</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>St. Louis, MO, Employer</b>	)	
_____	)	

*Appearances:*  
*Joseph A. Ott, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On November 21, 2022 appellant filed a timely appeal from a September 21, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 1, 2021, 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.<sup>3</sup>

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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.

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

<sup>3</sup> The Board notes that, following the September 21, 2022 decision, OWCP received additional evidence. 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.*

## 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 October 19, 2020 appellant, then a 51-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on October 18, 2020 she injured her lower back when she fell inside her postal vehicle while in the performance of duty. She did not stop work.

In a medical report dated October 18, 2020, Dr. James Toombs, a Board-certified family medicine specialist, noted that appellant related complaints of severe lower back pain, which she attributed to falling backwards a distance of two feet and landing on her buttocks while at work on October 18, 2020. He ordered x-rays of the lumbosacral spine, which revealed spondylolisthesis of L4 on L5.

In an emergency department note dated October 18, 2020, Dr. Luke Hofkamp, a Board-certified emergency medicine specialist, noted that appellant related a history of lower back pain after falling off of a mail truck while at work. On physical examination, he noted bilateral paraspinal muscle spasm and tenderness, but no midline tenderness or deformities throughout the spine. Dr. Hofkamp diagnosed acute bilateral low back pain without sciatica and spasm of muscle of lower back.

In a medical report dated October 22, 2020, Nancy Woods, a nurse practitioner, examined appellant and diagnosed low back pain, spondylolisthesis, and a contusion of the lower back and pelvis. She recommended physical therapy and released appellant to return to work with no kneeling, squatting, jumping, running, climbing ladders, prolonged sitting, bending forward, or twisting, and no lifting greater than five pounds.

In a report dated October 29, 2020, Denise Wagster, a nurse practitioner, noted similar examination findings and continued the same work restrictions.

In a note dated November 5, 2020, Jessica Meissner, a medical technician, released appellant to return to work part time, four hours per day, with the same prior restrictions. She diagnosed back pain and lumbar spondylolisthesis.

On December 2, 2020 OWCP accepted the claim for contusion of lower back and pelvis, muscle spasm of back, sprain of ligaments of the lumbar spine, and strain of muscle, fascia, and tendon of the lower back.

Appellant subsequently submitted claims for compensation (Form CA-7) for intermittent disability from work for the period December 3, 2020 through July 16, 2021.

On December 24, 2020 appellant began receiving physical therapy treatment to her lower back.

In a note and Form CA-17 dated January 7, 2021, Laura Marshall, a nurse practitioner, diagnosed low back pain and spondylolisthesis and recommended that appellant continue physical

therapy. She released appellant to return to work four hours per day with no kneeling, twisting, jumping, running, or climbing ladders and no lifting greater than 10 pounds.

In a January 29, 2021 medical report, Dr. R. Peter Mirkin, a Board-certified orthopedic surgeon, noted that appellant related complaints of lower back pain, which radiated down her left leg, after falling at work on October 18, 2020. He performed a physical examination, which revealed a limp, limited range of motion of the lumbar spine, a markedly positive straight leg raise on the left, and weakness in the left foot dorsiflexor. Dr. Mirkin obtained x-rays, which demonstrated spondylolisthesis of L4 on L5. He diagnosed spondylolisthesis with radicular symptoms and recommended that appellant undergo magnetic resonance imaging (MRI) scan of the lumbar spine. In a duty status report (Form CA-17) of even date, Dr. Mirkin maintained the same work restrictions.

A report of MRI scan of the lumbar spine dated February 22, 2021 revealed spondylolisthesis at L4-5 with resulting lateral recess and foraminal stenosis; bilateral disc protrusions into the foramina at L5-S1; prominent Schmorl's node with disc invagination into the superior endplate of L3 and additional disc protrusion extending to the foramina causing narrowing, but no central canal stenosis; and foraminal narrowing at L3-4 due to disc bulging with facet arthropathy.

In a report dated February 26, 2021, Dr. Mirkin reviewed appellant's MRI scan results and noted a left lateral protrusion at L5-S1, which was pressing on the left nerve root. He recommended surgery, including decompression and fusion, which she declined. Dr. Mirkin indicated that appellant was also a candidate for epidural steroid injections. He recommended that she continue the same part-time work restrictions.

In a May 27, 2021 report, Dr. Richard S. Gahn, a Board-certified anesthesiologist, noted that appellant related persistent, severe pain in the low back, buttocks, thighs, and right lower extremity toward the calf, ankle, and foot, which she attributed to a fall at work on October 18, 2020. He performed a physical examination, which revealed pain with flexion, extension, and lateral flexion of the spine, spinous process tenderness over the L4 area, and painful straight raise on the right. Dr. Gahn noted that strength and sensation were normal in the legs, and there were no trigger points identified. He reviewed the MRI scan results and diagnosed lumbar radiculopathy, lumbar intervertebral disc displacement, lumbar spondylolisthesis without myelopathy, lumbar spinal stenosis, and low back pain. Dr. Gahn recommended an interlaminar lumbar epidural steroid injections targeted at the L4-5 level.

Dr. Gahn administered a lumbar epidural steroid injection on June 19, 2021 and noted postoperative diagnoses of lumbar radiculopathy and lumbar disc displacement.

In a July 9, 2021 compensation claim development letter, OWCP informed appellant that the evidence submitted was insufficient to establish disability from work during the claimed period. It advised her of the type of additional evidence needed and afforded her 30 days to provide the necessary evidence.

OWCP thereafter received a November 30, 2020 medical report by Tracy Reese, a nurse practitioner, who diagnosed muscle spasm, low back pain, and lumbar spondylolisthesis. Ms. Reese released appellant to return to work with restrictions including no kneeling, bending

over, twisting, jumping, running, climbing ladders, and prolonged sitting and no lifting over 5 pounds at or below shoulder height and no lifting below the waist greater than 10 pounds.

In a report dated December 24, 2020, Maggie Lewis, a nurse practitioner, maintained the same restrictions.

In letters dated January 25 and February 17, 2021, Dr. Chad J. Smith, a Board-certified family medicine specialist, noted that appellant had been attending physical therapy twice per week and was struggling to complete a workday on Wednesdays. He recommended that she be excused from work on Wednesdays for one month in order to continue her rehabilitation process. Dr. Smith also noted that appellant should not use muscle relaxant medication during the workday due to sedation.

In an after-visit summary dated April 20, 2021, Dr. Smith diagnosed chest pain, acute lumbar radiculopathy, hypertension, and left toe pain. In a Form CA-17 of even date, he diagnosed acute lumbar radiculopathy and released appellant to return to work four hours per day.

In Forms CA-17 dated May 18 and June 15, 2021, Dr. Smith diagnosed acute lumbar radiculopathy and released appellant to return to work on Mondays, Tuesdays, and Thursdays with the same restrictions. He noted that she should be permitted to stand up and/or leave work if necessary due to pain.

An after-visit summary dated June 17, 2021, indicated that appellant was seen for complaints of leg pain and noted a diagnosis of chronic lumbar radiculopathy.

In a letter dated June 28, 2021, appellant resigned from her federal employment, effective July 11, 2021. She noted that she had been injured on the job and could not continue to work due to pain that was so severe that she could not drive, stand for long periods, or bend.

Dr. Gahn administered a second lumbar epidural steroid injection on July 29, 2021 and noted postoperative diagnoses of lumbar radiculopathy and lumbar disc displacement.

By decision dated September 1, 2021, OWCP denied appellant's claim for compensation, finding that she had not submitted sufficient medical evidence to establish disability from work during the claimed period due to the accepted conditions. It further noted that the evidence of record reflected diagnoses of lumbar radiculopathy, spinal stenosis, disc displacements, and spondylolisthesis, which were not accepted conditions. OWCP requested that appellant provide additional medical evidence to support that those additional conditions were causally related to the accepted October 18, 2020 employment injury.

OWCP continued to receive medical evidence, including a June 17, 2021 emergency department report by Jessica Nichole Stricklin, a physician assistant, who noted that appellant related left lower extremity pain, which she attributed to an October 18, 2020 work injury. Ms. Stricklin performed a physical examination, diagnosed lumbar radiculopathy, and recommended x-rays of the sacrum and coccyx, which revealed anterolisthesis of L4 with respect to L5.

OWCP also received a September 15, 2021 letter by Dr. Mirkin, and duplicate copies of medical evidence previously of record.

On September 6, 2022 appellant, through counsel, requested reconsideration of OWCP's September 1, 2021 decision. In support of the request, counsel submitted a May 3, 2022 narrative report by Dr. Mirkin, who outlined the history of the October 18, 2020 work injury and his examination findings, including positive straight leg raise and weakness in the left foot dorsiflexor. Dr. Mirkin noted that diagnostic testing revealed spondylolisthesis at L4-5 with foraminal narrowing and a left lateral disc protrusion at L5-S1. He opined that appellant's symptomatology was caused by the work injury and that she was capable of working light duty for four hours per day. Dr. Mirkin further opined that the spondylolisthesis was partially preexisting, but that the herniated disc was a new injury.

By decision dated September 21, 2022, OWCP denied appellant's request for reconsideration, 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.*, 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

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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).

<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 (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* 20 C.F.R. § 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); *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).

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 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>12</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). 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>13</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>14</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's September 6, 2022 reconsideration was request was untimely filed.

OWCP's regulations<sup>15</sup> and procedures<sup>16</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>17</sup> The most recent merit decision was OWCP's September 1, 2021 decision. As appellant's request for reconsideration was received by OWCP on September 6, 2022 more than one year after the September 1, 2021 OWCP decision, the Board finds that it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>18</sup>

The Board further finds, however, that this case is not in posture for decision as to whether appellant's September 6, 2022 reconsideration request demonstrated clear evidence of error.

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<sup>12</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>13</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

<sup>14</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>15</sup> 20 C.F.R. § 10.607(a); *see S.M.*, Docket No. 19-1961 (issued January 28, 2021); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>16</sup> *S.M.*, *id.*; *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>17</sup> 20 C.F.R. § 10.607(b); *see A.M.*, Docket No. 20-0143 (issued October 28, 2020); *Debra McDavid*, 57 ECAB 149 (2005).

<sup>18</sup> *Id.* at § 10.607(b); *see S.M.*, *supra* note 15; *M.W.*, Docket No. 17-0892 (issued May 21, 2018); *see S.M.*, Docket No. 16-0270 (issued April 26, 2016).

OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.<sup>19</sup> Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>20</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.<sup>21</sup> As well, OWCP'S procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>22</sup>

In denying appellant's September 6, 2022 reconsideration request, OWCP failed to analyze the evidence as to whether it was sufficient to demonstrate clear evidence of error.<sup>23</sup> The September 21, 2022 decision simply noted: "You did not present clear evidence of error." However, OWCP provided no discussion relative to the new medical evidence submitted by appellant.<sup>24</sup> The Board will therefore set aside OWCP's September 21, 2022 decision and remand the case for an appropriate decision on her untimely reconsideration request, which describes the evidence submitted on reconsideration and provides detailed reasons for accepting or rejecting the reconsideration request.<sup>25</sup>

### CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed. The Board further finds that the case is not in posture for decision regarding whether she has demonstrated clear evidence of error.

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<sup>19</sup> *J.A.*, Docket No. 20-1483 (issued December 19, 2022); *V.R.*, Docket No. 19-0536 (issued February 22, 2021); *T.P.*, Docket No. 19-1533 (issued April 30, 2020).

<sup>20</sup> 5 U.S.C. § 8124(a).

<sup>21</sup> 20 C.F.R. § 10.126.

<sup>22</sup> *Supra* note 6 at Chapter 2.1400.5 (February 2013).

<sup>23</sup> *See V.R.*, *supra* note 19; *J.A.*, *supra* note 19; *Order Remanding Case, J.K.*, Docket No. 20-0556 (issued August 13, 2020).

<sup>24</sup> *See V.R.*, *id.*; *J.A.*, *id.*; *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

<sup>25</sup> *See V.R.*, *id.*; *J.A.*, *id.*; *Order Remanding Case, C.D.*, Docket No. 20-0450 (issued August 13, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 21, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 26, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board