



## ISSUE

The issue is whether OWCP properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

## FACTUAL HISTORY

On January 22, 2008 appellant, then a 55-year-old nurse, filed an occupational disease claim alleging that the aching and radiating pain occurring from the top of her right hip into the mid-buttock was due to her federal employment. She first knew of her condition on January 15, 2008 and reported that it to her supervisor and sought medical treatment on January 16, 2008. Appellant returned to work on January 17, 2008. A September 11, 2007 report from Dr. Peter O. Holliday, a Board-certified neurological surgeon, advised that appellant had back surgery 12 months prior and had reached maximum medical improvement.

In a February 5, 2008 letter, OWCP advised appellant of the factual and medical evidence needed to support her claim.

In response, OWCP received a partial copy of appellant's occupational disease claim, a statement from her noting that her supervisor made an incorrect finding in block 35 of the claim and correcting it to reflect that her previous back injury was and continued to be to her cervical spine and left upper extremity with radiculopathy. In a February 25, 2008 statement, James G. Hampton, a workers' compensation specialist for the employing establishment, challenged appellant's claim. He acknowledged inspecting appellant's work site and advising her supervisor to make ergonomic changes to prevent future injury.

In a January 16, 2008 duty status report, an unknown family practitioner diagnosed hip pain. The injury was described as "leaning forward taking manual [unreadable] felt twinge (R) hip progressed to pain." The physician opined that appellant's hip pain was not due to the described injury.

By decision dated March 10, 2008, OWCP denied appellant's claim on the grounds that she had failed to establish the fact of injury. It found that the evidence was insufficient to establish that the exposure occurred as alleged and no medical evidence was received addressing the claimed work. Appellant did not describe the duties or job factors believed responsible for her hip complaints and there was no medical on file which supported an injury caused by any job factors.

In a November 14, 2009 letter received by OWCP on December 2, 2009, appellant requested reconsideration. She requested assistance in obtaining a job description to document her work exposure and "inappropriate equipment" that led to injury over a period of time. Appellant reported the low sitting patient chair was a potential safety hazard to her unit supervisor on the second day in her position and, while he agreed with her analysis, the situation was never corrected in the months she worked there. She alleged managerial negligence regarding the nonreplacement of her chair and discussed ergonomics and her employer's responsibility to provide a safe working environment.

Appellant submitted medical evidence previously of record and a February 13, 2009 diagnostic test of the cervical, thoracic and lumbar spine. Dr. George Stefanis, a Board-certified neurological surgeon, treated appellant January 18, 2008 to May 8, 2009. In January 21 and February 13, 2009 reports, he noted that appellant had a work-related injury and underwent back surgery on June 12, 2006. Appellant started to experience pain in her neck and both shoulders due to a locked bathroom door incident which involved pulling to open the door. Dr. Stefanis stated that, since she went back to work, she had intermittent complaints of right-sided sciatica which appellant felt was due to not having an ergonomic chair. While they had requested an ergonomic chair, it was not obtained for her. Dr. Stefanis set forth findings on examination and noted that appellant would undergo cervical and lumbar myelogram and a postmyelogram computerized tomography scan to rule out a herniated disc. In a February 13, 2009 report, he advised that a cervical myelogram showed a solid fusion at C5-6 and a herniated disc with nerve root compression at L4-L5 with degeneration. The remainder of the reports noted appellant's progress.

By decision dated February 22, 2010, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.<sup>3</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of the Act.<sup>4</sup>

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>5</sup> OWCP regulations and procedure 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 application for review shows clear evidence of error on the part of OWCP.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>8</sup> Evidence which does not raise a

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>5</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>6</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

<sup>7</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>8</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</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>11</sup> To show 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 *prima facie* 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>

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office or abused its discretion in denying merit review in the face of such evidence.<sup>13</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. An application requesting reconsideration must be sent within one year of the OWCP decision or any subsequent merit decision.<sup>14</sup> As appellant's November 14, 2009 request for reconsideration was submitted more than one year after the March 10, 2008 Office merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.<sup>15</sup>

Appellant contended that she tried to document her work exposure to inappropriate equipment and what she believed to be a potential safety hazard that was not corrected while she was assigned to the workplace. She also alleged there was managerial negligence regarding the nonreplacement of her chair. These contentions, however, do not establish clear evidence of error on the part of OWCP. It denied appellant's claim on the grounds that fact of injury was not established. Appellant's factual assertions are insufficient to *prima facie* shift the weight of the evidence in favor of her claim. The underlying issue is whether the event had occurred as alleged and whether there was a medical condition causally related to such exposure. Appellant's statements, which focus on alleged errors by her employer, are irrelevant to the denial of her claim. While her statements add some further detail into the nature of her claim, the Board finds that her contentions are insufficient to raise a substantial question concerning the correctness of OWCP's denial of her claim or to shift the weight of the evidence in her favor.

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<sup>9</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> See *Leona N. Travis*, *supra* note 8.

<sup>11</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>12</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>13</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>14</sup> 20 C.F.R. § 10.607(a); see *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>15</sup> *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

The medical reports and diagnostic testing submitted by appellant are insufficient to establish clear error by OWCP in denying her claim. Dr. Stefanis' reports and the diagnostic testing fail to address the underlying issue of whether she sustained a back condition caused by the established work factors. While he noted that appellant believed her right sided sciatica was due to not having an ergonomic chair, he did not offer an opinion on the causal relationship of appellant's sciatica. The term clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted prior to when the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>16</sup> The medical evidence submitted on reconsideration does not raise a substantial question as to the correctness of OWCP's decision. Therefore, appellant has not submitted evidence of clear error.

Appellant's arguments on appeal are largely repetitious of her assertions on reconsideration. OWCP denied her claim finding she did not sufficiently identify or established specific employment factors or incidents as a cause of her claimed condition and because the medical opinion evidence failed to establish a diagnosed condition causally related to her work factors. Appellant's assertions do not show that OWCP committed clear evidence of error. Appellant also submitted new evidence of appeal but the Board is precluded from reviewing new evidence on appeal.<sup>17</sup>

### **CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

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<sup>16</sup> *Joseph R. Santos*, 57 ECAB 554 (2006); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.3c (January 2004).

<sup>17</sup> See 20 C.F.R. § 501.2(c)(1).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board