

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

P.A., Appellant	)	
	)	
and	)	<b>Docket No. 12-1813</b>
	)	<b>Issued: February 8, 2013</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Nashua, NH, Employer	)	
	)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 12, 2012 appellant, through her attorney, filed a timely appeal from an August 9, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as it was untimely filed and did not establish clear evidence of error. As the last merit decision by OWCP was issued on August 8, 2008, the Board lacks jurisdiction to review the merits of this case.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the August 9, 2012 nonmerit decision.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

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<sup>1</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. See 20 C.F.R. § 501.3(d)(2). An appeal of a final adverse OWCP decision issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

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

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated September 6, 2000, the Board affirmed February 29 and May 29, 1998 decisions finding that appellant was not entitled to compensation after June 22, 1997 due to her accepted work injuries of cervical strain, right shoulder strain and right hip strain.<sup>3</sup> The Board determined that the opinion of Dr. Gerald M. DeBonis, a Board-certified orthopedic surgeon and OWCP referral physician, constituted the weight of the evidence and established that she had no further disability due to her work injury. On July 21, 2004 the Board affirmed a June 5, 2003 decision denying modification of its finding that she had no disability after June 22, 1997 and a December 16, 2003 decision denying her request for reconsideration under section 8128.<sup>4</sup> By decision dated February 17, 2006, the Board affirmed a June 1, 2005 decision denying appellant's request for a hearing and a September 29, 2005 decision denying merit review under section 8128.<sup>5</sup> On June 16, 2009 the Board affirmed an August 8, 2008 decision finding that she had not established that she was disabled after June 22, 1997 due to her January 19, 1994 work injury.<sup>6</sup> In a decision dated December 20, 2011, the Board affirmed a January 28, 2011 decision denying appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.<sup>7</sup> The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

In a form report dated December 5, 2011, Dr. Argirios Moustakas, a Board-certified neurologist, diagnosed possible degenerative disc disease and indolent right L5 radiculopathy. A December 5, 2011 nerve conduction study (NCS) and electromyogram (EMG) revealed findings of "possible old or chronic and indolent radiculopathy of the right L5 myotome without evidence of any active denervation" and a normal right upper extremity examination.

In a progress report dated February 14, 2012, Dr. Gregory W. Soghikian, a Board-certified orthopedic surgeon, evaluated appellant for a right shoulder condition caused by a 1994 employment injury. He diagnosed chronic shoulder pain due primarily to impingement. Dr. Soghikian recommended a subacromial decompression and distal claviclectomy. A magnetic resonance imaging (MRI) scan study obtained on February 15, 2012 revealed joint hypertrophy at the acromioclavicular (AC) joint without an inferior mass effect and a prominent sublaxal foramen without a rotator cuff tear. In a report dated February 24, 2012, Dr. Vladimir Sinkov, a Board-certified orthopedic surgeon, diagnosed degenerative disc disease and facet arthropathy resulting in cervical pain.

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<sup>3</sup> Docket No. 98-2432 (issued September 6, 2000). OWCP accepted that on January 19, 1994 appellant sustained cervical strain, right shoulder strain and right hip strain when she slipped and fell on ice.

<sup>4</sup> Docket No. 04-630 (issued July 21, 2004).

<sup>5</sup> 57 ECAB 441 (2006). On May 16, 2007 the Board denied appellant's petition for reconsideration. *Order Denying Petition for Recon.*, Docket No. 06-75 (issued May 16, 2007).

<sup>6</sup> Docket No. 08-2358 (issued June 16, 2009). The Board found that, while OWCP's August 8, 2008 decision purported to be a nonmerit denial of appellant's request for reconsideration, it had conducted a merit review of the claim.

<sup>7</sup> Docket No. 11-1120 (issued December 20, 2011).

By letter dated April 16, 2012, appellant, through her attorney, requested reconsideration. In support of the request, counsel submitted a March 5, 2012 medical report from Dr. John Ellis, Board-certified in family medicine, who discussed appellant's history of slipping on ice and going up into the air before landing on her right shoulder and hip. He noted that she had continued complaints of neck pain, right shoulder pain, pain in the shoulders and low back and bilateral knee pain and instability. Dr. Ellis diagnosed a neck strain, bilateral brachial plexus impingement, a right shoulder contusion with traumatic arthritis and impingement, back strain, a deranged disc at L4-5, nerve impingement at L5, lumbosacral plexus impingement, knee strain with derangement, right hip strain, a right knee contusion and a consequential right knee injury. He described appellant's fall on ice on January 19, 1994. Dr. Ellis explained that the force of the fall was significant and resulted in muscle and ligament strains in the neck, back, knees and right shoulder. The muscle and ligament tightness increased pressure on the cervical and lumbar discs resulting in nerve root impingement and radiculopathy. Dr. Ellis further stated:

“The initial contusion to the right shoulder moved the internal structures of the shoulder causing tearing of the ligaments and internal structures resulting in tendinitis, traumatic arthritis and impingement syndrome. [Appellant] landed on her right hip causing pain in the iliotibial band and trochanteric bursitis. She strained the ligaments and cartilage of her left knee requiring surgery. [Appellant] contused her right knee initially, but gradually improved with minimal residual. Her right knee is now bothering her due to the abnormal gait due to her left knee and right hip.”

Dr. Ellis found that appellant was disabled from employment.

By decision dated August 9, 2012, OWCP denied appellant's request for reconsideration after finding that it was untimely and did not establish clear evidence of error.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>8</sup> As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>9</sup>

The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.<sup>10</sup> To establish clear evidence of error, a

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<sup>8</sup> 5 U.S.C. § 8101 *et seq.*

<sup>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.<sup>11</sup>

### ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.<sup>12</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>13</sup> As appellant's April 16, 2012 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>14</sup>

Appellant has not established clear evidence of error in OWCP's decision finding that she had no disability after June 22, 1997 causally related to her accepted cervical strain, right shoulder strain and right hip strain. In a report dated December 5, 2011, Dr. Moustakas diagnosed indolent right L5 radiculopathy and possible degenerative disc disease by EMG. He did not, however, address causation and thus his opinion is of little probative value and insufficient to show clear evidence of error.<sup>15</sup>

On February 14, 2012 Dr. Soghikian diagnosed right chronic shoulder pain due to impingement. On February 24, 2012 Dr. Sinkov diagnosed facet arthropathy and degenerative disc disease. Neither physician, however, addressed the relevant issue of employment-related disability and thus their opinions are insufficient to show clear evidence of error.

In a report dated March 5, 2012, Dr. Ellis discussed appellant's work injury and listed numerous diagnoses including cervical strain, back strain, right hip strain, a right knee and shoulder contusion, brachial plexus bilaterally, disc derangement at L4-5, nerve impingement at L5 and lumbosacral plexus impingement. He described the circumstances surrounding her work injury and explained that the force of injury strained her neck, back and right shoulder muscles and the knee ligaments bilaterally. Dr. Ellis asserted that the tightness throughout the spine caused pressure on the neck and lumbar discs and resulted in impingement down the arms and legs. He further opined that the right shoulder contusions resulted in traumatic arthritis and impingement syndrome due to ligament tears and that the right hip injured resulted in bursitis. Dr. Ellis advised that appellant had a traumatic right knee injury to her abnormal gait from her left knee and right hip conditions. He concluded that she was disabled from work. Dr. Ellis' report is detailed and contains medical rationale. The term "clear evidence of error," however, is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical

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<sup>11</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>12</sup> 20 C.F.R. § 10.607(a).

<sup>13</sup> *Robert F. Stone*, *supra* note 11.

<sup>14</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>15</sup> *See Conard Hightower*, 54 ECAB 796 (2003).

opinion requiring further development, is not clear evidence of error.<sup>16</sup> The evidence must clearly shift the weight of the evidence in favor of appellant.<sup>17</sup> Dr. Ellis' report does not manifest on its face that OWCP committed an error in finding that she had no work-related disability after June 22, 1997 and thus is insufficient to show clear evidence of error.

As the evidence submitted by appellant does not raise a substantial question as to the correctness of OWCP's last merit decision, she has not established clear evidence of error.<sup>18</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 9, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>17</sup> *See Darletha Coleman*, *supra* note 11.

<sup>18</sup> *See Veletta C. Coleman*, 48 ECAB 367 (1997).