



## **FACTUAL HISTORY**

Appellant, a 60-year-old electronic technician, filed a claim for traumatic injury alleging that he injured the right side of his neck in the performance of duty on June 5, 2012. He was installing and adjusting belts on that date when he felt a stabbing pain in his right shoulder and right hand. Appellant also reported a tingling sensation in the right outside fingers, as if he had slammed his elbow. He has an accepted traumatic injury claim for cervicgia (ICD-9 No. 723.1), which arose on June 11, 2010 (xxxxxx352). Appellant first thought his current complaints were associated with his June 11, 2010 employment injury and, therefore, he filed a recurrence (Form CA-2a) under the prior claim number. Given the description of the June 5, 2012 employment incident, OWCP advised him that he reported a new traumatic injury.

Dr. Scott T. Sauer, a Board-certified orthopedic surgeon, examined appellant on June 12, 2012. His treatment notes indicate a diagnosis of right cervical radiculopathy and cervicgia. Dr. Sauer advised appellant to avoid using his right upper extremity. Also, he referred appellant to a pain management specialist for further evaluation of his neck. In a June 12, 2012 attending physician's report (Form CA-20), Dr. Sauer referenced appellant's prior OWCP claim number (xxxxxx352), but identified June 5, 2012 as the date of injury. He noted that appellant was injured at work in 2010 carrying a mailbag. Dr. Sauer also noted that appellant was injured "pulling on a belt on a piece of machinery." He diagnosed cervical radiculopathy, which he attributed to appellant's employment.<sup>2</sup> Dr. Sauer referred appellant to Dr. Steven A. Mortazavi, a Board-certified anesthesiologist with a subspecialty in pain medicine.

On August 3, 2012 Marissa M. Marion, a certified physician assistant (PA-C) and associate of Dr. Mortazavi's diagnosed cervical radiculopathy and excused appellant from his regular duties for the next two weeks.

Appellant returned for a follow-up visit on August 31, 2012, at which time he was seen by both Ms. Marion and Dr. Mortazavi. The report noted that appellant had a work-related neck injury on June 11, 2010, and he still complained of pain radiating down the right arm with associated tingling in the fourth and fifth digits of his right hand. Appellant also complained of stabbing pain in the area and weakness of the right upper extremity, as well as headaches across the front of his head, which were present 80 percent of the day. Dr. Mortazavi also noted that appellant previously had a total of three cervical epidural steroid injections that had helped somewhat with his neck pain. Presently, appellant reported 20 percent relief following the latest series of two injections. His current medications included Vicodin and naproxen. Appellant reportedly did not like taking medication often and expressed interest in undergoing physical therapy (PT) because it helped in the past. Dr. Mortazavi examined appellant and reviewed a July 13, 2010 cervical magnetic resonance imaging (MRI) scan, which showed mild degenerative bulging at C6-7 with severe left-sided foraminal stenosis that warranted correlation for left-sided C7 radiculopathy. He diagnosed cervical radiculopathy, cervicgia, cervical spondylosis without myelopathy, cervical degenerative disc disease (DDD), cervical disc displacement, cervical spinal stenosis, and limb pain. Dr. Mortazavi excused appellant from his

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<sup>2</sup> Dr. Sauer checked the "yes" box in response to question number 8 (Form CA-20) which asked if he believed "the condition found was caused or aggravated by an employment activity," but he did not offer an explanation in the space provided.

regular duties for another six weeks, and ordered PT three times a week. Appellant was to return after completing six weeks of PT.

By decision dated October 12, 2012, OWCP denied appellant's traumatic injury claim. It found the medical evidence failed to establish a causal relationship between the diagnosed conditions and the June 5, 2012 employment incident when appellant was "adjusting and installing belts."

Approximately one week after the denial, OWCP received an October 12, 2012 duty status report (Form CA-17) signed by Ms. Marion. Appellant was reportedly injured June 5, 2012 while installing a belt on a delivery bar code sorter (DBCS) machine. The diagnosis due to injury was cervical spine disc displacement. Ms. Marion advised appellant he could return to work effective October 15, 2012 in a full-time, limited-duty capacity.

On October 15, 2013 OWCP received appellant's request for reconsideration dated October 9, 2013. Appellant explained that he was injured on June 5, 2012, and stopped work a few days later. He then saw Dr. Sauer on June 12, 2012 and was referred to Dr. Mortazavi's office for a neck evaluation, where he was seen on June 19, 2012. Additionally, appellant stated that he was essentially doing the same thing on June 5, 2012 -- belt repair/replacement -- as he had done on June 11, 2010 when he strained his neck and upper back installing a drive belt on a motor underneath a mail processing machine. He questioned why the same injury was accepted by OWCP in 2010, but not now.

Along with his request for reconsideration, appellant submitted various treatment records regarding his June 11, 2010 injury, which included a June 12, 2010 Form CA-20 from a physician assistant who diagnosed cervical muscle strain with radiculopathy and thoracic muscle strain. Appellant also submitted a July 30, 2010 initial consultation report from Dr. Mortazavi, as well as follow-up treatment notes dated August 2 and October 8, 2010.<sup>3</sup> As previously indicated, Dr. Mortazavi's office administered a series of right C6-7 epidural steroid injections in August and September 2010. OWCP also received February 24 and March 1, 2011 follow-up treatment notes from Dr. Mortazavi, and a report of a March 11, 2011 right C6-7 epidural steroid injection.

The next report from Dr. Mortazavi is dated June 19, 2012.<sup>4</sup> He noted that appellant presented that day complaining of pain -- 9 on a scale of 1 to 10 -- following a workers' compensation injury on June 11, 2010. Dr. Mortazavi further noted that he last saw appellant in March 2011 for cervical epidural steroid injection, which provided good relief. However, appellant's pain returned to a mild extent in April when he fell on his right knee and "flared up his neck pain." He reported that his neck pain was similar to his past pain, which was worse on the right side with radiation down his right arm and into the right ear. Dr. Mortazavi also noted

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<sup>3</sup> Dr. Mortazavi's initial July 30, 2010 diagnosis was cervical radiculopathy, cervicgia, cervical spondylosis without myelopathy, cervical DDD, cervical disc displacement, cervical spinal stenosis, and limb pain. Although appellant reported having been injured at work on June 11, 2010, Dr. Mortazavi's initial report did not include a description of the mechanism of injury.

<sup>4</sup> The copy of the report appellant submitted on reconsideration is incomplete as it does not include any physical examination findings.

appellant's condition was "exacerbated within the last week without trauma."<sup>5</sup> Appellant currently reported numbness and tingling in the first, fourth, and fifth digits of the right hand, with weakness of the right upper extremity. He also complained of daily headaches. Dr. Mortazavi again diagnosed cervical radiculopathy, cervicgia, cervical spondylosis without myelopathy, cervical DDD, cervical disc displacement, cervical spinal stenosis, and limb pain. He excused appellant from work for two days -- June 18 and 19, 2012 -- and scheduled another cervical epidural steroid injection, which was administered on June 28, 2012.<sup>6</sup> After the cervical injection appellant was excused from work for the next two weeks. He returned for follow-up on July 12, 2012. Dr. Mortazavi noted that appellant currently rated his pain at 7 out of 10, and reported 70 percent relief. He reiterated that appellant had been involved in a workers' compensation injury on June 11, 2010 involving the neck. Dr. Mortazavi provided the same seven cervical-related diagnoses, and he scheduled appellant for additional epidural steroid injections, which were administered on August 3 and 17, 2012. Appellant was excused from his regular employment through October 15, 2012.

OWCP also received a July 29, 2013 functional capacity evaluation (FCE). Appellant was deemed capable of performing at a medium physical demand level, but right upper extremity repetitive motion was contraindicated. At the conclusion of the FCE, appellant reported pain in the right C6-7 paraspinal region, as well as trapezius and posterior shoulder pain (2 out of 10), with tingling in his fourth and fifth fingers.

In a January 13, 2014 decision, OWCP denied appellant's request for reconsideration because it was untimely and he failed to establish clear evidence of error with respect to OWCP's October 12, 2012 merit decision.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>7</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>8</sup> One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>9</sup> When a request for reconsideration is untimely, OWCP will undertake a

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<sup>5</sup> Ms. Marion's notes identify the recent fall as having occurred on April 2, 2012. She also noted appellant's neck pain was worse last week, June 6, 2012 "pulling belt."

<sup>6</sup> OWCP authorized the June 28, 2012 cervical injection under claim number xxxxxx352.

<sup>7</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607.

<sup>9</sup> *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.<sup>10</sup>

### ANALYSIS

By decision dated October 12, 2012, OWCP denied appellant's traumatic injury claim because the medical evidence failed to establish a causal relationship between his current cervical conditions and the accepted June 5, 2012 employment incident. Appellant submitted a request for reconsideration dated October 9, 2013, which was postmarked October 12, 2013 and received by OWCP on October 15, 2013. The request would have been timely if received on or before October 11, 2013. However, as the request was not received until October 15, 2013, the request for reconsideration was untimely.<sup>11</sup> Because appellant's request for reconsideration was untimely, he must demonstrate clear evidence of error on the part of OWCP in denying his June 5, 2012 traumatic injury claim.<sup>12</sup>

The issue on reconsideration is causal relationship and whether OWCP erred in finding the evidence deficient.<sup>13</sup> Appellant claims that his current cervical and right upper extremity complaints stem from an injury he sustained on June 5, 2012 while replacing a belt on a DBCS machine. Dr. Sauer examined appellant on June 12, 2012 and diagnosed right cervical radiculopathy and cervicalgia. His CA-20 identified June 5, 2012 as the date of injury. Dr. Sauer noted appellant was injured in 2010 carrying a mailbag and also injured "pulling on a belt on a piece of machinery." Although he indicated on the Form CA-20 that appellant's cervical radiculopathy was employment related, Dr. Sauer did not describe or otherwise explain how the diagnosed condition was causally related to the June 5, 2012 employment incident.

The initial evidence presented to OWCP also included Ms. Marion's August 3, 2012 diagnosis of cervical radiculopathy. She excused appellant from work through August 17, 2012. Ms. Marion, a physician assistant, did not specifically address the cause of appellant's cervical radiculopathy at the time. Certain health care providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined

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<sup>10</sup> 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>11</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). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b.

<sup>12</sup> 20 C.F.R. § 10.607(b).

<sup>13</sup> Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996).

under FECA.<sup>14</sup> Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.<sup>15</sup>

The only other medical evidence received at the time was Dr. Mortazavi's August 31, 2012 follow-up report. Dr. Mortazavi diagnosed cervical radiculopathy, cervicalgia, cervical spondylosis without myelopathy, cervical DDD, cervical disc displacement, cervical spinal stenosis, and limb pain. He did not attribute the diagnosed conditions to appellant's June 5, 2012 employment incident, but instead noted that appellant sustained a work-related neck injury on June 11, 2010, and still had pain radiating down the right arm with associated tingling in the fourth and fifth digits of the right hand. In fact, his August 31, 2012 report made no mention of any June 5, 2012 employment incident.

Since denying the claim on October 12, 2012, OWCP received various medical records, including evidence regarding appellant's preexisting cervical condition. As noted, appellant sustained a June 11, 2010 employment injury, which OWCP accepted for cervicalgia. The various medical records covering the period June 12, 2010 through March 11, 2011 predate the current injury, and clearly do not address the cause of appellant's claimed injury of June 5, 2012. As such, these records do not demonstrate clear evidence of error.

On reconsideration, appellant also submitted additional treatment records covering June through October 2012. Dr. Mortazavi's June 19, 2012 report noted that appellant had a workers' compensation injury on June 11, 2010 and his prior cervical epidural steroid injection provided good relief. It had been more than 15 months since appellant's last visit. Dr. Mortazavi noted that appellant's pain returned to a mild extent in April 2012 when he fell on his right knee and "flared up his neck pain." He also reported that appellant's condition was "exacerbated within the last week without trauma." Dr. Mortazavi did not specifically reference a June 5, 2012 employment injury. Moreover, he did not explain how appellant's condition was "exacerbated within the last week...." In his June 19, 2012 report, Dr. Mortazavi continued to diagnose the same seven cervical-related conditions he initially diagnosed in July 2010. Beginning in June 2012, he excused appellant from work for approximately four months, and during that time he prescribed pain medication, physical therapy, and administered additional cervical epidural steroid injections. However, the above-noted treatment records do not establish a causal relationship between the June 5, 2012 employment incident and appellant's current cervical conditions.

Ms. Marion's October 12, 2012 duty status report (Form CA-17) is also insufficient. The report noted that appellant was injured on June 5, 2012 while installing a belt on a piece of machinery. Ms. Marion diagnosed injury-related cervical spine disc displacement. As

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<sup>14</sup> 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

<sup>15</sup> *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

previously indicated, a physician assistant is not considered a “physician” as defined under FECA.<sup>16</sup> Therefore, Ms. Marion’s October 12, 2012 Form CA-17 will not suffice.<sup>17</sup>

Lastly, the July 29, 2013 FCE did not address causal relationship.

The evidence submitted on reconsideration fails to establish a causal relationship between appellant’s current cervical conditions and the June 5, 2012 employment incident. Accordingly, he failed to establish clear evidence of error on the part of OWCP in denying his June 5, 2012 traumatic injury claim. As such, there is no justification for further merit review. The Board finds that OWCP properly declined to reopen appellant’s case.

**CONCLUSION**

Appellant’s October 9, 2013 request for reconsideration was untimely, and he failed to demonstrate clear evidence of error. Therefore, he is not entitled to further merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 13, 2014 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: February 4, 2015  
Washington, DC

Christopher J. Godfrey, 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> 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

<sup>17</sup> *See id.*