

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

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**L.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
North Metro, GA, Employer**

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**Docket No. 17-0760  
Issued: September 5, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 21, 2017 appellant filed a timely appeal from an August 25, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated August 13, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted new evidence following the August 25, 2016 decision. However, since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

## **FACTUAL HISTORY**

On June 24, 2014 appellant, then a 49-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 2, 2013 she sustained an injury when she attempted to transport staged equipment to the dock for dispatch. The claim form did not indicate whether she stopped work. Appellant submitted a position description of the physical requirements for a mail processing clerk position.

By letter dated June 30, 2014, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she respond to an attached questionnaire in order to substantiate the factual element of her claim and submit additional medical evidence to establish a diagnosed medical condition causally related to the alleged December 2, 2013 employment incident within 30 days. Appellant did not respond within the time allotted.

OWCP denied appellant's claim by decision dated August 6, 2014. It accepted that the December 2, 2013 incident occurred as alleged, but it denied her claim because the medical evidence of record failed to establish a diagnosed condition causally related to the accepted incident.

On May 21, 2015 appellant requested reconsideration. She described the December 2, 2013 employment injury and explained that she did not immediately file a claim because she was unaware of the process. Appellant noted that she immediately reported the incident to her assigned supervisor. She related that approximately three to four months after the incident she started to experience tingling and shooting pains from the same location in her left foot. Appellant described the medical treatment that she received for her left foot.

On May 21, 2015 OWCP also received medical evidence in support of appellant's reconsideration request. Appellant was treated in an urgent care facility on May 28, 2014 by Dr. Christopher L. Stevens, a family practitioner, who indicated that she was seen for complaints of an ankle injury. He diagnosed left ankle and left foot pain.

In July 7 and 8, 2014 office notes, Dr. Shan Neal, a chiropractor, indicated that appellant was seen in his office on that day. He reported that she was unable to work.

Appellant was also treated by Dr. Valens M. Plummer, a Board-certified family practitioner. In a November 18, 2014 examination note, Dr. Plummer related her complaints of left ankle pain. He diagnosed left ankle joint pain for greater than three months, mixed hyperlipidemia, and obesity.

In an April 20, 2015 report, Dr. Ashkan Lahiji, a Board-certified orthopedic surgeon, indicated that appellant returned to his office for follow-up of her left ankle posterior tendinitis and reactive arthropathy of the subtalar joint. Upon physical examination, he reported swelling along her left ankle and intact plantar flexion/dorsiflexion. Neurological examination was otherwise benign. Dr. Lahiji diagnosed tibialis posterior tendinitis and reactive arthropathy of the subtalar joint.

Appellant also provided various diagnostic examination reports, including a November 18, 2014 left ankle x-ray image. In an April 10, 2015 left ankle magnetic resonance

imaging (MRI) scan report, Dr. Craig M. Logan, a Board-certified radiologist, noted tenosynovitis at the tibialis posterior tendon and a partial thickness tear of the tibialis posterior tendon. He diagnosed tibialis posterior tendinitis.

In a decision dated August 13, 2015, OWCP denied modification of the August 6, 2014 decision. It noted that, while the evidence of record provided a medical diagnosis of a left foot and ankle condition, it was insufficient to establish that appellant's left foot condition was a result of the December 2, 2013 employment incident.

On August 16, 2016 OWCP received appellant's August 12, 2016 request for reconsideration. Appellant provided her response to the June 30, 2014 development letter. She related that on December 2, 2013 she was performing dispatch duties at work and pushing the bulk mail container (BMC) to the loading dock. Appellant explained that the wheels were not working properly and when she finally got the BMC to keep going, her left foot was hit and got caught under the bottom. She noted that she immediately stopped, checked her ankle, and walked around a bit to shake off pain. Appellant reported that there was no one in the immediate area at the time so there were no witnesses. She indicated that she reported the injury to her supervisor the next day, to the union steward on a number of occasions, and to the Postmaster.

In a July 7, 2014 initial evaluation report, Dr. Zouheir Shama, a Board-certified general surgeon, related that appellant had worked for the employing establishment since November 2011 and described her employment duties. He noted that on December 2, 2013, she experienced left ankle and foot pain when the inside of her left heel was struck by a BMC machine at work and that she continued to work and receive medical treatment for her continued left foot pain and swelling. Dr. Shama reviewed appellant's history and conducted an examination. He reported a painful left ankle and foot, rated 9/10. Dr. Shama noted moderate deformity of appellant's left foot and ankle with swelling. He provided range of motion findings. Dr. Shama opined that appellant suffered an injury to her foot and ankle as a result of the work that she performed. He explained that the mechanism of injury was consistent with the report of her injury that she was transporting a BMC when her heel was struck. Dr. Shama noted that appellant continued to work following the injury, which only aggravated her condition. He diagnosed internal derangement of the left ankle joint and left crash ankle injury. Dr. Shama included appellant's patient application and injury form.

Appellant also provided a July 8, 2014 initial evaluation chiropractor report by Dr. Neal, who related her complaints of pinching and pressure in her left ankle and foot radiating to her left toes and thigh. Upon examination of her left ankle, she observed moderate myospasms, tenderness, and trigger points. Dr. Neal provided range of motion and muscle strength findings. Neurological examination showed decreased hypoesthesia on the left at L4, L5, and S1 and positive deep tendon reflexes. Dr. Neal diagnosed internal derangement of the left ankle joint and crushing injury to the left ankle. She provided a July 8, 2014 prescription note for physical therapy.

In an undated statement, appellant related that she had worked for the employing establishment since November 2011 and described her employment duties. She described the December 2, 2013 employment injury and noted that she continued to work. Appellant reported that when she reported the injury to her Postmaster between December 2013 and April 2014, he

informed her that it was not too late to file a compensation claim. She indicated that she went to an urgent care facility on May 28, 2014 and was recommended to continue to seek medical treatment. Appellant related that she had not been able to do any of her hobbies of walking and light exercise because of her injury.

By decision dated August 25, 2016, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence that OWCP's decision was in error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely.<sup>5</sup> In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request.<sup>6</sup>

OWCP, however, may not deny an application for reconsideration solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.<sup>7</sup> In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to

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<sup>3</sup> *Thankamma Matthews*, 44 ECAB 765, 768 (1993).

<sup>4</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>5</sup> 20 C.F.R. § 10.607(a); 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 FECA. 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>6</sup> *Id.* at § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>7</sup> *See id.* at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>8</sup> *See id.* at § 10.607(b); *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>9</sup> *Supra* note 3.

<sup>10</sup> *Supra* note 7; *Fidel E. Perez*, 48 ECAB 663 (1997).

demonstrate clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or demonstrate a clear procedural error, but 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>13</sup> The Board has held that even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.<sup>14</sup>

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

### ANALYSIS

OWCP's last merit decision dated August 13, 2015, affirmed the denial of appellant's traumatic injury claim. On August 16, 2016 it received her August 12, 2016 request for reconsideration. In a decision dated August 25, 2016, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees' Compensation System (iFECS)).<sup>16</sup> By decision dated August 13, 2015, OWCP affirmed the denial of appellant's traumatic injury claim. It received her latest request for reconsideration on August 16, 2016, which was outside the one-year time limit. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>17</sup>

The Board has reviewed the record and finds that the evidence submitted in the untimely request for reconsideration does not raise a substantial question as to the correctness of OWCP's August 13, 2015 decision and is, therefore, insufficient to demonstrate clear evidence of error.

In its most recent merit decision, OWCP denied appellant's traumatic injury claim because the medical evidence of record failed to demonstrate a causal relationship between her left ankle condition and the accepted December 2, 2013 employment incident. Along with her

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<sup>11</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>12</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>13</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>14</sup> *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

<sup>15</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *supra* note 3 at 765, 770.

<sup>16</sup> *Supra* note 6 at Chapter 2.1602.4(b) (February 2016).

<sup>17</sup> *Supra* note 7; *Debra McDavid*, 57 ECAB 149 (2005).

most recent reconsideration request, appellant provided additional medical evidence. In a July 7, 2014 report, Dr. Shama accurately described the December 2, 2013 employment incident and provided physical examination findings. He opined that appellant's left foot and ankle conditions were the result of her employment incident. Although this report provides diagnoses and an opinion regarding causal relationship between the December 2, 2013 employment incident and her left ankle condition, it does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error.<sup>18</sup> As previously noted, even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.<sup>19</sup>

In a July 8, 2014 chiropractor report, Dr. Neal provided examination findings and a medical diagnosis, but this report does not demonstrate clear evidence of error because it is not relevant to the main issue of the present case which is medical in nature. The report does not constitute probative medical evidence because appellant's chiropractor did not diagnose spinal subluxations as demonstrated to exist by x-rays and is therefore not a physician under FECA.<sup>20</sup>

In order to demonstrate clear evidence of error, the evidence 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>21</sup> The medical evidence submitted by appellant does not have sufficient probative value to shift the weight of the evidence in favor of her.

Appellant also provided her response to OWCP's June 30, 2014 development letter and undated statement. She described the December 2, 2013 employment injury and the medical treatment that she received. Appellant alleged that she was no longer able to do any of her hobbies because of her injury. The Board finds that these statements also fail to demonstrate clear error on the part of OWCP as they are irrelevant to the underlying issue regarding causal relationship.<sup>22</sup> Accordingly, these statements are insufficient to demonstrate clear error by OWCP with respect to appellant's traumatic injury claim.

The Board has found that the term "clear evidence of error" is intended to represent a difficult standard.<sup>23</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>24</sup> The evidence submitted must be of sufficient probative

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<sup>18</sup> *Supra* note 13.

<sup>19</sup> *Supra* note 14.

<sup>20</sup> 5 U.S.C. § 8101(2). See *Jack B. Wood*, 40 ECAB 95, 109 (1988). See also *J.D.*, Docket No. 08-0241 (issued May 6, 2008).

<sup>21</sup> See *supra* note 13.

<sup>22</sup> *Supra* note 3.

<sup>23</sup> *James R. Mirra*, 56 ECAB 738 (2005); *supra* note 6 at Chapter 2.1602.5(a) (October 2011).

<sup>24</sup> *Supra* note 14.

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>25</sup>

The Board finds that appellant has failed to support her reconsideration request with evidence or argument demonstrating that OWCP's August 13, 2015 decision denying her traumatic injury claim was clearly erroneous. Appellant request was insufficient to raise a substantial question as to the correctness of OWCP's August 13, 2015 decision or shift the weight of the evidence in her favor.

### **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 August 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 5, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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

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<sup>25</sup> *Supra* note 15.