



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 21, 2014 appellant, then a 52-year-old vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that, while walking to her car immediately after leaving work at 5:00 p.m. that day, she tripped on an uneven sidewalk, fell, and struck both knees. On the reverse side of the form, the employing establishment noted that her regular work shift varied between the hours of 7:30 a.m. and 8:00 p.m.

In a development letter dated February 5, 2014, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of additional evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond. Appellant did not submit additional evidence as requested.

By decision dated March 18, 2014, OWCP denied appellant's traumatic injury claim, finding that she had not established fact of injury as she submitted no medical evidence establishing an injury in connection to the January 21, 2014 employment incident.

On June 9, 2014 appellant requested reconsideration. In support of her request, she submitted reports dated May 6, 2014 through January 7, 2015 by Dr. Ed Wolski, a Board-certified family practitioner, who opined that the January 21, 2014 employment incident caused a right ankle sprain.

In a January 28, 2015 email, the employing establishment noted that on January 21, 2014 appellant's scheduled work shift was 7:30 a.m. to 4:00 p.m.

By decision dated January 29, 2015, OWCP modified the March 18, 2014 decision, to find that the medical evidence of record established a medical diagnosis; however, the claim remained denied as appellant was not in the performance of duty at the time of the claimed January 21, 2014 employment incident. It noted that her work shift ended at 4:00 p.m., and she fell at 5:00 p.m., beyond the standard 30-minute allowance for coming and going from work.

On March 6, 2015 appellant, through her then-representative, requested reconsideration.

On March 19, 2015 OWCP received appellant's January 21, 2014 statement in which she contended that employing establishment nurses routinely stayed after the end of their shift to complete documentation or finish job duties. Appellant noted that the employing establishment did not require employees to clock in or out.

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<sup>2</sup> Docket No. 17-0737 (issued September 18, 2017).

On March 19, 2015 OWCP received statements from two of appellant's coworkers dated January 21, 2014, contending that employing establishment nurses often stayed after the end of their scheduled tour to complete charting and other work tasks.

OWCP also received copies of medical reports previously of record, physical therapy notes, an imaging study, and reports signed by a physician assistant.

By decision dated April 20, 2015, OWCP denied modification of its January 29, 2015 decision. It found that the additional evidence submitted did not establish that appellant had been in the performance of duty at the time of the January 21, 2014, employment incident.

OWCP received additional reports by Dr. Wolski, dated April 20 and May 22, 2015.

On July 6, 2015 appellant again requested reconsideration. Commencing August 4, 2015, she submitted reports by Dr. Wolski dated from June 30, 2015 through January 28, 2016 and diagnostic study reports.

By decision dated February 26, 2016, OWCP denied modification.

OWCP received additional reports from Dr. Wolski dated February 29 and April 11, 2016.

On May 2, 2016 appellant requested reconsideration of OWCP's February 26, 2016 decision. She submitted reports from Dr. Wolski dated May 11 and June 20, 2016.

By decision dated July 29, 2016, OWCP denied modification.

On August 3, 2016 OWCP received a June 20, 2016 report by Dr. Wolski.

On August 8, 2016 appellant again requested reconsideration. Commencing on August 15, 2016 she submitted reports by Dr. Wolski dated from July 22 through November 28, 2016.

By decision dated January 4, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). Appellant then appealed to the Board.

During the pendency of the prior appeal, appellant submitted reports by Dr. Michael V. Tran, a podiatrist, dated from February 6, 2015 through December 19, 2016 and reports by Dr. Wolski dated from July 22, 2016 through January 26, 2017.

By decision issued September 18, 2017,<sup>3</sup> the Board affirmed OWCP's January 4, 2017 denial of reconsideration of the merits of appellant's claim. The Board found that the evidence submitted on reconsideration was irrelevant to the underlying issue of whether she was in the performance of duty when she fell at 5:00 p.m. on January 21, 2014.

On April 3, 2018 OWCP received reports by Dr. Wolski dated March 14, 2018.

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<sup>3</sup> *Id.*

On July 31, 2018 appellant requested reconsideration. In support of her request, she submitted a November 7, 2018 statement by her supervisor, contending that emergencies and staffing issues often resulted in employees working beyond the end of their shift.

By decision dated July 9, 2019, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On February 10, 2020 appellant again requested reconsideration.

By decision dated March 23, 2020, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

In an April 21, 2020 statement, appellant contended that OWCP had not received her August 2, 2019 request for reconsideration although she had sent it by certified mail. She telephoned OWCP on January 24, 2020 and received a return call on January 28, 2020 instructing her to resend the letter. Appellant also alleged that OWCP had not timely responded to her prior requests for reconsideration.

In a January 18, 2022 letter, appellant requested an appeal rights form as she "would like to appeal this case or do a reconsideration."

By decision dated January 25, 2022, OWCP denied appellant's request for reconsideration of its July 29, 2016 merit decision, finding that her January 18, 2022 reconsideration request was untimely filed and failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8124(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 of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).<sup>6</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>7</sup>

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited

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<sup>4</sup> 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>7</sup> *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

review to determine whether the request demonstrates clear evidence of error.<sup>8</sup> OWCP's regulations and procedures 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 claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.<sup>10</sup> Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to 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> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>13</sup> The Board makes an independent determination as to whether a claimant has demonstrated 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>14</sup>

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.<sup>15</sup> The claimant must present evidence that on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report that, 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>16</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>8</sup> 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>9</sup> *Supra* note 6. *See also supra* note 6 at Chapter 2.1602.5a (September 2020).

<sup>10</sup> *Supra* note 8 at § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>11</sup> *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>12</sup> *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *see also supra* note 8 at § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (September 2020).

<sup>16</sup> *R.P.*, Docket No. 22-0686 (issued September 30, 2022); *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought. OWCP received appellant's request for reconsideration on January 18, 2022 more than one year after the last merit decision dated July 29, 2016. Appellant's request was, therefore, untimely filed. Consequently, she must demonstrate clear evidence of error.<sup>17</sup>

The underlying issue in the claim is whether appellant was in the performance of duty when she fell at 5:00 p.m. on January 21, 2014. In support of her untimely request for reconsideration, she submitted her January 18, 2022 letter requesting an appeal rights form as she wished to pursue an appeal or request for reconsideration. The record also contains appellant's April 21, 2020 statement regarding OWCP's receipt of prior requests for reconsideration. As previously noted, clear evidence of error is intended to represent a difficult standard.<sup>18</sup> The evidence must shift the weight in appellant's favor.<sup>19</sup> As neither appellant's April 21, 2020 statement or her January 18, 2022 letter addressed the issue of performance of duty, they are irrelevant to the claim.<sup>20</sup> Thus, this evidence does not raise a substantial question as to the correctness of OWCP's decision.<sup>21</sup>

The Board finds that the arguments submitted by appellant in connection with her untimely request for reconsideration are insufficient to shift the weight of the evidence in her favor or raise a substantial question that OWCP erred in the issuance of its July 29, 2016 decision. Accordingly, OWCP properly denied her reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>17</sup> *Supra* notes 8 and 9.

<sup>18</sup> *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (September 2020).

<sup>19</sup> *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Robert Burns*, *supra* note 11; *see also D.H.*, Docket No. 21-0251 (issued May 9, 2022); *R.S.*, Docket No. 18-0505 (issued July 24, 2018).

<sup>20</sup> *D.H.*, *id.*; *see N.V.*, Docket No. 20-0781 (issued November 18, 2020); *T.B.*, Docket No. 21-0045 (issued June 2, 2021).

<sup>21</sup> *D.H.*, *id.*, *see P.T.*, Docket No. 18-0494 (issued July 9, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 25, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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