

FACTUAL HISTORY

On April 19, 1969 appellant, then a 25-year-old mail carrier, filed an occupational disease claim alleging that carrying mail placed excessive weight on her shoulder. OWCP accepted an aggravation of a preexisting postural complex condition. On August 30, 1970 appellant sustained an employment-related strain of her right trapezius muscle, reagravation of the preexisting postural condition and an emotional condition, accepted for paranoid reaction. She received wage-loss compensation beginning September 1, 1970. In a March 24, 1980 decision, OWCP denied the claim for compensation after January 4, 1980. Appellant returned to work briefly in 1981 but stopped on April 9, 1981. OWCP denied wage-loss compensation.

Appellant returned to work again on October 2, 1982 but stopped on October 8, 1982. She claimed compensation beginning October 8, 1982 due to right shoulder pain. In an April 9, 1984 decision, OWCP denied appellant's claim for compensation based on the opinion of an impartial medical examiner, Dr. Gordon Clark, a Board-certified orthopedic surgeon. On November 9, 1983 Dr. Clark found that she was not disabled as a result of any work-related injury and that her continuing restrictions were not work related. OWCP affirmed this decision on November 7, 1984 and August 2, 1985. In a July 16, 2003 merit decision, it denied modification of its prior decisions. OWCP found that the opinion of Dr. Clark was due special weight.

The claim was thereafter dormant until 2010. In a letter dated July 7, 2010, appellant noted that she was sending medical evidence to OWCP to establish that her medical condition was an ongoing and permanent injury. She also advised that she was experiencing stress.

On October 7, 2010 appellant requested reconsideration and submitted an April 28, 2010 report from Dr. James V. Luck, Jr., a Board-certified orthopedic surgeon, who noted that she was a 67-year-old woman who complained of pain in both shoulders which began when she was carrying mail between 1969 through the 1980s. Dr. Luck advised that appellant was requesting "an evaluation as part of her application to reopen her claim" and that he did not have access to her medical records. Appellant related that she sustained several injuries while working "between 1969 through the 1980's, all involving her shoulders and related to carrying mail." On examination, she had pain radiating out the upper trapezius bilaterally and radiating up to the occiput without numbness or tingling of her upper extremities and no radiculopathy. Appellant noted that she slept with a cervical pillow in order to reduce the pain and was currently attending physical therapy. Dr. Luck found a full range of motion of both shoulders, tight trapezius muscles bilaterally and limited range of motion of the cervical spine. He diagnosed upper trapezius myalgia, early osteoarthritis of the glenohumeral joint, left shoulder and moderate to moderately advanced osteoarthritis of the acromioclavicular joint, right shoulder. Dr. Luck recommended that appellant avoid heavy lifting or anything strenuous regarding her right shoulder. He opined that her "problem of upper trapezius myalgia and osteoarthritis of the acromioclavicular joint could easily relate to her history of carrying a heavy mail sack over the right shoulder." Dr. Luck recommended physical therapy.

In a June 24, 2010 disability certificate, a physician whose signature is illegible, advised that appellant was disabled due to chronic neck and shoulder pain exacerbated by her work at the employing establishment.

In a January 10, 2011 decision, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁴

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁵

The imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁶ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *Id.* at § 10.607(b).

whether the new evidence demonstrates clear error on the part of OWCP.⁸ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.⁹

ANALYSIS

In its January 10, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on July 16, 2003. Appellant's October 7, 2010 letter requesting reconsideration was submitted more than one year after the July 16, 2003 merit decision and was untimely.

In accordance with internal guidelines and with the Board precedent, OWCP properly performed a limited review to determine whether appellant's application for review established clear evidence of error, which would warrant reopening her case for merit review, notwithstanding the untimeliness of her application. It reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The underlying issue is whether OWCP properly found that appellant no longer had any disabling conditions causally related to her employment factors.

The April 28, 2010 report of Dr. Luck, related appellant's history and provided an opinion that her "problem of upper trapezius myalgia and osteoarthritis of the acromioclavicular joint could easily relate to her history of carrying a heavy mail sack over the right shoulder." The Board notes that his report is not sufficient to establish clear evidence of error as his opinion is speculative and not well reasoned with regard to why her current condition and disability are attributable to her work injuries. It is noted that even a well-reasoned opinion supporting causal relationship would be insufficient to establish clear evidence of error. The Board has held that 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 OWCP's 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 a case.¹⁰

⁸ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁹ *Id.*

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

Other evidence submitted is also insufficient to establish clear evidence of error. A June 24, 2010 disability certificate is of no probative medical value as it cannot be determined that it is from a physician.¹¹ Likewise, reports from appellant's physical therapists do not constitute probative medical evidence. A physical therapist is not defined as a physician under FECA.¹² Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.¹³

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in its determination that appellant no longer had any conditions which were causally related to employment factors.¹⁴ The Board finds that she has not presented clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹¹ *C.B.*, Docket No. 09-2027 (issued May 12, 2010) (a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2); reports lacking proper identification do not constitute probative medical evidence).

¹² *See David P. Sawchuk*, 57 ECAB 316 (2006). *See* 5 U.S.C. § 8101(2).

¹³ *F.R.*, Docket No. 09-575 (issued January 4, 2010).

¹⁴ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2012
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees Compensation Appeals Board