

which required bending and twisting and realized that her current condition was causally related to employment factors on January 21, 2009.

In an April 15, 2010 report, it was noted that appellant had left-sided neck and leg pain which had recently worsened. Appellant related that her symptoms began in June 2008, with constant pain aggravated by sitting, walking, bending and repetitive movement. She also reported continued neck pain radiating into the right shoulder with associated numbness and tingling in the arm, which increased with activity. The report was not signed by a physician.

By decision dated June 10, 2010, OWCP found that appellant did not sustain her claimed left shoulder, neck and back conditions in the performance of duty.

In a report dated September 26, 2011, Dr. Rudy Panganiban, a specialist in family practice, stated that appellant was experiencing neck, left shoulder and lower back pain, with stiffness and spasms. On examination, appellant showed a mild loss of range of motion in the left shoulder caused by pain. Dr. Panganiban diagnosed myofascial pain syndrome and prescribed pain medication, physical therapy and electrical stimulation producing myofascial release.

On October 24, 2011 Dr. Panganiban related that appellant was initially treated on November 6, 2009 for neck, left arm, left torso, left leg and spinal pain stemming from a June 20, 2008 employment injury. Appellant related that her pain worsened when she walked or moved her arms. Dr. Panganiban stated that she had a functional decline of her neck and lumbar spine as well as decreased range of motion in her joints and spine. Appellant underwent shoulder surgery on March 2, 2011. Dr. Panganiban asserted that she had a chronic condition which could be self-limiting. He stated that appellant's prognosis was good if she adhered to a maintenance program. Dr. Panganiban opined that she might be able to do partial, sedentary work but would need to undergo a functional capacity test and a psychological evaluation for depression and her anxiety.

By letter dated January 29, 2012, appellant's attorney requested reconsideration and submitted a January 10, 2012 magnetic resonance imaging (MRI) scan of appellant's cervical spine.¹ The history of injury noted a work injury in June 2008 and chronic neck pain. The MRI scan findings were stated as slight increased disc bulge at C5-6 and a small posterior annular tear not seen on a prior study of November 5, 2008.

By decision dated February 24, 2012, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely requested and that she had not established clear evidence of error. This decision noted that she was receiving benefits under case File No. xxxxxx942 for injuries to her neck, low back and shoulders stemming from a fall on June 20, 2008 and the medical evidence submitted for reconsideration pertained to this other claim.

¹ The physician's signature is illegible.

LEGAL PRECEDENT

Section 8128(a) of FECA² does not entitle an employee to a review of OWCP's decision as a matter of right.³ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, OWCP has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).⁶

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ OWCP procedures state that it will reopen appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows “clear evidence of error” on the part of OWCP.⁸

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) submitting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

⁶ *See* cases cited *supra* note 3.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that it committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ To show clear evidence of error, 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴ The Board makes an independent determination of whether appellant 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.¹⁵

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its most recent merit decision was issued on June 10, 2010. OWCP received appellant's request for reconsideration on January 29, 2012. The request was untimely as it was outside the one-year time limit.

The Board finds that appellant's January 29, 2012 request for reconsideration failed to establish clear evidence of error. To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. The reports from Dr. Panganiban stated findings on examination, related complaints of neck, left shoulder and lower back pain and diagnosed chronic myofascial pain syndrome. However, these reports are not sufficient to shift the weight of the evidence in favor of appellant or raise a substantial question as to the correctness of OWCP's decision. Appellant's claim was denied as she had not established that her diagnosed conditions in 2010 were causally related to factors of her federal employment. The Board has explained that it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The evidence appellant submitted with her 2011 reconsideration request provided findings regarding her condition in 2011, and noted her accepted 2008 injury, but did not address the cause of her alleged 2010 condition. The evidence

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, *supra* note 2.

¹² See *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Faidley*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, *supra* note 3.

submitted by her on reconsideration is insufficient to establish clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her January 29, 2012 reconsideration request. As her reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on February 24, 2012.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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