

FACTUAL HISTORY

OWCP accepted that on May 14, 2010 appellant, then a 56-year-old crew leader, sustained a neck strain, right shoulder closed acromioclavicular dislocation, right rotator cuff tear and displacement of cervical intervertebral disc without myelopathy due to a work-related motor vehicle accident. On March 16, 2011 Dr. Abraham S. Abdo, an attending Board-certified orthopedic surgeon, performed a right rotator cuff repair which was authorized by OWCP. Appellant received disability compensation for the periods March 16 to July 11, 2011 and February 14 to June 16, 2012 on the daily rolls.

Emergency room records from May 14, 2010 contain findings regarding appellant's neck and right shoulder and show that she was released in stable condition. Appellant underwent diagnostic testing on May 14 and June 16, 2010 and the findings reveal, *inter alia*, a right rotator cuff tear and right subluxed acromioclavicular joint with degenerative changes. In a June 22, 2010 form report, an attending chiropractor indicated that appellant had been totally disabled since May 20, 2010. There was no indication that a spinal subluxation had been determined from x-ray testing.

In November 2010, appellant filed a Form CA-7 claiming entitlement to disability compensation for the period May 16, 2010 to March 15, 2011.

Appellant submitted a January 5, 2011 report in which Dr. Abdo diagnosed cervical strain and torn right rotator cuff due to the May 14, 2010 injury. In a January 12, 2011 report, Dr. Abdo stated, "[Appellant] sustained an injury on the job on May 14, 2010 to her neck and right shoulder. She has been unable to work since that time." Appellant also submitted additional diagnostic testing results from March and June 2011 and a May 25, 2011 report, in which an attending physician discussed her neck condition but did not provide an opinion on disability.

In a June 24, 2011 decision, OWCP denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she had work-related disability for the period May 14, 2010 to March 15, 2011.

In a June 22, 2012 letter received by OWCP on June 27, 2012, appellant, through counsel, requested reconsideration of OWCP's June 24, 2011 decision. In the letter, counsel argued that the January 5 and 12, 2011 reports of Dr. Abdo established her claim for work-related disability for the period May 16, 2010 to March 15, 2011. The record does not contain the envelope in which the reconsideration request was sent. Appellant submitted additional medical evidence in support of the reconsideration request.

In a January 16, 2013 decision, OWCP denied appellant's request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error. It stated:

"This refers to [appellant's] recent letter requesting reconsideration of our decision dated June 24, 2011. [Her] letter was received June 27, 201[2]. According to the regulations in effect on the date the decision was issued, we will not review a decision unless the request is received within one year of that decision. We did consider [appellant's] request under 20 C.F.R. [§] 10.607(b) to

determine whether [she] presented clear evidence that [OWCP's] last merit decision was incorrect.... [Appellant] did not present clear evidence of error.”

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ 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.⁴

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁵ OWCP’s regulations and procedure 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 the claimant’s application for review shows “clear evidence of error” on the part of OWCP.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

As noted, OWCP’s regulations at 20 C.F.R. § 10.607(a) establish a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP’s procedure further provides, “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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error.”

⁷ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ *See Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

and an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought for merit decisions issued on or after August 29, 2011.¹² For cases where review is sought for merit decisions issued prior to August 29, 2011, timeliness is determined by the postmark on the envelope, if available.¹³ Otherwise, the date of the letter itself should be used.¹⁴

ANALYSIS

OWCP accepted that appellant sustained several medical conditions due to a May 14, 2010 work-related accident and she filed a Form CA-7 claiming entitlement to disability compensation for the period May 16, 2010 to March 15, 2011. In a June 24, 2011 decision, it denied her claim on the grounds that she did not submit sufficient medical evidence to establish that she had work-related disability for the period May 14, 2010 to March 15, 2011. Appellant requested reconsideration of this decision in a letter dated June 22, 2012.

In a January 16, 2013 decision, OWCP denied appellant's request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

The Board finds, however, that OWCP improperly determined that appellant filed an untimely request for reconsideration. OWCP indicated that her reconsideration request had to be received within one year of its June 24, 2011 merit decision to be considered timely. The standard noted by OWCP only applies to cases in which a claimant requests consideration of an OWCP decision dated on or after August 29, 2011.¹⁵ Appellant requested reconsideration of a June 24, 2011 merit decision, *i.e.*, a merit decision issued prior to August 29, 2011 and therefore the timeliness is determined by the postmark on the envelope, if available and by the date of the reconsideration letter if the postmark is not available.¹⁶

As the case record does not contain the envelope that accompanied appellant's request for reconsideration, the date of the request itself must be used to determine the timeliness of her request. The record shows that she requested reconsideration in a letter dated June 22, 2012. The record therefore establishes that appellant filed her request within one year of OWCP's June 24, 2011 decision. Consequently, OWCP improperly determined that her request for reconsideration of the merits of her claim was untimely. Because it improperly found that appellant filed an untimely reconsideration request, it also improperly applied the clear evidence of error standard in evaluating that reconsideration request.

Therefore, OWCP's January 16, 2013 decision shall be set aside and the case remanded to OWCP for evaluation of appellant's reconsideration request under the standards for a timely filed

¹² See Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.4 (October 2011).

¹³ *Id.* at Chapter 2.1602.3(a) (May 1991).

¹⁴ See *Douglas McLean*, 42 ECAB 759, 761-62 (1991); *William J. Kapfhammer*, 42 ECAB 271, 272-74 (1990).

¹⁵ See *supra* note 12.

¹⁶ See *supra* notes 13 and 14.

reconsideration request. After such development it deems necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of OWCP.

Issued: January 16, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board