

FACTUAL HISTORY

On June 19, 2009 appellant, then a 58-year-old letter carrier, filed an occupational disease claim alleging that as a result of over 20 years of repetitive motion in both her hands she developed carpal tunnel syndrome. She submitted progress reports by her treating physicians, including Dr. Thai T. Do, a Board-certified internist, who noted that appellant developed pain in both hands as a result of her work as a letter carrier, and that he was treating her for bilateral wrist tendinitis and ulnar nerve neuropathy. Dr. Do opined, “More likely than not, based on the available history, objective findings and diagnosis, it is my medical opinion that her condition is caused by repetitive casing and grasping, flexion and extension as well as ulnar deviation of the wrist.

By decision dated September 10, 2009, OWCP denied appellant’s claim as the medical documentation was not sufficient to establish that she sustained a medical condition connected to the claimed occupational exposures. Appellant had a prior claim for carpal tunnel syndrome that was filed in 2006 that had been denied, and it did not appear that her physicians had an accurate history with regard to the prior claim.

On November 22, 2010 appellant requested reconsideration and submitted medical evidence including a report by Dr. Do, dated September 4, 2009, that noted continued treatment for appellant’s complaints of bilateral wrist pain. She underwent a nerve conduction study on October 18, 2010 that was interpreted by Dr. Steve Y. Huang, a Board-certified radiologist, as showing no electrodiagnostic evidence of bilateral ulnar neuropathies across the wrist or median neuropathies. In reports dated November 24 and December 17, 2010 and January 14, 2011, Dr. Huang diagnosed tendinitis of the wrist and paresthesia of the upper limb. He stated that, after careful review of all available evidence, it was his opinion that appellant’s condition was more likely than not caused or aggravated by factors of her employment.

By decision dated February 18, 2011, OWCP denied appellant’s request for reconsideration as it was untimely filed and did not establish 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 her application for review within one year of the date of that decision.² 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.³

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.⁴ OWCP regulations and procedure provide that it will reopen a claimant’s

² 20 C.F.R. § 10.607(a).

³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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 establishes clear evidence of error on the part of OWCP.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ 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.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent OWCP merit decision is dated September 10, 2009. Appellant's request for reconsideration was dated November 22, 2010, more than one year after the merit decision. Accordingly, her request for reconsideration was not timely filed.

The Board further finds that appellant failed to establish clear evidence of error. In order to establish clear evidence of error, a claimant must submit evidence that is positive, precise and explicit and must manifest on its face that OWCP committed an error.¹² Appellant has not submitted such evidence. The September 4, 2009 report of Dr. Do is similar to his prior reports and does not contain any new evidence or rationale sufficient to establish clear evidence of error.

⁵ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide: 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 that a schedule award was miscalculated). 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 sufficient to establish clear evidence of error. *Id.* at Chapter 2.1602.3c

⁶ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁷ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁸ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ See *Leona D. Travis*, *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² 20 C.F.R. § 10.607(a); *A.F.*, Docket No. 11-1297 (issued December 20, 2011).

The reports of Dr. Huang are similar in content to the prior reports of Dr. Do. Furthermore, his conclusion that appellant's condition is more likely than not caused or aggravated by factors of employment is speculative in nature and does not provide medical rationale supporting his conclusion. Therefore, this report does not establish clear evidence of error.

The term clear evidence of error is intended to represent a difficult standard. The evidence submitted by appellant is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. Thus, she has not submitted evidence on reconsideration that meets the standard of establishing clear evidence of error and OWCP properly denied her request for reconsideration.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2011 is affirmed.

Issued: February 21, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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