

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that her request was untimely filed and failed to establish clear evidence of error.

On appeal appellant contends that OWCP's referral physicians did not review any objective findings such as magnetic resonance imaging (MRI) scans, x-rays or computerized tomography (CT) scans.

FACTUAL HISTORY

This case has previously been before the Board. In a March 6, 2006 decision, the Board affirmed OWCP's determination that appellant had not established entitlement to wage-loss benefits from March 13, 1999 to May 31, 2002. The facts as set forth in the Board's prior decision are hereby incorporated by reference.³

On March 13, 2007 OWCP accepted appellant's claim for major depression recurrent episode and displacement of cervical intervertebral disc without myelopathy. By decision dated September 3, 2008, it terminated her medical benefits for aggravation of preexisting cervical strain finding that the injury-related condition had resolved or ceased.⁴

By decision dated September 23, 2008, OWCP vacated the March 13, 2007 decision in part and rescinded acceptance of the condition of displacement of cervical intervertebral disc without myelopathy. It noted that the decision did not affect the acceptance of a major depression, recurrent episode.

By letter dated September 22, 2009, appellant, through counsel, requested reconsideration. Her attorney argued that the medical evidence showed that appellant still had residuals of her claimed condition. In a November 13, 2009 decision, OWCP considered appellant's request for reconsideration and noted that the appeal was not timely filed from the September 3, 2008 decision terminating her medical benefits for aggravation of preexisting cervical conditions. OWCP considered her request a request for reconsideration of the September 23, 2008 decision rescinding the acceptance of her condition for cervical intervertebral disc without myelopathy and found that the rescission was not in error.

Appellant submitted multiple reports from her Board-certified psychiatrist, Dr. Walter Afield. She also submitted further medical reports from Dr. Samy F. Bishai, an orthopedic

³ *Mattie M. Cole*, Docket No. 05-1799 (issued March 6, 2006). On April 26, 2000 appellant, then a 35-year-old distribution clerk, alleged that she experienced vascular migraine headaches and neck pain as a result of duties relating to her federal employment. She stopped work on March 13, 1999 and was terminated effective June 16, 2000 due to leave without pay in excess of one year. On April 25, 2002 OWCP accepted appellant's claim for aggravation of preexisting cervical muscle strain.

⁴ On December 5, 2012 appellant requested an oral hearing before an OWCP hearing representative with regard to the September 3, 2008 decision. By decision dated February 20, 2013, OWCP denied her request as it was untimely filed and as it determined that the issue could equally well be addressed by requesting reconsideration. Appellant did not appeal this decision.

surgeon, who diagnosed chronic cervical strain, cervical disc syndrome, disc protrusion at C6-7, disc bulge at C5-6, depression, bilateral carpal tunnel syndrome and ulnar nerve entrapment left elbow. Dr. Bishai treated appellant with physical therapy, acupuncture and medication. Appellant was also treated by Dr. Sara Viscay, a family practitioner, for chronic cervical strain, cervical disc syndrome, disc protrusions at C4-5, C5-6 and C6-7 and disc bulges at C3-4, C4-5, C5-6 and C6-7. Dr. Viscay also treated appellant with physical therapy and medication.

In a document received by OWCP on March 25, 2013, appellant requested reconsideration of the November 13, 2009 decision. In support of her reconsideration request, she submitted a February 28, 2013 report wherein Dr. Bishai stated that he was treating appellant for injuries sustained in a work accident of January 1, 1992, and that he believed that it was medically necessary to institute a pharmacology treatment plan including the prescription for Medrox.

On April 3, 2013 OWCP denied appellant's request for reconsideration as it was not timely filed and failed to 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.⁵ 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.⁶

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, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ OWCP 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 the claimant's application for review shows clear evidence of error on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must

⁵ 20 C.F.R. § 10.607(a).

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

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide 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 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 clear evidence of error. *Id.* at Chapter 2.1602.3c.

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

manifest on its face that OWCP 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 *prima facie* 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

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ As appellant's March 25, 2013 request for reconsideration was submitted more than one year after the last merit decision of November 13, 2009, it was untimely. Consequently, she must establish clear evidence of error by OWCP in denying her claim for compensation.

On reconsideration, appellant has not presented sufficient evidence to establish that OWCP improperly rescinded its acceptance of her condition of displacement of cervical intervertebral disc without myelopathy. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁷ Appellant has not submitted any rationalized medical evidence addressing how her ongoing issues with her back were causally related to her federal employment which ended on March 13, 1999. Dr. Afield, a psychiatrist, addressed appellant's emotional condition but this is not relevant to the condition rescinded in this case. The reports of Drs. Bishai and Viscay note treatment for a multitude of physical complaints but did not provide any well-rationalized medical opinion as to the basis for the rescission in this claim or why appellant's ongoing medical conditions were causally related to her federal employment. The undated report by Dr. Bishai noted that a Medrox Patch was medically necessary. This report was undated, did not provide a medical diagnosis, or address the issue relevant to the rescission of displacement of cervical intervertebral disc without

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona D. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 47 ECAB 149 (2005).

¹⁶ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

myelopathy. The evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of the last merit decision. She has not established clear evidence of error.

On appeal, appellant argues the merits of the case. As noted above, the Board only has jurisdiction over the nonmerit decision and therefore is precluded from conducting a merit review.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits 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 April 3, 2013 is affirmed.

Issued: December 4, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board