

**United States Department of Labor
Employees' Compensation Appeals Board**

W.J., Appellant

and

**DEPARTMENT OF COMMERCE,
Kenosha, WI, Employer**

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**Docket No. 12-1752
Issued: January 25, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2012 appellant filed a timely appeal of the February 24, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year elapsed between the most recent merit decision dated June 17, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On February 9, 2010 appellant, then a 54-year-old clerk, filed a claim for traumatic injury, alleging that he had sustained a right arm and shoulder injury on January 5, 2010 as a result of his federal employment. In a supplemental statement, he explained that the injury occurred when he was trying to pry open the vent of the coffee decanter at work with his fingers.

In support of the claim, appellant submitted a number of physical therapy records,³ as well as progress notes from Dr. William G. Raasch, a Board-certified orthopedic surgeon, wherein appellant's diagnosis was stated as rotator cuff tear of the right shoulder. OWCP also received a magnetic resonance imaging (MRI) scan report pertaining to his right shoulder from Dr. Scott J. Erickson, dated February 12, 2010, which diagnosed rotator cuff tear. This report noted anterior supraspinatus partial-thickness tearing, partial tearing of the biceps longhead tendon, intrasubstance tear of the subscapularis tendon, minimal undulation of the undersurface of the acromion and os acromiale articulation, anterior and posterior labral undermining with large posterior paralabral cyst measuring and superior labrum anterior posterior tear with paralabral cyst.

By decision dated June 17, 2010, OWCP denied appellant's claim on the grounds that he had failed to provide a rationalized medical opinion that diagnosed his condition and explained how the condition was caused by the employment incident.

Appellant subsequently submitted a number of progress reports from Dr. Raasch, who as of February 10, 2010 diagnosed rotator cuff tear. In an attending physician's report dated June 28, 2010, Dr. Raasch indicated with a checkmark that the condition diagnosed was causally related to appellant's employment activity.

On December 12, 2011 OWCP received an undated reconsideration request from appellant who stated that the employing establishment had access to his medical records but had not forwarded them to OWCP.

Along with the request, appellant submitted a narrative report from Dr. Raasch dated July 30, 2010, who stated the following:

“[Appellant] is a patient of mine who back on January 5, 2010 injured his right shoulder. At his February 10, 2010 visit, he described trying to pull up a 2½-gallon coffee pot lid and experiencing a sharp pain in the shoulder consistent with a rotator cuff strain. Because of persistent symptoms an MRI [scan] workup was performed which confirmed a partial undersurface cuff tear. I feel to a reasonable degree of medical certainty that the mechanism of injury is consistent with his pathology. This is based on the fact that the arm was away from the body when under load placing the rotator cuff at a mechanical disadvantage and creating a significant tensile stress resulting in the pathology.”

³ A physical therapist is not a “physician” within the meaning of section 8101(2) and cannot render a medical opinion. See *Vickey C. Randall*, 51 ECAB 357 (2000).

By decision dated February 24, 2012, OWCP denied appellant's December 12, 2011 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated June 17, 2010.

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle a claimant to a review of OWCP's decision as a matter of right.⁵ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's 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.⁶

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, which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

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.¹³ The

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.¹⁴

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁵ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶

The most recent merit decision in this case was OWCP's June 17, 2010 decision, which denied appellant's claim because he failed to establish the causal relationship element of his claim. As appellant's undated letter received by OWCP on December 12, 2011 requesting reconsideration of the merits of his claim by OWCP was made more than one year after the June 17, 2010 merit decision, the Board finds that it was not timely filed.¹⁷

On appeal, appellant contends that his request for reconsideration was untimely filed because he had contacted his employing establishment's workers' compensation office after his injury and was told that it would take care of all documentation and medical evidence for the claim. He stated that he was therefore under orders by his employing establishment not to submit further documentation in support of his claim. While appellant may have initially chosen to rely on what he believed was his employer's advice, he was advised of his burden to establish his claim and was advised of his appeal options by OWCP in the decision dated June 17, 2010. He has not explained his delay in questioning and pursuing his appeal options. The Board finds that OWCP correctly applied the clear evidence of error standard in evaluating appellant's newly submitted medical evidence.

OWCP's June 17, 2010 decision denied appellant's claim for failing to establish the causal relationship element. The decision noted that, while the medical reports submitted described the accepted incident and diagnosed a rotator cuff tear, no medical evidence of record provided a rationalized medical opinion explaining how the employment incident had caused the diagnosed condition.

Following the denial of his claim, appellant submitted to the record several progress notes regarding physical therapy, as well as progress notes from Dr. Raasch. He also submitted a narrative report from Dr. Raasch dated July 30, 2010. In this report, appellant provided a history of his injury, referred to the MRI scan report to confirm a rotator cuff tear diagnosis and opined that the injury occurred because his arm was away from the body when under load, placing the

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹⁶ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ Appellant had one year to request reconsideration by OWCP of its June 17, 2010 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

rotator cuff at a mechanical disadvantage and thus creating a significant tensile stress, resulting in the diagnosed condition. However, as the Board has explained, it is not enough to merely show that the evidence could be construed to reach a contrary conclusion, but rather the evidence must be positive, precise and explicit that OWCP committed an error in denying the claim. For these reasons, the Board finds that appellant has not established clear evidence of error on the part of OWCP.

CONCLUSION

The Board finds that appellant's reconsideration request was untimely filed, and did not establish clear evidence of error in the denial of his claim.

ORDER

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

Issued: January 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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