

request. He further argued that it failed to issue a decision within 90 days of appellant's request for reconsideration, prejudicing her appeal rights.

FACTUAL HISTORY

On February 28, 2012 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim alleging that she sustained pain in her lower back while exiting a postal vehicle on February 28, 2012. In support of her claim, she submitted a note dated March 1, 2012 from Dr. H. Mahmood Cheema, a Board-certified orthopedic surgeon, stating that she was totally disabled from February 29 through March 15, 2012.

In a letter dated March 21, 2012, OWCP requested additional factual and medical information from appellant. Dr. Cheema completed a form report on April 3, 2012 and diagnosed low back pain, spinal stenosis, facet hypertrophy, and radiculopathy. He indicated with a checkmark "yes" that he believed that appellant's condition was caused or aggravated by an employment activity, specifically lifting, and bending which aggravated low back and leg pain.

Dr. Uzma Parvez, a Board-certified physiatrist with a pain medicine subspecialty, examined appellant on March 29, 2012 and reported that she sustained an injury at work on February 28, 2012 when she stepped out of a truck and her back popped. He stated that she had a similar episode on November 9, 2010 at work when she lifted a tray and felt a pop in her back. Dr. Parvez stated that appellant did not require treatment in November 2010, but that since February 2012 her back pain had worsened with radiation of pain to both lower extremities. Appellant also reported numbness, tingling, and weakness in her legs resulting in three falls. Dr. Parvez stated that he reviewed a magnetic resonance imaging (MRI) scan dated February 10, 2012 which revealed moderate-to-severe central stenosis L3 through L5 with a left lateral disc herniation. He found severe spasms in the lumbar paraspinal musculature and right sacroiliac joint. Dr. Parvez stated that appellant had decreased sensation in the left lower extremity in the L4-5 dermatomes. He diagnosed low back pain, right lower extremity radiculopathy, moderate-to-severe spinal stenosis, and disc herniation at L3-4 with disc bulges at L3-5.

Appellant underwent an MRI scan on February 10, 2012 which demonstrated L3-4 left lateral herniation of the nucleus pulposus and moderate-to-severe central stenosis at L3-4, moderate-to-severe central stenosis at L4-5 and mild central stenosis at L2-3.

By decision dated April 26, 2012, OWCP denied appellant's claim for traumatic injury finding that she had not submitted sufficient medical evidence to establish a causal relationship between her diagnosed condition and her employment activities. Counsel requested an oral hearing on May 10, 2012 before an OWCP hearing representative.

In a report dated July 12, 2012, Dr. Parvez restated his findings and diagnoses from his March 29, 2012 report and noted that appellant had not worked since February 28, 2012.

Counsel appeared and appellant testified at the oral hearing before the hearing representative on August 16, 2012. He argued that she had sustained an aggravation of a preexisting work injury and requested that OWCP combine this case with appellant's other

claim.² Appellant testified that she was injured on November 9, 2010, underwent medical treatment and returned to work in December 2010. She stated that she did not experience any sciatica at that time. Appellant lost time from work due to asthma and before her return to work on December 10, 2012 experienced low back pain and sciatic pain in her left leg. She testified that her low back pain began again on February 10, 2012. Appellant returned to limited-duty work on February 28, 2012 and as she got out of her postal vehicle to deliver mail her back popped. She completed her workday and went home. Appellant stated that she took a muscle relaxer and a painkiller. The following morning she was unable to move and experienced sciatic pain in both legs. Appellant sought medical treatment from Dr. Cheema and stopped work. She fell a few times and began using a cane. Appellant testified that she was unable to complete housework, could not stand to shower, and could no longer ride the bus. She stated that she had radicular symptoms in her left leg, but that her right leg was pain free. Appellant stated that she did not seek treatment for her back condition between December 2010 and February 2012. The hearing representative requested additional medical evidence and allowed 30 days for a response.

In a decision dated September 28, 2012, the hearing representative affirmed the April 26, 2012 decision finding that appellant had not submitted the necessary medical opinion evidence to establish a causal relationship between her diagnosed back condition and her employment event. She noted that appellant underwent an MRI scan on February 10, 2012 prior to her alleged work injury which demonstrated disc herniation. The hearing representative found that Dr. Parvez's reports finding an aggravation were not clearly based on a proper factual background and did not provide sufficient medical reasoning to establish appellant's claim as he attributed her condition to lifting and bending, not stepping out of her mail vehicle.

Appellant, through counsel, requested reconsideration on a form dated September 24, 2013 and received by OWCP on September 30, 2013. Counsel submitted a brief of the same date and alleged that she had sustained an aggravation of her underlying condition through the February 28, 2012 traumatic injury. He alleged that the additional medical evidence included in the request for reconsideration was sufficiently detailed and well-reasoned to meet appellant's burden of proof.

Appellant submitted August 29 and November 8, 2012 treatment notes from Dr. Danielle Groves, a Board-certified orthopedic surgeon. In a report dated October 16, 2012, Dr. Groves summarized her August 29, 2012 notes and stated that she examined appellant on August 29 and October 3, 2012. She noted that appellant reported low back pain beginning November 9, 2010, a recurrence of back pain in December 2011 and a work-related injury on February 28, 2012 when she felt her back pop as she stepped out of her postal vehicle to deliver mail. Dr. Groves reviewed appellant's February 10, 2012 MRI scan which demonstrated central stenosis, disc bulging, and disc herniation at L3-4 as well as possible lumbar spasm. She stated that appellant underwent a nerve conduction study on June 5, 2012 which demonstrated left L5 radiculopathy and bilateral peroneal motor axonal neuropathy. Dr. Groves opined that appellant had significant low back pain due to her February 28, 2012 injury, with a history of lumbar stenosis, disc herniations and facet arthritis at multiple levels. She stated, "In my best medical opinion, [appellant] had a preexisting condition of her lumbar spine which is the lumbar stenosis, lumbar

² Counsel mentioned claim file number xxxxxx252. This claim is not associated with the current claim on appeal.

disc bulges, facet hypertrophy at L4-5 and L3-4, as this was all documented on an MRI scan of December 10, 2012 which was prior to the date of injury, and on the date of injury February 28, 2012 the patient aggravated her underlying condition and is suffering the consequences with severe low back pain and left leg pain and requires treatment at this time for her injuries.” In the November 8, 2012 note, Dr. Groves stated that appellant clearly had a preexisting condition present prior to her February 28, 2012 work incident. She concluded that the episode where appellant felt a pop in her back was a temporary aggravation of her underlying condition. Dr. Groves stated, “Spinal stenosis is a permanent condition, but [appellant’s] aggravation is really in the terms of a radiculitis and a strain and all of this information is within a reasonable degree of medical certainty.”

Appellant also included a nerve conduction velocity study and electromyography dated June 5, 2012 which demonstrated left L5 radiculopathy and bilateral peroneal motor axonal neuropathy.

In a letter dated June 19, 2014, counsel requested a decision responsive to his September 24, 2013 request for reconsideration.

By decision dated July 2, 2014, OWCP denied appellant’s request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error on the part of OWCP. It stated that the September 24, 2013 request for reconsideration was not received within one year from the September 28, 2012 decision. The request for reconsideration was not received and imaged until Monday, September 30, 2013, and was therefore, untimely. OWCP further found that the evidence submitted with the untimely request for reconsideration did not establish clear evidence of error and was not sufficient to require OWCP to reopen appellant’s claim for consideration of the merits.

LEGAL PRECEDENT

Under section 8128(a) of FECA³ OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. OWCP must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that “An application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.”⁴ In *Leon D. Faidley, Jr.*,⁵ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant’s case.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ 41 ECAB 104, 111 (1989).

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates “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 be 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 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 fundamental question as to the correctness of OWCP’s decision.¹² The Board makes an independent determination of whether a claimant 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.¹³

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated July 2, 2014 in which it declined to reopen appellant’s case on the merits because the request was not timely filed, and did not show clear evidence of error. Since more than 180 days elapsed from the date of issuance of OWCP’s September 28, 2012 merit decision to the date of the filing of appellant’s appeal, on December 10, 2014, the Board lacks jurisdiction to review that decision.¹⁴

The Board finds that contrary to counsel’s argument on appeal, OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought. The regulatory language unequivocally sets a one-year time limitation for

⁶ 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

⁸ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *See Jesus D. Sanchez*, *supra* note 6.

¹⁰ *See supra* note 8.

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

¹² *Supra* note 5.

¹³ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹⁴ *See* 20 C.F.R. § 501.3(e).

reconsideration requests to be received by OWCP.¹⁵ As appellant's request for reconsideration was not received by OWCP until September 30, 2013 more than one year after issuance of the September 28, 2012 merit decision, it was untimely. On appeal, counsel argued that the requirement of receipt by OWCP within one year of the date of merit decision prejudiced appellant's rights. The Board has consistently upheld this regulatory standard and the argument is without merit.¹⁶

On appeal, counsel also argued that OWCP failed to issue a timely decision regarding the request for reconsideration and that this prejudiced appellant's appeal rights. The Board notes that OWCP has a timeliness goal for issuing reconsideration decisions of within 90 days from receipt of the request.¹⁷ OWCP's procedures provide that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review.¹⁸ However, the procedure manual notes there is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request.¹⁹ The Board finds that in this case the 180-day period for appeal expired before appellant's request for reconsideration and that therefore OWCP's delay in issuing the decision on her request for reconsideration did not impact her appeal rights. Counsel's argument on appeal is thus without merit.

OWCP denied appellant's traumatic injury claim on the grounds that there was insufficient medical evidence to establish that her February 28, 2012 employment incident resulted in an injury as alleged. The hearing representative specifically noted that there was no medical evidence based on a proper factual background which established a causal relationship between the employment incident and appellant's diagnosed back conditions. With her untimely request for reconsideration, appellant submitted additional medical evidence from Dr. Groves opining that the February 28, 2012 employment incident resulted in an aggravation of appellant's underlying back condition. While Dr. Groves provided a clear and detailed history of injury and opined that appellant's underlying spinal stenosis was temporarily aggravated by her "pop" while stepping out of her postal vehicle on February 28, 2012 which resulted in a strain and radiculitis, she did not provide any medical reasoning explaining how or why these conditions resulted from the employment activity of stepping out of a postal vehicle. She failed to provide a rationalized medical explanation as to how appellant's employment incident aggravated her underlying back condition. Dr. Groves report does not establish clear evidence of error as it does not show that OWCP committed an error in denying appellant's claim, nor does it raise a substantial question as to the correctness of OWCP's decision.

¹⁵ *Id.* at § 10.607(a); *L.H.*, Docket No. 14-1655 (issued February 20, 2015).

¹⁶ *A.S.*, Docket No. 15-17 (issued February 27, 2015); *R.L.*, Docket No. 14-1342 (issued February 24, 2015).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (October 2011).

¹⁸ *Id.* at Chapter 2.1602.7.

¹⁹ *Id.*

The nerve conduction testing dated June 5, 2012 is diagnostic in nature and therefore does not address causal relationship. As such, the Board finds that it is insufficient to establish clear evidence of error.²⁰

On appeal, counsel argued that OWCP failed to consider whether appellant sustained an aggravation of her underlying condition in denying her claim on September 28, 2012. The Board notes that the hearing representative reviewed the medical evidence before her at the time the decision was issued and found that it was not sufficient to establish a causal relationship including an aggravation of appellant's preexisting back condition, noting that Dr. Parvez's reports including finding of an aggravation were not based on a proper factual background. This argument is not sufficient to establish clear evidence of error on the part of OWCP as it does not establish a clear procedural error, and is not of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of OWCP's decision.

The Board finds that the July 2, 2014 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute an abuse of discretion.

CONCLUSION

The Board finds that the July 2, 2014 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute an abuse of discretion.

²⁰ R.R., Docket No. 15-9 (issued February 27, 2015).

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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