

ISSUE

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

On appeal appellant's representative contends that appellant sustained a work-related injury.

FACTUAL HISTORY

On October 30, 2013 appellant, then a 56-year-old program support clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 24, 2013 she hurt her neck, back, and shoulders at work.

The employing establishment controverted the claim as appellant did not report her injury within 30 days and there was conflicting information regarding her injury.

By letter dated November 12, 2013, OWCP notified appellant of the deficiencies of her claim and afforded her 30 days to submit medical and factual evidence.

In an undated narrative statement, received on November 15, 2013, appellant described the alleged September 24, 2013 incident. She reported that between 7:15 a.m. and 8:00 a.m. on that date she placed an amplifier in a cabinet and when she proceeded to close the second door of the cabinet, the door came down on top of her so fast that she fell down. Appellant immediately placed the heavy door back onto the cabinet. She then informed Max Velazquez, Acting Chief of Medical Media Service, about the incident, who told appellant to talk to Maria Olivero, Chief of Medical Media Service, but she was not in the office at that time. Appellant took Tylenol to ease her pain, but the pain did not stop. She continued to work the whole week with pain and discomfort. On September 30, 2013 appellant told Mr. Velazquez about her continued pain and discomfort. Mr. Velazquez responded by giving her a form to present to the employee health unit. Appellant stated that she did not go to the health unit on that day. She went a few days later and was treated by Dr. Angel Green, a Board-certified internist, who recommended that she see an outside physician. Appellant saw a physician and was advised to obtain a sonogram of her shoulders and a magnetic resonance imaging scan of her back.

In an employing establishment report of contact dated October 29, 2013, Mr. Velazquez related that on the morning of September 30, 2013 appellant requested a form to see an employee health physician regarding her right shoulder pain which had resulted from an injury she allegedly sustained during the week of September 24 to 27, 2013 due to a loose cabinet door. He prepared the form and provided it to her. Mr. Velazquez noted that appellant did not return the form report indicating that she had visited an employee health physician.

An employing establishment incident report dated October 30, 2013 described the September 24, 2013 incident. The form reported that appellant injured both shoulders when the cabinet door fell while opening a cabinet.

In an undated statement, Ms. Olivero provided a chronology of events regarding appellant's alleged injury. She reported that appellant initially informed her of an October 8,

2013 injury and then later informed her that the correct date of injury was September 24, 2013. Mr. Velazquez informed Ms. Olivero that he had given appellant a form authorizing her visit to the employee health unit on September 30, 2013 and that she did not go to the health unit during that week. Ms. Olivero noted that appellant provided a copy of a work order dated September 24, 2013 to fix a cabinet door.

Appellant submitted medical reports and diagnostic test results dated October 22 to November 8, 2013 and undated reports, which addressed her bilateral shoulder, cervical, and lumbar conditions, disability for work, and medical treatment. She underwent surgery on November 8, 2013 to repair a rotator cuff tear of the right shoulder.

In a December 16, 2013 decision, OWCP denied appellant's claim as the medical evidence did not establish that she sustained a medical condition causally related to the accepted work incident of September 24, 2013.

On December 27, 2013 appellant requested a telephone hearing with an OWCP hearing representative. She submitted medical reports dated November 1, 2013 to July 25, 2014, which addressed her bilateral shoulder and elbow, cervical, and lumbar conditions, disability for work, and medical treatment. Diagnostic test results dated June 20 and 30, and July 31, 2014 addressed her bilateral upper and lower extremity conditions.

In a September 24, 2014 decision, an OWCP hearing representative affirmed the December 16, 2013 denial decision. She found that the medical evidence was insufficient to establish that appellant sustained a medical condition causally related to the September 24, 2013 accepted employment incident.

On October 5, 2015 appellant, through her representative, requested reconsideration of the September 24, 2014 decision. In an undated letter, she further described the September 24, 2013 employment incident and explained the delay in filing her traumatic injury claim and seeking medical treatment.

In a June 20, 2014 report, Dr. Juan Echeandia, a family practitioner, reviewed appellant's medical records, noted her complaints of pain in the cervical, lumbar, and shoulder regions, and reported findings on physical examination. He diagnosed status postoperative right shoulder arthroscopy, cervical and lumbar spine disease, bulging discs at C3-C4, C4-C5, C5-C6, L4-L5, and L5-S1, and tendinosis supraspinatus tendon and bursitis of the right shoulder.

In an October 7, 2015 decision, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.³

³ 20 C.F.R. § 10.607(a).

Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁵

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

OWCP procedures note 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.⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for a merit review of her claim. OWCP regulations⁹ and procedures¹⁰ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues,¹¹

⁴ *Id.* at § 10.607(b); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁵ *See Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *Robert G. Burns*, 57 ECAB 657 (2006).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

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

⁹ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, *supra* note 5.

¹⁰ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4 (October 2011); *see Veletta C. Coleman*, 48 ECAB 367 (1997).

¹¹ *See Robert F. Stone*, 57 ECAB 292 (2005).

including any merit decision by the Board and any merit decision following action by the Board.¹² The most recent merit decision was an OWCP hearing representative's September 24, 2014 decision affirming the denial of appellant's traumatic injury claim as she had not submitted sufficient medical evidence to establish a medical condition causally related to the accepted work incident. Appellant had one year from the date of this decision to make a timely request for reconsideration. Her request for reconsideration was received by OWCP on October 5, 2015.¹³ As her request for reconsideration was received more than one year after the September 24, 2014 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her traumatic injury claim.¹⁴

The Board finds that the arguments and evidence submitted by appellant in support of her request for reconsideration do not raise a substantial question as to the correctness of OWCP's hearing representative's September 24, 2014 decision which affirmed OWCP's December 16, 2013 finding that the medical evidence did not establish that the September 24, 2013 employment incident caused an injury.

In her request for reconsideration, appellant described the September 24, 2013 employment incident and explained the delay in filing her traumatic injury claim and seeking medical treatment. The Board notes, however, that the factual occurrence of the September 24, 2013 work incident is not in dispute. The claim was denied because the medical evidence did not establish that the September 24, 2013 incident caused an injury.

Appellant submitted Dr. Echeandia's June 20, 2014 report. Dr. Echeandia diagnosed status postoperative right shoulder arthroscopy, cervical and lumbar spine disease, bulging discs at C3-C4, C4-C5, C5-C6, L4-L5, and L5-S1, and tendinosis supraspinatus tendon and bursitis of the right shoulder. While Dr. Echeandia's report provided appellant's diagnoses, it did not demonstrate clear evidence of error.¹⁵ As noted, clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not sufficient to establish clear evidence of error.¹⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁷

¹² See *E.C.*, Docket No. 13-1937 (issued February 6, 2014); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4(a) (October 2011).

¹³ See 20 C.F.R. § 10.607(a) (the reconsideration request must be received within one year of OWCP's decision for which review is sought).

¹⁴ *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ See *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

¹⁶ *Supra* note 7.

¹⁷ *Supra* note 8.

On appeal appellant's representative contends that appellant sustained a work-related injury. As previously noted, the Board does not have jurisdiction over the merits of the claim. The only issue on appeal is whether OWCP properly denied appellant's request for reconsideration, as untimely filed and failing to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board