

and pulling medical equipment on carts in the performance of duty. She stopped work on October 18, 2006 and returned to modified duty on October 24, 2006. The Office accepted appellant's claim for aggravated right wrist arthritis, aggravated degenerative lumbar intervertebral discs, aggravated bilateral carpal tunnel syndrome and aggravated trochanteric bursitis.

Initial medical reports from Dr. William Swedler, a Board-certified internist, noted appellant's medical history included cervical spine stenosis at C3-4, C4-5 and C5-6 with disc herniation, bilateral carpal tunnel syndrome, fibromyalgia and trochanteric bursitis. Dr. Swedler advised indefinite light duty.

On October 19, 2007 appellant filed a claim for compensation beginning September 30, 2007. She continued submitting claims for compensation thereafter. Appellant stopped work on September 30, 2007 and did not return.

In an October 23, 2007 attending physician's report, Dr. Swedler diagnosed degenerative arthritis of the cervical and lumbar spine with stenosis, post-traumatic degenerative joint disease of the wrist and trochanteric bursitis. He indicated that appellant had been totally disabled since July 3, 2007. On November 2, 2007 Dr. Swedler indicated that since the October 8, 2006 work incident appellant had been unable to perform either full or light duty. He noted that work activities caused pain and undue stress and advised that appellant was disabled from work.

In a December 10, 2007 report, Dr. Stephen Chester, an osteopath specializing in emergency medicine, diagnosed chronic low back pain, resolved abdominal pain and history of post-traumatic stress disorder. He advised that appellant follow up with her primary care physician in three days.

On November 13, 2007 the Office referred appellant to Dr. Julie Wehner, a Board-certified orthopedic surgeon, for a second opinion. In a December 12, 2007 report, Dr. Wehner noted appellant's history including that she was discharged from the army with 50 percent medical disability due to carpal tunnel syndrome, for which she underwent a release in 1986. She noted examination findings and related that appellant reported she had been diagnosed with rheumatoid arthritis. Dr. Wehner diagnosed lumbar strain and indicated it was unclear if appellant had rheumatoid arthritis as there was no medical documentation. She noted that, if appellant had rheumatoid arthritis, it might require specific work limitations. Dr. Wehner opined that, based on the October 8, 2006 lumbar strain injury, there was no reason appellant could not return to full duty without work limitations. In a work capacity evaluation dated December 12, 2007, she advised that appellant could perform her usual job for eight hours per day.

The Office referred appellant to Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Drs. Swedler and Wehner regarding whether appellant was disabled. In an April 2, 2008 report, Dr. Komanduri provided appellant's detailed history and listed examination findings. He found evidence of bilateral carpal tunnel syndrome, mild thenar atrophy, no range of motion deficits in the wrists and no gross sensory deficits despite complaints of numbness. Dr. Komanduri opined that appellant's complaint of bilateral carpal tunnel syndrome, degenerative spinal stenosis, trochanteric bursitis and wrist arthritis was not caused or aggravated by work trauma. He noted no physical findings supported

radiculopathy and there was evidence of symptom fabrication. Dr. Komanduri opined that appellant's preexisting degenerative disease, wrist arthritis, trochanteric bursitis and bilateral carpal tunnel syndrome should not be considered work related. He explained that appellant did not do repetitive wrist flexion at work and simply pushing a cart would not cause or aggravate this condition beyond normal carpal tunnel syndrome and wrist arthritis. Dr. Komanduri noted that it appeared appellant did sustain low back strain of some sort on October 8, 2006 but that he did not believe this caused or aggravated lumbar intervertebral disc disease or trochanteric bursitis. He further noted that a lumbar strain would have resolved with treatment within three months from the date of injury. Dr. Komanduri opined that appellant's injury had resolved without permanent disability or need for further treatment or work restrictions. He further opined that other preexisting conditions were unrelated to this claim.

In an April 7, 2008 decision, appellant denied appellant's claim for compensation beginning September 30, 2007 finding that the weight of the medical evidence supported that appellant was not totally disabled from work due to her accepted work injury.¹

On November 29, 2008 appellant's attorney requested a telephone hearing for the Office's decision "dated November 25, 2008."

In a December 17, 2008 decision, the Office denied appellant's request for a telephone hearing as untimely filed as the request was filed more than 30 days after the April 7, 2008 decision. It noted that the matter could be further addressed through reconsideration.

In an October 19, 2009 letter, appellant's attorney requested reconsideration. He acknowledged that the request was more than one year after the April 7, 2008 Office decision but asserted that an accompanying April 15, 2009 medical report established clear evidence of error. Appellant submitted an April 15, 2009 report with an illegible signature noting that she had confirmed stenosis of the lumbar and cervical spine. The report also noted that appellant had right wrist tendinitis, bursitis, right trochanteric bursitis and fibromyalgia. It further noted that on October 8, 2006 appellant was pushing a cart at work that exaggerated her conditions and resulted in severe cervical radiculopathy, lumbar radiculopathy, and wrist and elbow tendinitis. The report listed work restrictions and advised that appellant was fully disabled from work.

In a November 3, 2009 decision, the Office denied appellant's reconsideration request finding it was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.² It will not review a decision denying or terminating a benefit unless the application for review is

¹ On May 7, 2008 appellant authorized her attorney to represent her. On November 25, 2008 the Office provided counsel with a copy of the April 7, 2008 decision.

² 5 U.S.C. § 8128(a).

filed within one year of the date of that decision.³ In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁴

When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁵ Its procedures state that the Office 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 the Office.⁶ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office 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 the Office. 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 raise a substantial question as to the correctness of the Office's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office, such that the Office abused its discretion in denying merit review in the face of such evidence.⁸

ANALYSIS

The Board finds that the Office properly found that appellant filed an untimely request for reconsideration. The one-year period for requesting reconsideration begins on the date of the original decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit

³ 20 C.F.R. § 10.607; *see also* *D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

⁴ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁵ *A.F.*, 59 ECAB ____ (Docket No. 08-977, issued September 12, 2008).

⁶ *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009).

⁷ *D.G.*, 59 ECAB ____ (Docket No. 08-137, issued April 14, 2008).

⁸ *Id.*

decision following action by the Board, but does not include prerecoupmnt hearing decisions.⁹ Therefore, appellant had one year from April 7, 2008 to submit a timely request for reconsideration. As her October 19, 2009 reconsideration request was made more than one year after the April 7, 2008 merit decision, the request was untimely.

As noted, when an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.¹⁰ The Board finds that appellant did not submit any evidence with her reconsideration request that raises a substantial question concerning the correctness of the Office's April 7, 2008 decision and establishes clear evidence of error. In an October 19, 2009 letter, appellant's attorney indicated he was submitting a medical report that met the criteria to establish clear evidence of error. However, this broad and general statement did not specifically address the relevant issue, which is medical in nature, regarding whether appellant was totally disabled for work beginning September 30, 2007 due to her accepted injury. Therefore, the attorney's letter did not raise a substantial question as to the correctness of the Office's decision.

The April 15, 2009 report appellant submitted with her reconsideration request lacks probative value as it contains an illegible signature with an unidentifiable author.¹¹ Neither the reconsideration request nor any other evidence of record identifies the person that signed the April 15, 2009 report. Following the April 7, 2008 decision, appellant did not otherwise submit medical evidence addressing the underlying medical issue regarding the cause of her claimed disability. In any event, the Board notes that the term 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 denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹²

Therefore, appellant has not submitted sufficient evidence to raise a substantial question as to the correctness of the Office's decision and has not established clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

⁹ *Leon D. Faidley*, 41 ECAB 104, 111 (1989). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (June 2002).

¹⁰ See *A.F.*, *supra* note 5.

¹¹ See *D.D.*, 57 ECAB 734 (2006) (medical reports lacking proper identification do not constitute probative medical evidence).

¹² See *A.F.*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated November 3, 2009 is affirmed.

Issued: September 7, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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