

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

<p>B.F., Appellant</p> <p>and</p> <p>U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Oklahoma City, OK, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 11-1181</p> <p>Issued: December 8, 2011</p>
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Appearances:
Lisa Head, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 31, 2011 appellant, through his representative, filed a timely appeal of the October 7, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than one year elapsed between the most recent merit decision dated July 18, 2007 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

¹ Under the *Board's Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's decision was issued on October 7, 2010 the 180-day computation begins on October 8, 2010. 180 days from October 8, 2010 was April 5, 2011. Since using April 6, 2011, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 31, 2011, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

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).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits as untimely filed and lacking clear evidence of error.

On appeal, counsel contends that the medical evidence of record established that appellant sustained an employment-related injury. Appellant further contends that he relied on the incorrect advice of a supervisor regarding the filing of his occupational disease claims (Form CA-2) and did not timely respond to OWCP's request for additional evidence.

FACTUAL HISTORY

On May 23, 2007 appellant, then a 54-year-old automated flat sorter, filed an occupational disease claim, Form CA-2, alleging that his right shoulder condition was caused by repetitive reaching, casing mail, pushing postcons and lifting heavy trays and tubs filled with mail in the performance of duty.

By letter dated June 4, 2007, OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested additional supporting evidence. It also requested that the employing establishment submit evidence in response to appellant's claim.

Medical records from Dr. John W. Ellis, an attending Board-certified family practitioner, and Dr. Glenn L. Smith, an orthopedic surgeon, dated March 20, 27 and May 22, 2007 advised that appellant could work with no restrictions.

In a July 18, 2007 decision, OWCP denied appellant's claim, finding the medical evidence insufficient to establish that he sustained an injury causally related to the established work-related duties.

On September 9, 2010 appellant requested reconsideration. In a September 9, 2010 letter, he contended that a detailed report from Dr. Ellis related his job duties to his claimed right shoulder injury. Appellant believed that his claim had been accepted which was assured by Dr. Ellis who also continued to treat him. He experienced a great deal of pain due to the rotator cuff tear in his right shoulder which required surgery. Appellant was deaf which made it difficult for him to navigate certain aspects of his life. He relied on his supervisors, including Mike Morris, a supervisor of distribution operations, physicians and Ms. Head, a congressional staff member, to navigate the workers' compensation process.

Appellant submitted medical reports from Dr. Ellis. In reports dated May 22, 2007 through December 9, 2009, Dr. Ellis obtained a history of appellant's work duties and prior employment-related injury. He listed his findings on physical examination and advised that appellant had a strain, bicipital tendinitis, impingement syndrome, adhesive capsulitis and an 80 percent thickness partial undersurface supraspinatus tendon tear of the right shoulder due to the established work duties. Dr. Ellis was restricted to left-hand work only. In a partially illegible report, he stated that a magnetic resonance imaging (MRI) scan of appellant's right shoulder showed degenerative changes. It was very likely that pushing and pulling a cart could aggravate existing problems in the shoulder. Dr. Ellis stated that another right shoulder MRI scan was

performed due to continued symptoms. It also revealed an 80 percent tear of the supraspinatus tendon. Dr. Ellis concluded that this condition was caused by nontreatment. In a July 14, 2008 certification of health care provider for Family and Medical Leave Act (FMLA), he reiterated his prior diagnosis of right shoulder impingement syndrome. This condition commenced on April 24, 2007.

In disability certificates dated July 10, 2007 through April 21, 2009, Dr. Ellis advised that appellant could return to work with restrictions.

On April 7 and July 14, 2008 Dr. Ellis ordered physical therapy to treat appellant's right shoulder impingement syndrome.

Treatment notes dated May 22, 2007 to June 16, 2009 and a September 23, 2008 letter from physician's assistants in Dr. Ellis' office addressed appellant's right hand and shoulder pain and work restrictions.

In a December 4, 2007 report, Dr. A. Christopher Degner, a Board-certified radiologist, advised that an MRI scan of appellant's right shoulder demonstrated degenerative changes at the acromioclavicular (AC) joint and humeral head and tendinosis of the supraspinatus tendon without a full thickness tear. On November 18, 2009 Dr. Aldo A. Battiste, a Board-certified radiologist, stated that a right shoulder MRI scan revealed an 80 percent thickness partial undersurface supraspinatus tendon tear, a small amount of fluid in the subacromial subdeltoid bursa, mild lateral down sloping of acromion and ACL hypertrophy that may narrow the supraspinatus outlet and mild thinning of glenohumeral articular cartilage.

In a January 15, 2008 certification of health care provider for the FMLA, Joe Beasley, a physician's assistant, stated that appellant had right wrist carpal tunnel syndrome that commenced on May 18, 2002 and right shoulder impingement syndrome that commenced on April 24, 2007. Appellant was able to work with his current restrictions.

Reports from Christa Gatewood, a physical therapist, addressed appellant's treatment from January 15 to June 4, 2008. In a July 9, 2008 report signed and certified by Dr. Ellis, Ms. Gatewood measured the range of motion of appellant's right upper extremity. She stated that appellant's ongoing right shoulder pain was most likely due to inflammation on the biceps tendon and rotator cuff although it did not appear that he had a rotator cuff tear.

A July 1, 2010 report from Dr. Tom W. Ewing, a Board-certified osteopath, obtained a history of the accepted work duties and reviewed appellant's diagnostic results. Dr. Ewing listed his findings on physical examination of the right shoulder and diagnosed a partial thickness tear of the rotator cuff, bicipital tendinitis, impingement syndrome and ACL hypertrophy secondary to repetitive trauma. He opined that the diagnosed conditions were caused by the accepted employment duties.

In a letter dated November 21, 2008, Mr. Morris described appellant's work duties as an automated flat sorter.

By decision dated October 7, 2010, OWCP denied appellant's September 9, 2010 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 July 18, 2007.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of OWCP's decision as a matter of right.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of its 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.⁵

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by it in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.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 that 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 substantial question as to the correctness of OWCP's decision.¹² The

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

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

¹² *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.¹³

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. Its regulations and procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁴ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵

The most recent merit decision in this case was OWCP's July 18, 2007 decision which found the medical evidence insufficient to establish that appellant sustained a right shoulder injury causally related to the established work duties. As appellant's September 9, 2010 letter requesting reconsideration of the merits of his claim by OWCP was more than one year after the July 18, 2007 merit decision,¹⁶ the Board finds that it was not timely filed.

The Board further finds that appellant has not established clear evidence of error on the part of OWCP. In his September 9, 2010 reconsideration request, appellant asserted that an unidentified report from Dr. Ellis, who assured him that his claim had been accepted, established that he sustained an employment-related injury. He complained that the pain in his right shoulder was due to a rotator cuff tear that warranted surgery. While appellant addressed the nature of his injury, the Board finds that his general allegations do not raise a substantial question as to the correctness of OWCP's denial of his claim. The Board notes that the underlying issue in this case is medical in nature and the opinion of a lay person cannot be considered to be probative medical evidence.¹⁷ Although appellant contended that his delay in the filing a request for reconsideration was due to his hearing loss condition which required him to rely on assistance from others to navigate the workers' compensation process, such a reason will not excuse a failure to file a request for reconsideration within the one-year time limit of OWCP's regulations and procedures.¹⁸ The Board has held that the regulatory language is unequivocal in setting forth the time limit and does not indicate that the late filing may be excused by extenuating circumstances.¹⁹ The Board finds that appellant's arguments on

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

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

¹⁵ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁶ Appellant had one year to request reconsideration by OWCP of its July 18, 2007 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

¹⁷ *See Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992).

¹⁸ 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

¹⁹ *Donald Jones-Booker*, 47 ECAB 785 (1996).

reconsideration are insufficient to raise a substantial question concerning the correctness of OWCP's denial of his claim or to shift the weight of the evidence in his favor.

Moreover, the medical evidence relied upon by appellant in his reconsideration request is insufficient to establish clear error on the part of OWCP. The reports from Dr. Ellis found that appellant's right shoulder strain, bicipital tendinitis, impingement syndrome, adhesive capsulitis and partial supraspinatus tendon tear were caused by the established work duties. While Dr. Ellis' reports support a causal relationship between the claimed right shoulder condition and established work-related activities, they do not demonstrate clear evidence of error or raise a substantial question as to the correctness of OWCP's decision. He did not provide any medical opinion explaining how the established work duties caused the diagnosed conditions. Dr. Ellis' disability certificates found that appellant was able to return to work with restrictions from July 10, 2007 through April 21, 2009. He did not provide a diagnosis or address the relevant issue of whether appellant sustained a medical condition causally related to the established work duties. Dr. Ellis's April 7 and July 14, 2008 prescriptions ordered physical therapy to treat appellant's right shoulder impingement syndrome. This evidence contained no opinion on the work relatedness of the diagnosed condition. Similarly, the July 9, 2008 report of Ms. Gatewood, a physical therapist, which constitutes probative medical evidence as it was signed and certified by Dr. Ellis, a qualified physician,²⁰ did not provide an opinion addressing causal relation between appellant's ongoing right shoulder pain and accepted employment-related duties. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.²¹ Further, the Board notes that pain is a symptom, not a compensable medical diagnosis.²² For the reasons stated, the Board finds that the reports of Dr. Ellis and Ms. Gatewood are insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim.

The Board further finds that Ms. Gatewood's other reports and those of physician's assistants are of no probative value as they are not signed by a physician and, thus, do not constitute probative medical evidence.²³

Dr. Ewing's July 1, 2010 report found that appellant's right shoulder partial thickness tear of the rotator cuff, bicipital tendinitis, impingement syndrome and ACL hypertrophy were caused by the established work duties. He did not provide any medical opinion explaining how the established work duties caused the diagnosed conditions. The Board finds, therefore, that Dr. Ewing's report is insufficient to establish clear evidence of error on the part of OWCP in the July 18, 2007 decision.

²⁰ 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

²¹ *F.R.*, Docket No. 09-575 (issued January 4, 2010).

²² *Robert Broome*, 55 ECAB 339 (2004); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

²³ 5 U.S.C. § 8101(2); see *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physical therapists and physician's assistants are not competent to render a medical opinion under FECA).

None of the other evidence submitted by appellant on reconsideration raised a substantial question as to the correctness of OWCP's denial of his claim as it did not provide a medical opinion addressing the relevant issue of whether he sustained a right shoulder condition due to the established work duties.²⁴

The Board finds that the arguments and evidence submitted by appellant in support of his untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet his burden of proof to show clear evidence of error on the part of OWCP.

Although counsel contended on appeal that, appellant sustained an injury causally related to the established work duties, the medical evidence, as discussed above, was not sufficient to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision.

Similarly, appellant's contention that his request for reconsideration was not timely filed due to his reliance on incorrect advice regarding the filing of CA-2 forms from a supervisor, as discussed above, was not sufficient to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's denial of his claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

²⁴ *F.R.*, *supra* note 21.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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