

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

FACTUAL HISTORY

On March 21, 2008 appellant, then a 45-year-old letter carrier, filed an occupational disease claim alleging that she sustained neck and wrist injuries as a result of employment activities. By decision dated May 6, 2008, OWCP denied her claim on the grounds that the evidence failed to establish a causal relationship between her employment activities and her claimed conditions.

On November 26, 2008 appellant requested reconsideration. In a January 30, 2009 decision, OWCP vacated its May 6, 2008 decision regarding the claim for a wrist condition and accepted appellant's claim for bilateral carpal tunnel syndrome. It, however, denied modification of its prior decision regarding its denial of her claim for a cervical condition. OWCP found the evidence insufficient to establish a causal relationship between appellant's claimed cervical condition and established employment activities.

Appellant submitted reports from her treating physicians, Dr. Boqing Chen, a Board-certified physiatrist, who treated her for carpal tunnel syndrome and Dr. Michael Rieber, a Board-certified orthopedic surgeon, who treated her for a cervical condition. In a May 1, 2009 report, Dr. Rieber stated that he had been treating her since June 2008 for neck pain and carpal tunnel syndrome. He noted that a recent magnetic resonance imaging (MRI) scan showed an obvious disc herniation. Dr. Rieber opined that appellant's neck condition was causally related to her work because she had sustained no previous injury to her neck.

In a March 22, 2010 report, Dr. Rieber provided a narrative summary of his treatment, noting that appellant had engaged in repetitive activities, training and heavy lifting at work. He diagnosed cervical radiculopathy with carpal tunnel syndrome and opined that her work activities aggravated her underlying cervical condition and were "more causally related to cause cervical radiculopathy than even her carpal tunnel syndrome." Dr. Rieber indicated that the requirements of appellant's position, which included heavy lifting, twisting and carrying, more often than not caused disc pathology. He stated, "This is clearly, without question, causally related and should be addressed and treated."³

On July 14, 2010 appellant, through her representative, requested reconsideration of the January 30, 2009 decision, and asked that accepted conditions be expanded to include a cervical condition. Counsel contended that Dr. Rieber's March 22, 2010 report "clearly established" that appellant's cervical condition was causally related to her job activities.

³ The record reflects that OWCP accepted an October 23, 2009 claim for recurrence of a medical condition related to appellant's carpal tunnel syndrome on January 8, 2010, and a claim for recurrence of disability related to right carpal tunnel release surgery on July 7, 2010. The record also contains medical reports, diagnostic tests results, hospital reports and disability slips related to appellant's carpal tunnel condition.

In a September 9, 2010 decision, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of a decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ OWCP regulations and procedures provide that it 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 OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). 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. *Id.* at Chapter 2.1602.3c.

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See M.L.*, Docket No. 09-956 (issued April 15, 2010). *See Leona N. Travis*, *supra* note 10.

and whether the new evidence demonstrates clear error on the part of OWCP.¹³ 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.¹⁴

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. The one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision and upon any subsequent merit decision.¹⁵ As appellant's July 14, 2010 request for reconsideration was submitted more than one year after OWCP's January 30, 2009 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error on the part of OWCP in the denial of her claim.¹⁶

Appellant contended that her claim was improperly denied as she submitted sufficient medical evidence to support her cervical condition. This contention does not establish error on the part of OWCP, but merely repeats arguments previously raised and considered by it. Appellant's arguments on reconsideration are insufficient to raise a substantial question concerning the correctness of OWCP's denial of her claim or to shift the weight of the evidence in her favor.

Moreover, the medical evidence relied upon by appellant in her reconsideration request is insufficient to establish clear error on the part of OWCP. In his May 1, 2009 report, Dr. Rieber provided a history of his treatment and reviewed a recent MRI scan, which showed an obvious disc herniation. He opined that appellant's neck condition was causally related to her work because she had sustained no previous injury to her neck. In a March 22, 2010 report, Dr. Rieber diagnosed cervical radiculopathy with carpal tunnel syndrome and opined that her work activities aggravated her underlying cervical condition and were "more causally related to cause cervical radiculopathy than even her carpal tunnel syndrome." He indicated that the requirements of appellant's position, which included heavy lifting, twisting and carrying, more often than not caused disc pathology. Dr. Rieber stated, "This is clearly, without question, causally related and should be addressed and treated." The Board finds that, while his reports support a causal relationship between the claimed cervical condition and work-related activities, they do not raise a substantial question as to the correctness of OWCP's decision. 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 prior to the merit decision denying the original claim, would have created a conflict in medical opinion requiring further development, does not constitute clear evidence of error.¹⁷

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁵ *Supra* note 5; see *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁶ *Supra* note 7; see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ *Joseph R. Santos*, 57 ECAB 554 (2006).

The remaining evidence submitted subsequent to the January 30, 2009 merit decision relating to appellant's carpal tunnel syndrome, is not relevant to the issue that was adversely decided by OWCP. Therefore, it is insufficient to establish clear evidence of error.

Accordingly, the Board finds that the evidence submitted by appellant does not establish evidence of clear error.¹⁸

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁸ On appeal, counsel contends that the medical evidence of record establishes error on the part of OWCP in denying merit review. For reasons stated herein, the Board finds that the evidence is insufficient to establish clear evidence of error. Counsel also argues that the claim should be expanded to include a cervical condition, as employment conditions continued to aggravate appellant's cervical condition even after the filing of the March 21, 2008 occupational disease claim. Appellant may file a new occupational disease claim for new injuries, as counsel indicated that he intended to do on her behalf.