

than 180 days elapsed from the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.³

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for further merit review of her claim under 5 U.S.C. § 8128(a); and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On October 9, 2007 appellant, then a 57-year-old postmaster relief, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left shoulder injury on October 6, 2007 when she picked up an oblong box off the floor with her left arm.

In a narrative statement, Emy Troutman, appellant's supervisor, reported that she was not present when appellant allegedly hurt her shoulder that morning or recall ever hearing her complain of shoulder pain prior to the date of injury.

In emergency room medical reports dated October 6, 2007, Dr. Kenneth Langille, a treating physician, diagnosed left shoulder bursitis.

In medical reports dated December 22, 2006 to May 5, 2007, prior to the October 6, 2007 employment incident, Dr. Shabir Bhayani, a Board-certified orthopedic surgeon, reported that appellant complained of left shoulder pain and had problems with her shoulders for several years. He reviewed her magnetic resonance imaging (MRI) scan and diagnosed bilateral shoulder impingement syndrome and acromioclavicular joint arthritis due to degenerative changes. Dr. Bhayani noted no tear of the rotator cuff.

In medical reports dated October 9 to November 6, 2007, Dr. Bhayani reported a history that appellant noted a sharp pain in her left shoulder after she lifted a heavy box at work on October 6, 2007. Dr. Bhayani diagnosed left shoulder capsulitis, impingement syndrome and left acromioclavicular joint arthritis.

By letter dated February 4, 2008, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

Appellant submitted a January 30, 2008 medical report from Dr. Bhayani, who reported that she continued to have left shoulder pain from her October 6, 2007 injury.

³ For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

By decision dated March 5, 2008, OWCP denied appellant's claim finding that the evidence was insufficient to establish that her injury was causally related to the accepted October 6, 2007 employment incident.

On November 1, 2008 appellant, through her attorney, requested reconsideration of OWCP's decision.

In a narrative statement, appellant reported how the October 6, 2007 incident occurred. She noted that she previously had corticosteroid shots in both of her shoulders for pain caused by too much work and that the shots would relieve her pain. After October 6, 2007, appellant was in constant pain with her shoulder joint.

In medical reports dated July 6, 2004 to August 15, 2006, Dr. Bhayani noted that appellant complained of bilateral shoulder pain and diagnosed her with impingement syndrome and acromioclavicular joint arthritis.

In a January 5, 2007 MRI scan of the left shoulder, Dr. Mark J. Welch, a Board-certified diagnostic radiologist, reported that there was no evidence of tear.

In a July 7, 2008 note, Dr. Bhayani recommended surgery for appellant's left shoulder impingement syndrome.

By decision dated March 12, 2009, OWCP affirmed its March 5, 2008 decision finding that the medical evidence did not establish that appellant's left shoulder condition was causally related to the October 6, 2007 employment incident.

By letter dated September 29, 2009, appellant, through her attorney, requested reconsideration of OWCP's decision. In medical reports dated January 20 and June 14, 2009, Dr. Bhayani noted that appellant was initially treated on October 9, 2007 after she lifted a box on October 6, 2007 at work and felt a sharp pain. Appellant's diagnosis at that time was acromioclavicular joint arthritis, impingement syndrome, capsulitis and trapezial strain possibly related to degenerative joint disease of the cervical spine. She underwent surgery on June 2, 2008 for arthroscopy of the left shoulder, open distal clavicle resection and subacromial decompression. A September 2, 2008 MRI scan of the cervical spine showed degenerative joint disease, mild spinal stenosis and no herniated disc. An October 7, 2008 MRI scan of the rotator cuff showed tendinitis but no rotator cuff tear. Dr. Bhayani stated that appellant had been treated prior to October 6, 2007 for both shoulders and was doing well prior to this injury. He opined that the October 6, 2007 incident aggravated her prior condition.

By decision dated November 17, 2009, OWCP affirmed the March 12, 2009 decision, finding that the medical evidence failed to establish that appellant's left shoulder injury was causally related to the October 6, 2007 employment incident.

By letter dated May 13, 2010, appellant, through her attorney, requested reconsideration of the November 17, 2009 OWCP decision.

In support of her request, appellant submitted a May 13, 2010 medical report from Dr. Garrett W. Dixon, Board-certified in physical medicine and rehabilitation, who reported that

he initially evaluated her on January 27, 2010 for shoulder pain. Dr. Dixon noted that she had a history of bilateral shoulder tendinitis and tendinopathy, worse on the left side. He opined that appellant's existing tendinopathy of the left shoulder was aggravated by her lifting injury on October 6, 2007. Dr. Dixon noted that, given the underlying tendinopathy, an aggravation of this condition would not be surprising following a lifting injury.

By decision dated May 27, 2010, OWCP affirmed the November 17, 2009 decision. It noted that Dr. Dixon's report was based on an inaccurate factual history and that his report failed to explain how the incident caused the aggravation of the injury.

By letter dated May 12, 2011, appellant, through her attorney, requested reconsideration of the May 27, 2010 OWCP decision. Counsel noted that he was enclosing the appeal request form, appellant's affidavit, a June 2, 2008 surgical report, a January 16, 2007 office note and a January 5, 2007 MRI scan report.

In an undated statement, appellant reported that the January 5, 2007 MRI scan showed no evidence of tear. She stated that the June 2, 2008 postoperative report showed that tears were present when she had surgery and that she was diagnosed with anterior-superior labral tears of the left shoulder. Appellant stated that a November 24, 2009 medical report from Dr. Bhayani opined that lifting the box, which required abduction rotation of the shoulder, was a mechanism that would cause impairment syndrome which established causal relationship between her injury and the October 6, 2007 employment incident. She contended that the factual and medical evidence was sufficient to establish that the October 6, 2007 incident caused or aggravated her left shoulder condition, noting that the anterior-superior labral tear was a firm diagnosis that was not present prior to the October 6, 2007 incident. Appellant stated that she was enclosing a June 2, 2008 surgical report, a January 16, 2007 office note and a January 5, 2007 MRI scan.

By decision dated August 11, 2011, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence. It noted that Dr. Bhayani's November 24, 2009 report, the June 2, 2008 surgical report and the January 16, 2007 office note were not submitted. OWCP further noted that the other medical evidence referenced by appellant in her statement had previously been submitted and reviewed.

On August 19, 2011 appellant, through her attorney, requested reconsideration. Counsel argued that the medical evidence was submitted as enclosures with his May 12, 2011 letter and that the missing reports must have been an oversight because OWCP did receive some of his enclosures. The attorney stated that he was enclosing the appeal request form, explanations and appellant's affidavit, a June 2, 2008 surgical report, a January 16, 2007 office note, a January 5, 2007 MRI scan report and a November 24, 2009 office note.

In a May 12, 2011 narrative statement, appellant recounted her allegations of the October 6, 2007 incident and the medical treatment she received after that date. She resubmitted Dr. Welch's January 5, 2007 MRI scan report of the left shoulder and her previously submitted narrative statement.

In a June 6, 2008 surgical report, Dr. Bhayani provided a preoperative diagnosis of left shoulder acromioclavicular joint arthritis and impingement syndrome. A postoperative diagnosis stated left shoulder acromioclavicular joint arthritis and impingement syndrome, anterior-superior labral tears and grade 3 chondromalacia of the glenoid.

By decision dated September 7, 2011, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) of OWCP regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS -- ISSUE 1

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

On appeal, appellant's attorney argues that the a June 2, 2008 surgical report, January 16, 2007 office note and January 5, 2007 MRI scan were attached as enclosures with his May 12, 2011 letter requesting reconsideration but these reports were not received by OWCP. Appellant discussed Dr. Bhayani's November 24, 2009 medical report in her narrative statement. Counsel did not list this report as an enclosure and the record does not contain this report. The Board notes that, while the January 5, 2007 MRI scan report was not received, it was previously submitted and is duplicative of evidence already reviewed. As appellant's reconsideration request was received, the issue is whether the request was accompanied by new and relevant evidence. She has not otherwise provided argument or evidence of sufficient probative value to show that all of the referenced enclosures were ever received by OWCP.⁶ The record before the Board contains no such reports.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her May 12, 2011 application for reconsideration, she did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a new and relevant legal

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

⁶ *W.M.*, Docket No. 11-887 (issued December 12, 2007).

argument. Her argument was that her injury was employment related and she referenced various medical reports which would establish causal relationship. Appellant referenced Dr. Bhayani's November 24, 2009 report, a June 2, 2008 surgical report, a January 16, 2007 office note and a January 5, 2007 MRI scan report but failed to submit any medical evidence addressing causal relationship. There is no indication that any medical reports concerning causal connection was received by OWCP. The underlying issue in this case was whether appellant's injury was causally related to the accepted October 6, 2007 employment incident. That is a medical issue which must be addressed by relevant medical evidence.⁷ A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence addressing causal relationship.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

LEGAL PRECEDENT -- ISSUE 2

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁸ 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.⁹

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.¹⁰

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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.¹¹

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that

⁷ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁸ 20 C.F.R. § 10.607(a).

⁹ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹⁰ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *Jimmy L. Day*, 48 ECAB 652 (1997).

the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁴ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁵

ANALYSIS -- ISSUE 2

In its September 7, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.¹⁶ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷ As appellant's August 19, 2011 request for reconsideration was submitted more than one year after the date of the last merit decision of record on May 27, 2010, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁸

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In support of her request for reconsideration, appellant resubmitted a previous January 5, 2007 MRI scan and narrative statement already of record. She also submitted a June 6, 2008 operative report from Dr. Bhayani and a May 12, 2011 narrative statement detailing her injury. Dr. Bhayani provided a preoperative diagnosis of left shoulder acromioclavicular joint arthritis and impingement syndrome and a postoperative diagnosis stated left shoulder acromioclavicular joint arthritis and impingement syndrome, anterior-superior labral tears and grade 3 chondromalacia of the glenoid. However, this evidence is insufficient to establish that OWCP erred in its denial of appellant's claim.¹⁹ Dr. Bhayani did not provide detailed medical rationale explaining how the October 6, 2007 employment incident caused appellant's injury. Further, this evidence was submitted after OWCP's May 27, 2010 merit decision and the August 11, 2011 nonmerit decision denying appellant's request for reconsideration. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.²⁰ Dr. Bhayani's report does not raise a substantial question as to the correctness of OWCP's May 27, 2010 merit decision or demonstrate clear evidence of error.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁶ *Supra* at note 9.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹⁸ *See Debra McDavid*, 57 ECAB 149 (2005).

¹⁹ *See W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²⁰ Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.1602.3(c) (March 2011).

On appeal, appellant's attorney argues that he enclosed a January 5, 2007 MRI scan report, January 16, 2007 office note and a June 6, 2008 operative report with his May 12, 2011 letter. As noted, these enclosures were not received by OWCP as alleged by counsel.²¹ The Board further notes that, in the August 19, 2011 request for reconsideration, appellant's attorney stated that he was enclosing a November 24, 2009 report from Dr. Bhayani but no report was received.²²

Counsel raised several arguments that he had presented on prior occasions regarding the merits of the claim, namely, that appellant submitted sufficient medical evidence to support a causal relationship between her diagnosed shoulder condition and the October 6, 2007 employment incident. On its face this argument does not establish clear evidence of error.

Appellant's attorney further argued that his May 12, 2011 reconsideration request was timely and that his August 19, 2011 letter explaining his disagreement with OWCP's decision was not a request for reconsideration. The Board notes that OWCP issued a decision on August 11, 2011 denying a merit review of appellant's claim, pursuant to her timely May 12, 2011 reconsideration request. As the attorney's August 19, 2011 letter took issue with this decision, counsel was requesting reconsideration of the last OWCP decision of August 11, 2011.

Appellant's attorney also argues that the September 7, 2011 OWCP decision references receiving a duplicate copy of the June 2, 2008 operative report which shows that the report was in the file prior to the August 11, 2011 decision. The September 7, 2011 decision, however, states that OWCP received a copy, not a duplicative copy, of an operative report dated June 2, 2008 for left shoulder surgery."

Counsel's contentions do not establish clear evidence of error or raise a substantial question as to the correctness of OWCP's decision. The Board notes that the underlying issue is medical in nature and the medical evidence submitted was not sufficient to shift the weight of the evidence in her favor and establish that OWCP erred in denying her claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's May 12, 2011 request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence. The Board further finds that her August 19, 2011 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

²¹ *G.D.*, Docket No. 07-11-1 (issued September 11, 2007).

²² The Board notes that Dr. Bhayani's November 24, 2009 report was submitted after OWCP's September 7, 2011 decision. As previously mentioned, the Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ORDER

IT IS HEREBY ORDERED THAT the September 7 and August 11, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 2, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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