

ISSUE

The issue is 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

This case has previously been before the Board. By decision dated October 20, 2010, the Board affirmed an August 26, 2009 nonmerit decision of OWCP which denied appellant's reconsideration request and found that she neither raised substantive legal questions nor included new and relevant evidence.³ The findings of fact and conclusions of law from the prior decision and order are hereby incorporated by reference.

On April 8, 2009 appellant, then a 49-year-old automation clerk, filed an occupational disease claim (Form CA-2) alleging that she developed right shoulder bursitis and tendinitis, left shoulder pain and upper back pain and spasms. She reported that her injuries were a result of pushing, pulling and lifting trays of mail repeatedly, as well as sweeping mail.⁴ Appellant first became aware of her condition on January 20, 2007 and of its relationship to her employment on January 23, 2009.⁵

In an April 21, 2009 attending physician's report (Form CA-20), Dr. Mark O. Carter, Board-certified in family medicine, diagnosed bilateral shoulder tendinitis. He checked the box marked "yes" when asked if the condition was employment related.

By letter dated June 2, 2009, Dr. Carter reported that appellant was diagnosed with bilateral chronic shoulder pain, which was initially brought on by her preexisting work-related activities and which required surgery. In May 2008, appellant returned to work and switched positions to an automation clerk. Dr. Carter noted that she had preexisting conditions of acromioclavicular joint arthritis with prominent spurs, subacromial impingement with cystic changes to humeral head and tendinitis of rotator cuff. Appellant had surgery for these issues. Dr. Carter opined that the repetitive use of her upper arms was causing her chronic pain.

³ Docket No. 10-825 (issued October 20, 2010).

⁴ According to the statement of accepted facts, appellant was initially employed as a USPS window distribution clerk in March 1999. Due to several work-related injuries and work restrictions, she was given a new position as an automation clerk beginning in May 2008.

⁵ OWCP noted that appellant had prior accepted claims. Appellant's September 27, 2000 traumatic injury claim was accepted for a laceration/contusion of the right thumb, master claim number xxxxxx632. A May 13, 2003 occupational disease claim was accepted for a left shoulder tendinitis/sprain; chronic impingement and partial tear rotator cuff tendon; impingement and partial tear rotator cuff tendon. OWCP accepted a January 20, 2007 occupational disease claim for a right shoulder impingement syndrome with labral and cartilage tear with surgery performed in June 2007; aggravation of the left shoulder tendinitis/sprain, chronic impingement and partial tear rotator cuff with surgery performed in July 2007, master claim number. xxxxxx632. On February 10, 2010 appellant filed another occupational disease claim for carpal tunnel syndrome, claim number xxxxxx364.

By decision dated August 3, 2009, OWCP denied appellant's claim finding that the evidence failed to establish that the claimed shoulder conditions were related to the accepted work-related events.⁶

On August 17, 2009 appellant requested reconsideration. She stated that she was on limited duty as of January 23, 2009 and that further documentation would be submitted from Dr. Carter.

By decision dated August 26, 2009, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence. It specifically noted that no new additional evidence was submitted.⁷

On February 2, 2010 appellant sought review by the Board.

As noted, in an decision dated October 20, 2010, the Board affirmed the August 26, 2009 OWCP decision.⁸

On January 27, 2011 appellant, through her representative, requested reconsideration of the Board's October 20, 2010 decision. In support of her request, she provided a narrative statement describing the pain she endured from her injury which deteriorated her quality of life.

Appellant submitted two medical reports dated January 12, 2011 from Dr. Carter, who provided a history of her bilateral shoulder problems starting from 2003. After surgery in June 2007, she continued to experience spasms and pain due to her left shoulder. Appellant was placed on limited duty in her position as a sales service and distribution clerk. In May 2008, she started a new position as an automation clerk. Dr. Carter reported that appellant's duties included lifting mail trays, swiping letters, pushing and pulling containers of mail, sorting packages in the priority mail section, processing letters and magazines and lifting tubs of mail. He reported that she was in extreme pain in January 2009 and the repetitive motion from her work duties caused tendinitis and bursitis in both shoulders. Appellant was placed on limited-duty assignment and had not worked since May 2009.

⁶ OWCP noted that medical evidence from appellant's previous master claim number xxxxxx632 had been copied into this claim file. However, the medical evidence did not provide a medical opinion relating appellant's then current bilateral shoulder condition to her duties as an automation clerk.

⁷ The Board notes that appellant submitted additional evidence after OWCP rendered its August 26, 2009 decision. 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. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

⁸ Docket No. 10-825 (October 20, 2012).

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). The last merit decision of record was OWCP's August 3, 2009 decision. The time began to run from the August 3, 2009 decision on August 4, 2009 from which 180 days fell on Sunday, January 31, 2010. Appellant had until the close of the next business day, February 1, 2010 to timely submit an appeal; however, the postmark on the appeal was February 2, 2010. Thus, the Board lacked jurisdiction over the merits of the claim.

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

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁹ 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.¹⁰

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.¹¹

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.¹²

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

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

⁹ 20 C.F.R. § 10.607(a).

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

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

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

decision.¹⁷ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁸ As appellant's February 2, 2010 request for reconsideration was submitted more than one year after the last merit decision of record of August 3, 2009, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁹

The Board finds that appellant has not established clear evidence of error on the part of OWCP. Appellant submitted two medical reports from Dr. Carter, who noted that her duties as an automation clerk included lifting mail trays, swiping letters, pushing and pulling containers of mail, sorting packages in the priority mail section, processing letters and magazines and lifting tubs of mail. Dr. Carter reported that she was in extreme pain in January 2009 and the repetitive motion from her work duties caused tendinitis and bursitis in both shoulders. However, this evidence is insufficient to establish that OWCP erred in its denial of appellant's claim.²⁰ Although Dr. Carter provided some medical rationale explaining how her work duties caused her bilateral shoulder tendinitis and bursitis, this evidence was submitted after OWCP's August 3, 2009 merit decision. 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.²¹ Dr. Carter's reports do not raise a substantial question as to the correctness of OWCP's August 3, 2009 merit decision or demonstrate clear evidence of error.

On appeal, appellant stated that her injury negatively affected her quality of life. While she addressed her disagreement with OWCP's denial of her claim, her general allegations do not 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.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's decision.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁷ *Supra* note 9.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹⁹ *See Debra McDavid*, 57 ECAB 149 (2005).

²⁰ *See W.R.*, Docket No. 09-2336 (issued June 22, 2010).

²¹ Federal (FECA) Procedure Manual, *supra* note 18, Chapter 2.1602.3(c) (March 2011).

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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