

FACTUAL HISTORY

On October 15, 2009 appellant, then a 40-year-old rural carrier, filed a traumatic injury claim alleging that on October 5, 2009 she felt something pop and pull in her low and mid back when she delivered two parcels weighing approximately 50 to 60 pounds each from the trunk of her vehicle. She stopped work and returned on October 6, 2009.

In an October 8, 2009 report, Dr. Lorn Miller, a Board-certified neurologist, stated that he had examined appellant in his office on October 6 and 8, 2009 and excused her from work until October 22, 2009. He also reported that she had complaints of back pain and noted well-healed surgical scar-multiple from sacral base to L1 on her back. Appellant had related that in 2004 she began to suffer from low back pain at work and in 2005 she underwent surgery on her low back. She reported that on October 5, 2009 she reinjured her back when she got two large packages out of the trunk of her car and felt a sharp pain in her low back. Dr. Miller diagnosed migraine without aura, cervicgia/neck pain, low back pain, muscle spasm, failed back surgery syndrome, swelling of extremity, paresthesia, osteoarthritis, degenerative disc disease, anatomical short leg, osteopenia and tobacco abuse. He further reported that her nerve conduction study and electromyograph results were normal and that cervical spine x-rays revealed minimal but maintained cervical lordosis.

In an October 29, 2009 work excuse slip, Dr. Miller excused appellant from work until December 1, 2009 with restrictions.

Appellant submitted an undated personal narrative statement regarding the alleged October 5, 2009 injury and medical treatment for her back.

In a decision dated December 3, 2009, OWCP denied appellant's claim finding that the medical evidence failed to demonstrate that her lower back condition resulted from the October 5, 2009 work event.

On December 7, 2010 OWCP received appellant's request for reconsideration dated April 13, 2010 along with additional evidence. In an April 6, 2010 handwritten statement, she reported that on July 20, 2009 she had previously delivered a package from a trunk when she stepped back in a hole and twisted her back, causing a bulging disc at L3-4. Appellant returned to light duty on September 12, 2009. On October 5, 2009 she delivered two heavy, large parcels when she felt something pop in her mid back and a pull in her low back. Appellant went to see her doctor and underwent x-ray reports, which revealed a bulging disc at L2-3. She explained that she had been a regular postal employee for 16 years and that since her injury she experienced chronic pain and nausea.

A September 22, 2010 report of Dr. Miller stated that on October 5, 2009 appellant injured her low back at work and that her condition would continue to progress and cause increased pain.

Dr. Miller further noted, in a September 24, 2010 report, that appellant was examined in his office on June 14, 2010 and reported that she was no longer able to tolerate sedentary work because sitting exacerbated her low back pain.

In December 30, 2009 and January 21, 2010 reports, Dr. Miller stated that appellant was first examined in his office from March to May 2005 and returned on July 5, 2009 with complaints of headaches and neck pain. Appellant was later examined for low back pain and failed back surgery syndrome. She stated that on October 5, 2009 she reinjured her low back at work. Dr. Miller reviewed appellant's x-ray results and opined that her condition would continue to progress and cause increased pain.

The employing establishment, in a December 2, 2010 statement, forwarded medical evidence to OWCP that it had received that day from appellant's treating physician, Dr. Miller. It noted that it had been advised by Dr. Miller that appellant had not found the reports sufficient to support her claim.

By decision dated December 15, 2010, OWCP denied appellant's claim on the grounds that her claim was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP 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 OWCP's 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

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 that was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.⁷ It 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.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 to merely show that

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 *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

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

⁸ *Annie L. Billingsley*, 50 ECAB 210 (1998); *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that OWCP properly determined that appellant did not file a timely request for reconsideration as more than one year had passed from the date of the last OWCP decision on December 3, 2009 and her request for reconsideration received on December 7, 2010. The Board notes that the postmark on the envelope is unavailable or illegible. OWCP regulations provide that when a postmark is unavailable or illegible, other evidence may be used to determine the date of the mailing such as certified mail receipts, certificate of service and affidavits.¹³

The Board finds that the evidence does not support that appellant's request was timely filed within one year of the December 3, 2009 OWCP decision. Although the date on the request for reconsideration was April 13, 2010 appellant stated on appeal that she mailed her reconsideration request on November 23, 2010, which would fall within the one year time limitation. The Board finds, however, that the record does not contain any evidence to support her contention. Various medical reports submitted contemporaneously with appellant's request were also received by OWCP on December 7, 2010, which was the same day that OWCP received her request for reconsideration. The Board finds that the evidence of record is not sufficient to establish that appellant filed her reconsideration request within one year of OWCP's December 3, 2009 decision.¹⁴ The record before OWCP does not contain any other evidence which may be used to determine the date of the mailing such as certified mail receipts, certificate of service and affidavits. As appellant's request for reconsideration was received by OWCP on December 7, 2010, more than one year after the December 3, 2009 merit decision, OWCP properly found it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁵

The Board finds that appellant failed to establish clear evidence of error on the part of OWCP. On appeal, appellant alleged that the evidence submitted with her reconsideration request establishes that she was injured on October 5, 2009 in the performance of duty. In support of her request for reconsideration, the record included several medical reports from Dr. Miller and a handwritten April 6, 2010 statement. Dr. Miller noted his previous treatment for

¹⁰ *Id*; *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *Thankamma Mathews*, 44 ECAB 765 (1993).

¹² *Pete F. Dorso*, 52 ECAB 424; *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹³ *Supra* note 5.

¹⁴ *See L.N.*, Docket No. 07-1092 (issued January 9, 2008).

¹⁵ *See Debra McDavid*, 57 ECAB 149 (2005).

appellant's back pain and stated that she reinjured her back on October 5, 2009. While these reports provide some support for causal relationship, clear evidence of error is intended to represent a difficult standard and must *prima facie* shift the weight of the evidence in appellant's favor.¹⁶ The Board has held that even a well-rationalized medical report which would have created a conflict with medical evidence of record had it been timely received does not equate to clear evidence of error.¹⁷ Dr. Miller's reports are insufficient to demonstrate clear evidence of error by OWCP.¹⁸

Appellant also submitted a handwritten statement dated April 6, 2010 relating her previous back conditions to the October 5, 2009 work event. She did not, however, explain how her lay opinion raises a substantial question concerning the correctness of OWCP's decision. This evidence, therefore, also fails to demonstrate clear evidence of error.

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in its December 3, 2009 decision. As appellant has not presented clear evidence of error, the Board finds that OWCP properly denied her request for further review of the merits.

CONCLUSION

The Board finds that appellant's request for reconsideration received on December 7, 2010 was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ *R.C.*, 59 ECAB 546 (2008); *Coleman*, *supra* note 8.

¹⁷ *R.E.*, Docket No. 11-1630 (issued February 7, 2012).

¹⁸ *See S.J.*, Docket No. 10-2135 (issued July 15, 2011).

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2012
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