

ISSUE

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

On appeal, appellant contends that she was assigned normal work duties rather than light-duty work, which aggravated her arm condition resulting from a motor vehicle accident.

FACTUAL HISTORY

On September 18, 2007 appellant, then a 51-year-old health technician, filed an occupational disease claim alleging that since July 9, 2007 she experienced pain in both wrists and hands. She further alleged that on September 17, 2007 she first realized that her condition was caused by her employment after being advised by a physician that her hand and wrist movement caused a pin in her arm to shift which resulted in pain. Appellant stopped work on September 19, 2007.

In an October 15, 2007 letter, appellant stated that following her June 2004 return to work, she was supposed to perform light-duty work that involved answering a telephone with a headset that she never received. On June 20, 2007 she was placed on medium-duty work status which involved lifting, pushing and pulling no more than 10 to 15 pounds, gripping and limited wrist turning. When she worked alone, appellant had to perform venipunctures and open doors for patients and push them in wheelchairs. She moved both wrists and arms while performing these duties eight hours a day, five days a week which resulted in pain. After evaluation, a physician advised appellant that she aggravated her arm and wrist injury and placed her off work on September 19, 2007. Appellant noted that she broke her left arm in an August 1973 car accident.

A state traffic accident report indicated that on March 16, 2007 appellant was involved in a motor vehicle accident. On that date, Dr. Steven M. Sanders, a Board-certified internist, reported a history of the car accident. He diagnosed left forearm both bone fracture and right forearm ulna shaft fracture. On March 17, 2007 Dr. Sanders performed surgery to treat appellant's right forearm ulna shaft fracture. In reports dated May 23, June 20 and September 19, 2007, he advised that she was unable to work on intermittent dates from June 6 through October 1, 2007.

Medical reports dated March 23 through December 11, 2007 included a September 21, 2007 report from Dr. Colby P. Young, a Board-certified orthopedic surgeon, who obtained a history that appellant was first seen following a car accident in which she sustained severe bilateral forearm injuries that required open reduction and internal fixation. Appellant complained about pain over the ulnar aspect of the wrist. She related that her condition was exacerbated by her current working conditions, noting that typing was difficult to perform with ulnar deviation. Dr. Young listed findings on physical examination and diagnosed triangular fibrocartilage complex (TFCC) tear with ulnocarpal abutment syndrome. He recommended ulnar shortening osteotomy.

In a January 4, 2008 decision, OWCP denied appellant's claim, finding that the medical evidence was insufficient to establish that she sustained a bilateral upper extremity condition causally related to her federal employment.

By letter dated January 17, 2008, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative.⁴

In a January 12, 2008 letter, appellant contended that her work duties, which included typing and answering a telephone with a headset that she never received, aggravated the arm and wrist injuries resulting from the car accident. Dr. Sanders placed her off work on September 19, 2007 due to the aggravation. Appellant underwent left arm surgery on November 27, 2007 and was waiting to undergo right arm surgery.

In a March 3, 2008 report, Dr. Young advised that appellant was initially injured in a car accident. Subsequent procedures were performed to correct the fractures she sustained as a result of the accident.

In a June 25, 2008 decision, an OWCP hearing representative affirmed the January 4, 2008 decision.⁵ She found that the medical evidence was insufficient to establish that appellant sustained an injury causally related to her established work duties.

By letter dated February 19, 2012, appellant requested reconsideration before OWCP.

Appellant submitted a March 28, 2007 report, in which Dr. Sanders advised that she was unable to work. Dr. Sanders stated that she could return to work on July 1, 2007.

In an April 4, 2007 report, Dr. Young reiterated the history of appellant's motor vehicle accident and resultant left upper extremity injury and surgical treatment. He listed physical examination findings and diagnosed minimally symptomatic distal radioulnar joint. Appellant was status post open reduction and internal fixation of both bones forearm fracture. On October 8, 2007 Dr. Young reported his discussion and appellant's decision to proceed with ulna shortening osteotomy and diagnostic arthroscopy and TFCC debridement. In a November 27, 2007 operative report, he indicated that she underwent the stated surgical procedures on that date. On December 5, 2007 Dr. Young reported that appellant's was clean, dry and intact. He placed her in a short arm cast for approximately three weeks. On December 19, 2007 Dr. Young advised that appellant had decreased pain and increased mobility. On December 28, 2007 he removed the cast. Dr. Young stated that fluoroscopy confirmed acceptable alignment in the frontal and sagittal planes. In reports dated January 28, March 19 and June 4, 2008, he advised that appellant had some scar sensitivity, but she also had improved left wrist range of motion.

⁴ Prior to her January 17, 2008 request for a telephone hearing, appellant, on January 12, 2008, appealed OWCP's January 4, 2008 decision to the Board. By letter dated May 30, 2008, appellant's attorney requested that the appeal be withdrawn so that appellant could seek review by OWCP's Branch of Hearings and Review. By order dated August 8, 2008 the Board dismissed the appeal. *Order Dismissing Appeal*, Docket No. 08-781 (issued August 8, 2008).

⁵ In the June 28, 2008 decision, the hearing representative noted that appellant's attorney changed his request for an oral hearing to a review of the written record.

In a November 27, 2007 report, Dr. Robert M. Litt, a Board-certified radiologist, advised that an x-ray of the left wrist showed postoperative changes. Appellant resubmitted Dr. Young's September 21, 2007 and March 3, 2008 reports and Dr. Sanders' May 23, June 20 and September 19, 2007 reports.

In a May 24, 2012 decision, OWCP denied appellant's February 19, 2012 request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated June 25, 2008.

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁷ 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.⁸

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.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 the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Id.* at § 10.607(b).

¹⁰ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹⁵ The 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.¹⁶

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. The Board's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁷ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁸

On February 19, 2012 appellant requested reconsideration of the denial of her occupational disease claim. OWCP rendered its most recent merit decision on June 25, 2008. As appellant's February 19, 2012 letter requesting reconsideration of the merits of her claim by OWCP was made more than one year after the June 25, 2008 merit decision,¹⁹ the Board finds that it was not timely filed.

OWCP denied appellant's occupational disease claim because there was insufficient medical evidence to establish a diagnosis causally related to factors of her federal employment. The Board finds that the medical evidence submitted by appellant is not sufficient to establish clear error by OWCP in denying her claim.²⁰

Dr. Sanders' March 28, 2007 report found that appellant was unable to work. He advised that she could return to work on July 1, 2007. Dr. Sanders did not provide a specific diagnosis or medical opinion addressing whether any diagnosed condition was caused or aggravated by factors of appellant's federal employment, which included typing, answering a telephone, lifting, pushing and pulling no more than 10 to 15 pounds, gripping, limited wrist turning, performing venipunctures and opening doors for and pushing patients in wheelchairs.²¹ Moreover, he did not provide any medical opinion addressing whether her disability was caused by the established

¹⁵ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

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

¹⁸ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁹ Appellant had one year to request reconsideration by OWCP of its November 24, 1998 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

²⁰ *See J.R.*, Docket No. 10-2137 (issued July 12, 2011).

²¹ *F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

work duties. Dr. Sanders' May 23, June 20 and September 19, 2007 reports, resubmitted by appellant on reconsideration, were previously of record and reviewed by OWCP. The resubmission of this evidence does not raise a substantial question as to the correctness of OWCP's decision.²² For the reasons stated, the Board finds that Dr. Sanders' reports do not establish clear evidence of error on the part of OWCP.

Similarly, Dr. Young's reports do not establish clear evidence of error on the part of OWCP in its June 25, 2008 decision. His reports dated April 4, 2007 through June 4, 2008 found that appellant had minimally symptomatic distal radioulnar joint and TFCC and addressed her surgical procedures and status post surgeries. However, Dr. Young did not provide any medical opinion addressing whether the diagnosed conditions were caused or aggravated by the established work duties.²³ On reconsideration, appellant resubmitted Dr. Young's September 21, 2007 and March 3, 2008 reports, which were previously of record and reviewed by OWCP. The resubmission of this evidence does not raise a substantial question as to the correctness of OWCP's decision.²⁴ For the stated reasons, the Board finds that Dr. Young's reports do not establish clear evidence of error in the denial of appellant's occupational disease claim.

Dr. Litt's November 27, 2007 diagnostic test results also do not raise a substantial question as to the correctness of OWCP's denial of appellant's claim. He found that an x-ray of the left wrist showed postoperative changes, but failed to provide a medical opinion addressing whether the established employment factors caused or aggravated her diagnosed condition.²⁵ The Board finds, therefore, that appellant did not discharge her burden of showing clear evidence of error.

The Board finds that the evidence submitted by appellant in support of her 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 her burden of proof to show clear evidence of error on the part of OWCP.

On appeal, appellant contended that she was assigned normal work duties which aggravated her arm condition resulting from a motor vehicle accident when she should have been performing light-duty work. Her assertion does not constitute medical evidence as she is a lay person and is not competent to render a medical opinion.²⁶ The Board finds that appellant's argument on appeal is 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.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *James A. Long*, 40 ECAB 538, 542 (1989).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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