

ISSUE

The issue is whether OWCP properly found appellant's application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

The case was previously before the Board. By decision dated March 1, 2004, the Board affirmed an August 12, 2003 OWCP decision finding that appellant's application for reconsideration was insufficient to warrant merit review of the claim.³ Appellant filed a traumatic injury claim alleging that on March 29, 2001 she injured her left shoulder while cleaning a locker room. The claim was denied by OWCP decision dated July 12, 2001. In a decision dated August 6, 2002, OWCP denied modification, noting that attending Board-certified orthopedic surgeon, Dr. Prem Parmar, stated in an April 5, 2002 report that appellant did repetitive overhead motion with her shoulders in her job. OWCP stated that the claim was for a traumatic injury and the evidence did not include sufficient factual information regarding appellant's job duties. The Board found that the evidence submitted on reconsideration was not sufficient to require OWCP to review the merits of the claim. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

By letter dated October 13, 2011, appellant, through her representative, requested reconsideration. She argued that the evidence submitted on reconsideration established clear evidence of error.

In a March 29, 2001 treatment note, Dr. Frederic Gilhousen, a Board-certified orthopedic surgeon, crossed out the "interim history." He provided brief results on examination, noting appellant seemed tender over the shoulder. Above the note there is a handwritten statement "reinjured at work."⁴ Appellant also submitted the April 5, 2002 report from Dr. Parmar, who stated that she had been treated for left shoulder problems since January 2001. Dr. Parmar stated that her work involved doing repetitive overhead motion with her shoulders and he felt this led to left shoulder impingement. He stated that wiping and cleaning of treadmills and other machinery could have contributed to this, as "[d]oing this over a long period of time can cause some type of tendinitis/impingement problems to patient." In a report dated August 7, 2003, Dr. Parmar stated that appellant first underwent surgery on April 20, 2001, and postoperative recovery was complicated by arthrofibrosis. He stated that she was still in a lot of pain when last seen on July 14, 2003.

By decision dated November 18, 2011, OWCP found the application for reconsideration was untimely. It determined that appellant was not entitled to a merit review as the evidence did not show clear evidence of error.

³ Docket No. 04-244 (issued March 1, 2004).

⁴ The copy submitted also contains a March 19, 2001 note from Dr. Parmar stating that appellant was seen for a cortisone injection for her left shoulder impingement.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁵ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”⁶

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁷ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁸ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA. As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹

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.¹⁰ Evidence that 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 The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

The most recent decision on the merits of appellant’s claim for compensation was dated August 6, 2002. Her application for reconsideration was dated October 13, 2011. Since this is

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.605 (1999).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

⁹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ *Thankamma Mathews*, 44 ECAB 765 (1993).

more than one year after the last merit decision, it is untimely filed. To require OWCP to reopen the case for merit review, appellant must show clear evidence of error by OWCP.

With her application for reconsideration, appellant resubmitted three medical reports and argued that the evidence established an injury causally related to her federal employment. The March 29, 2011 treatment note from Dr. Gilhausen, provides brief examination results, with a brief history that was illegible. It is not clear who wrote “reinjured at work,” but even if it were established as written by Dr. Gilhausen, it is of little probative value without additional detail.

Appellant also submitted an April 5, 2002 report from Dr. Parmar, who referred to her performing repetitive overhead motion of the shoulder at work over a long period of time. The claim for compensation in this case was for a traumatic injury on March 29, 2001. As OWCP noted in its August 6, 2002 decision, there was little factual evidence with respect to appellant’s job duties. To the extent that OWCP considered the present claim to include factors over more than a single workday,¹⁴ the April 5, 2002 report from Dr. Parmar was of diminished probative value. Dr. Parmar referred generally to overhead motion and cleaning of treadmills and other machinery. It is not clear what appellant’s specific job duties involved, how long she performed them or other relevant detail. Therefore it is not established that Dr. Parmar had a complete and accurate background for an opinion on causal relationship. He did not provide any medical rationale to support his opinion regarding shoulder impingement, other than to state that “[d]oing this over a long period of time can cause some type of tendinitis/impingement problems to patient.” To be of probative value, the opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁵ The Board finds that Dr. Parmar’s April 5, 2002 report does not provide a rationalized medical opinion based on a complete and accurate background.

The final report submitted by appellant on reconsideration was the August 7, 2003 report from Dr. Parmar,¹⁶ who did not discuss causal relationship between a diagnosed condition and federal employment, and this report is not sufficient to establish clear evidence of error.

As noted above, the clear evidence of error standard requires that appellant submit evidence that raises a substantial question as to the correctness of OWCP’s decision. The term clear evidence of error is intended to represent a difficult standard; it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The evidence does not raise a substantial question as to the correctness of OWCP’s denial of the claim and is not sufficient to establish clear evidence of error.

¹⁴ A traumatic injury is an injury caused by incidents within a single workday or shift; an occupational disease or illness is a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. §§ 10.5(ee) and 10.5(q).

¹⁵ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

¹⁶ The Board considered this report on the prior appeal, but the Board did not consider the content other than to indicate that it was duplicative of prior reports.

On appeal, counsel argues that the medical evidence does show clear evidence of error by OWCP, as it establishes a compensable employment-related aggravation of a preexisting left shoulder condition. For the reasons stated above, the Board finds that appellant has not established clear evidence of error in this case.

CONCLUSION

The Board finds that OWCP properly found the application for reconsideration was untimely and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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