

**United States Department of Labor
Employees' Compensation Appeals Board**

C.E., Appellant)

and)

U.S. POSTAL SERVICE, ARCH ANNEX)
STATION, Stockton, CA, Employer)

**Docket No. 13-1110
Issued: August 7, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 4, 2013 appellant, through her attorney, filed a timely appeal from a February 13, 2013 decision of OWCP of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than 180 days elapsed from the most recent merit decision of September 26, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On February 1, 2011 appellant, then a 41-year-old city carrier, filed an occupational disease claim alleging that she developed back and right arm pain due to factors of her federal employment. Dr. Jerry Crooks, an attending family practitioner, stated that she could return to

work with restrictions on February 22, 2011. On February 11, 2011 OWCP requested additional factual and medical evidence in support of appellant's claim.

By decision dated April 6, 2011, OWCP denied appellant's claim finding that she failed to submit factual evidence describing the employment duties which she felt caused or contributed to her claimed condition.

Appellant requested an oral hearing before an OWCP hearing representative on April 15, 2011. In a decision dated September 26, 2011, the hearing representative found that appellant had adequately described her employment duties at the oral hearing. Appellant also provided medical evidence of diagnosed neck and lumbar strains. The hearing representative found that appellant did not submit sufficient medical evidence to establish a causal relationship between her diagnosed conditions and her employment duties.

Following the oral hearing, appellant submitted a report dated April 5, 2012 from Dr. Crooks diagnosing myalgia and myositis. On March 14, 2012 Dr. Michael Shi, a family practitioner, stated that appellant developed back, elbow and multiple joint pains in January 2011. She attributed her condition to work, but did not provide any documentation of a work injury. Dr. Shi stated, "My opinion regarding the patient's multiple joint problems is an arthritis type of problem because there is no direct evidence to support her work injury-related issue." Dr. Crooks completed a form report on March 15, 2012 and diagnosed right rotator cuff tendinitis and fibromyalgia. He stated that it was not his opinion that appellant's conditions were related to her employment.

In a letter dated February 5, 2013, counsel requested reconsideration of the September 26, 2011 merit decision and submitted new evidence. In a report dated December 13, 2012, Dr. Michael Hebrard, Board-certified in physical medicine and rehabilitation, noted appellant's employment history and job duties of repetitive standing, squatting, bending, twisting, reaching at and above the shoulder, lifting and carrying. He provided findings on physical examination and diagnosed right bicipital tenosynovitis, right shoulder impingement tendinitis, shoulder strain on the right and rotator cuff syndrome bursitis. Dr. Hebrard stated, "Based on my evaluation of the patient, it is the opinion of the undersigned with a reasonable degree of medical certainty that there is a causal relationship with the patient's current condition of the right shoulder in terms of the duties she was responsible for performing with repetitive reaching below, at and above the level of the shoulder in the course of her employment which signifies causation to a reasonable degree of medical certainty."

By decision dated February 13, 2013, OWCP found that appellant's request for reconsideration was not timely filed and that she failed to establish clear evidence of error. It noted the divergent opinions among her physicians and stated that Dr. Hebrard's supportive report was not sufficient to establish that OWCP made an error or to shift the weight of the evidence in favor of her claim or to raise a fundamental question as to the correctness of OWCP's decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,¹ OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that “An application for reconsideration must be sent within one year of the date of [OWCP] decision for which review is sought.”² In *Leon D. Faidley, Jr.*,³ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant’s case.

If the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates “clear evidence of error” on the part of OWCP.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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 fundamental question as to the correctness of OWCP’s decision.¹⁰ The Board makes an

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607.

³ 41 ECAB 104, 111 (1989).

⁴ *Supra* note 2; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁵ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁷ *See Jesus D. Sanchez*, *supra* note 4.

⁸ *See supra* note 6.

⁹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Supra* note 3 at 114.

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.¹¹

ANALYSIS

The only decision before the Board is that dated February 13, 2013 which declined to reopen appellant's case on the merits because her request was not timely filed and did not show clear evidence of error.

The Board finds that OWCP did not abuse its discretion by denying to reopen appellant's claim for further consideration of the merits of the claim under 5 U.S.C. § 8128(a). Appellant's request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 or show clear evidence of error.

OWCP's hearing representative denied appellant's claim for an occupational disease on the grounds that she failed to submit adequate medical opinion evidence to establish a causal relationship between her diagnosed back and shoulder conditions and her accepted employment duties. Appellant submitted several medical reports in support of her request for reconsideration. Dr. Crooks nor Dr. Shi supported a causal relationship between appellant's employment duties and the conditions diagnosed, indicating that her arthritis type" condition and fibromyalgia were not due to her employment. These reports do not support appellant's claim or establish error on the part of OWCP in the denial of her claim.

Appellant also submitted a report dated December 13, 2012 from Dr. Hebrard, who opined that her diagnosed conditions were causally related to her employment duties. While Dr. Hebrard's report is generally supportive of her occupational disease claim, his report is not sufficient to establish clear evidence of error on the part of OWCP. His report is not of sufficient probative value to shift the weight of the medical evidence in favor of appellant or to raise a fundamental question as to the correctness of OWCP's decision. While Dr. Hebrard offered an opinion that the conditions that he diagnosed were due to her employment, he did provide an explanation to overcome the contrary opinions of Dr. Crooks nor Dr. Shi or to shift the weight of the medical evidence in appellant's favor.

The Board finds that appellant did not submit sufficient evidence to establish clear evidence of error on the part of OWCP, and thus it properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that appellant has not established clear evidence of error such that OWCP was required to reopen her untimely request for reconsideration for consideration of the merits.

¹¹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2013
Washington, DC

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

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

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