

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 17, 2007 appellant, then a 43-year-old nursing assistant, filed a traumatic injury claim alleging that she slipped on a wet floor and injured her right knee in the performance of duty on May 8, 2007. She stopped work on May 8, 2007.

In a decision dated September 5, 2007, OWCP denied appellant's claim for compensation finding that she had not met the requirements for establishing that she sustained an injury as alleged. It noted that they had not received a clear statement from her regarding the basis of her claim and the basis of her claim was unclear or unknown.

In a decision dated April 24, 2008, OWCP's hearing representative affirmed as modified OWCP's decision dated September 5, 2007. The hearing representative found that the claimed incident occurred but that the medical evidence was insufficient to establish that any diagnosed condition was caused or contributed to by the May 8, 2007 employment incident.

OWCP subsequently received numerous treatment notes. They included a July 5, 2007 report from Dr. Thomas Scilaris, a Board-certified orthopedic surgeon; a July 10, 2007 treatment note from Dr. Orsuville Cabatu, a treating physician; reports dating from February 12, 2008 to August 9, 2011 from Dr. Victor Sasson, a Board-certified orthopedic surgeon, treatment notes dated April 29 and May 6, 2009 from Dr. Mehul Shah, a Board-certified orthopedic surgeon and a December 15, 2011 treatment note from Dr. Luciano Tuluca, a Board-certified internist.

Additionally, OWCP received: a May 31, 2007 x-ray read by Dr. John T. Rigney, a Board-certified diagnostic radiologist; a June 18, 2007 magnetic resonance imaging (MRI) scan of the lumbar spine read by Dr. Robert D. Soloman, a radiologist; a June 15, 2009 MRI scan of the right shoulder read by Dr. Harold Tice, a Board-certified diagnostic radiologist; prescriptions dated September 4 and 11, 2008 for a knee brace from Dr. Indu Garg, Board-certified in physical medicine and rehabilitation; and operative reports from Dr. Sasson dated March 12, 2008 for synovitis of the right knee and August 5, 2009 for rotator cuff partial tear. It received numerous physical therapy reports dating from April 3, 2008 to August 25, 2009.

Appellant also submitted copies of her October 4, 2007 letter requesting a hearing.

In a letter dated April 18, 2012, appellant's representative requested reconsideration and submitted new medical evidence. He alleged that the new evidence suggested that the claim should be reopened.

In a March 17, 2012 report, Dr. Garg noted appellant's history of injury and treatment. He advised that he treated her for her right knee and noted that her history was consistent with her falling down at work on May 8, 2007. Dr. Garg opined that appellant continued to be in pain

and was unable to work full duty, although she continued to work modified duty. He indicated that her injury to the right knee and low back was related to her work.

In a decision dated April 30, 2012, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”³

OWCP's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁴ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁵

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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence

³ 5 U.S.C. § 8128(a).

⁴ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

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.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. 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.⁸

ANALYSIS

In its April 30, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on April 24, 2008. Counsel's April 18, 2012 letter requesting reconsideration was submitted more than one year after the April 24, 2008 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening her case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application. It reviewed the evidence submitted by her in support of her application for review, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The underlying issue in this case is whether OWCP properly denied appellant's claim for an injury in the performance of duty on the grounds that the medical evidence was insufficient to establish that any diagnosed condition was caused or contributed to by the accepted employment incident of May 8, 2007.

With his April 18, 2012 request for reconsideration, counsel submitted a March 17, 2012 report from Dr. Garg, who noted appellant's history of injury and treatment and noted that her history was consistent with her falling down at work on May 8, 2007. Dr. Garg opined that appellant's injury to the right knee and low back was related to her work. The Board finds that, while this medical report provides some support for causal relationship, it is insufficient to establish clear evidence of error as it does not show that OWCP's denial of the claim was erroneous or raise a substantial question as to the correctness of OWCP's determination that appellant did not establish an injury in the performance of duty. The Board notes that the record also contains numerous treatment notes and diagnostic reports and these too are insufficient to establish clear evidence of error. The Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award).

⁷ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁸ *Id.*

Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.⁹

Appellant also submitted copies of physical therapy notes. Section 8101(2) of FECA provides that the term physician includes surgeons, podiatrist, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.¹⁰ Physical therapists are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.¹¹ Consequently, these reports are insufficient to establish clear error by OWCP.

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 denying appellant's claim for an injury in the performance of duty. Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ 5 U.S.C. § 8101(2).

¹¹ *Id.*; *J.M.*, 58 ECAB 448 (2007); *G.G.*, 58 ECAB 389 (2007); *David P. Sawchuk*, 57 ECAB 316 (2006); *Allen C. Hundley*, 53 ECAB 551 (2002).

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2013
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