

FACTUAL HISTORY

On September 19, 2008 appellant, then a 58-year-old mail handler, filed an occupational disease claim alleging that on August 19, 2008 she first realized that her lateral epicondylitis, tenosynovitis of the radial styloid and carpal tunnel syndrome were caused by her federal employment. She did not stop work. In narrative statements dated September 19 and November 3, 2008, appellant described her repetitive work duties and the development of her bilateral elbow conditions.

In an August 19, 2008 medical report, Dr. Martha R. Andrews, a family practitioner, advised that appellant had lateral epicondylitis, tenosynovitis of the radial styloid and carpal tunnel syndrome.

In a November 3, 2008 report, Dr. Kaochoy S. Saechao, Board-certified in occupational medicine, recommended work restrictions until appellant's next visit on November 17, 2008.

In a December 18, 2008 decision, OWCP denied appellant's claim. It found that the medical evidence of record was insufficient to establish that the claimed medical conditions were casually related to the accepted work-related factors. The attached notice of appeal rights advised that any request for reconsideration had to be received within one calendar year of the date of the decision.

By letter dated October 9, 2012, appellant, through her attorney, requested reconsideration.

In an October 9, 2008 progress note, Maria E. Serret, a physical therapist, addressed the treatment of appellant's bilateral elbow pain and hand numbness with scaphoid and shoulder motor control deficits. She provided a treatment plan for her conditions. In an addendum to Ms. Serret's progress note dated October 9, 2008, Dr. Andrews reviewed her assessment and approved the recommended treatment. In an October 31, 2008 report, she obtained a history of appellant's repetitive work duties, listed findings on physical examination and diagnosed lateral epicondylitis, tenosynovitis of radial styloid and carpal tunnel syndrome.

In a December 18, 2008 referral form, Dr. Saechao indicated that October 26, 2007 was the date of injury. He ordered treatment for appellant's trapezius and forearm conditions. In a November 4, 2008 report, Dr. Saechao obtained a history that while working as a mail handler on the date of injury she was engaged in repetitive motions with her right upper extremity, which included lifting heavy boxes up to 70 pounds, pushing, pulling and casing mail, when she noted pain in the lateral epicondyle bilaterally. Appellant also awakened with numbness in both hands. She had no weakness or paresthesias. Appellant's symptoms increased with the use of her hands and decreased with rest. Dr. Saechao also listed a history of her medical, family and social background. His neurological examination findings were positive for sensory change and negative for tingling and focal weakness. Dr. Saechao diagnosed bilateral carpal tunnel syndrome and tennis elbow. He advised that appellant's condition was work related as his findings and diagnosis were consistent with the history of injury or onset of illness. Dr. Saechao released her to return to modified-duty work through November 17, 2008. In reports dated November 17, 2008 through January 5, 2009, he reiterated his diagnoses of bilateral carpal

tunnel syndrome and tennis elbow. Dr. Saechao released appellant to return to modified-duty work with restrictions through January 19, 2009.

In a July 25, 2012 report, Dr. Daniel Kharrazi, a Board-certified orthopedic surgeon, advised that on October 22, 2010 appellant sustained an employment-related full thickness rotator cuff tear of the left shoulder injury for which she underwent surgery on April 23, 2012. He further advised that she was temporarily totally disabled.

In a December 11, 2012 decision, OWCP denied appellant's 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 its December 18, 2008 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA² does not entitle a claimant to a review of an OWCP decision as a matter of right.³ 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.⁴

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.⁵

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

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Id.* at § 10.607(b).

⁶ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁷ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁸ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

⁹ *Leona N. Travis*, *supra* note 7.

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.¹⁰

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.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹²

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹³ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁴ As appellant's October 9, 2012 request for reconsideration was submitted more than one year after the last merit decision, issued on December 18, 2008, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁵

The Board finds that the evidence submitted by appellant in support of her October 9, 2012 request for reconsideration does not raise a substantial question as to the correctness of OWCP's December 18, 2008 decision or *prima facie* shift the weight of the evidence of record in her favor. OWCP denied appellant's occupational disease claim because there was insufficient medical evidence to establish that the claimed medical condition was related to established work-related factors.

Dr. Saechao's November 4, 2008 report provided a history of the established work duties. He opined that appellant sustained work-related bilateral carpal tunnel syndrome and tennis elbow as his findings and diagnosis were consistent with the history of injury or onset of illness. A detailed, well-rationalized medical report which could have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.¹⁶ While the report of Dr. Saechao is generally supportive of appellant's claim, it does not establish clear error on the part of OWCP in rendering its

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 393 (2005).

¹⁵ 20 C.F.R. § 10.607(a); see *D.G.*, *id.*; *Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *Joseph R. Santos*, 57 ECAB 554 (2006).

December 18, 2008 decision. His reports are insufficient as they either do not address the issue of whether the diagnosed conditions were caused by the established employment factors¹⁷ or raise a substantial question concerning the correctness of OWCP's decision.

Similarly, the October 9, 2008 progress note of Ms. Serret, a physical therapist and Dr. Andrews' October 9, 2008 addendum to Ms. Serret's progress note and October 31, 2008 report, which addressed appellant's bilateral elbow and hand conditions and treatment, are of limited probative value and insufficient to establish clear evidence of error. This evidence does not contain any opinion on the issue of causal relationship.¹⁸

The July 25, 2012 report which contained Dr. Kharrazi's typed name lacks probative value as it is unsigned¹⁹ and failed to address the issue of causal relationship.²⁰ The Board finds that this evidence does not establish clear evidence of error.

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, appellant's attorney contended that OWCP's December 18, 2008 decision was contrary to fact and law. For the reasons stated above, the Board finds that appellant has not established clear evidence of error.

CONCLUSION

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

¹⁷ See *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).

¹⁸ *Id.*

¹⁹ *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004); *Merton J. Sills*, 39 ECAB 572 (1988).

²⁰ See *F.R.*, *supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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