

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal, appellant contended that OWCP erred in terminating her compensation benefits.

FACTUAL HISTORY

On April 27, 1999 appellant, then a 44-year-old distribution clerk, filed a traumatic injury claim alleging that on that date she injured, her shoulder, arm and back due to lifting and pulling mail trays. OWCP accepted the claim for aggravation of cervical degenerative disc disease.

On February 26, 2004 OWCP received a January 15, 2004 report from Dr. David A. West, a second opinion osteopath, who based on a review of the statement of accepted facts, medical evidence and physical examination, concluded that appellant's accepted cervical degenerative disc disease aggravation had resolved. A physical examination revealed full range of motion of the neck and intact sensory and motor examinations. Dr. West attributed appellant's current cervical spine problems to the normal progression of her degenerative joint disease, not to the accepted employment injury. He opined that the accepted employment injury only caused a temporary exacerbation of her preexisting cervical degenerative disc disease.

In a February 22, 2004 supplemental report, Dr. West provided work restrictions based upon a functional capacity evaluation performed on February 9, 2004.

On May 25, 2004 OWCP issued a notice proposing to terminate wage-loss and medical benefits on the grounds that appellant no longer had any disability or residuals due to her accepted condition.

In a June 24, 2004 report, Dr. Rommel G. Childress, a treating Board-certified orthopedic surgeon, reviewed Dr. West's opinion and noted his disagreement with the conclusion that appellant's accepted employment injury had resolved.

By decision June 29, 2004, OWCP finalized the termination of appellant's benefits effective that day.

On July 14, 2004 appellant requested an oral hearing before an OWCP hearing representative, which was held on December 14, 2004. At the hearing she noted her disagreement with Dr. West's opinion and his findings.

Subsequent to the hearing, OWCP received a January 10, 2005⁴ report from Dr. Childress who opined that appellant continued to have problems with her cervical spine and strain. Dr. Childress opined that the accepted employment injury resulted in a permanent aggravation of her preexisting cervical degenerative disc disease.

⁴ It appears that there is a typographical error with respect to the year as it read 2004 but should be 2005.

By decision dated March 25, 2005, the hearing representative affirmed the termination of appellant's compensation. She found that the weight of the medical evidence rested with the opinion of Dr. West. The hearing representative also found that Dr. Childress' report was insufficient to create a conflict in the medical opinion evidence as she found the report contained insufficient rationalization.

In a June 24, 2005 letter, appellant requested reconsideration and submitted magnetic resonance imaging scans dated October 19, 2001 and September 12, 2003 in support of her request.

By decision dated November 25, 2005, OWCP denied reconsideration.

On February 17, 2012 appellant filed an occupational disease claim for a cervical condition⁵ and noted that a claim had previously been filed for this condition under claim number xxxxxx925. In support of her claim, she submitted medical evidence from June 3, 1999 and September 7, 2000, which had been previously considered by OWCP and an August 17, 2000 electromyography (EMG) test.⁶

By letter dated March 12, 2012, OWCP informed appellant that claim number xxxxxx303 had been deleted as it had been found to be a duplicate of a prior claim. It informed her that evidence she had submitted with her duplicate claim had been moved to the prior claim. OWCP considered this submission a request for reconsideration of claim number xxxxxx925.

By decision dated March 13, 2012, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.⁷

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitation on the exercise of its discretionary authority under section 8128(a) of FECA.⁸ It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁹ When an application for review is untimely, OWCP undertakes a limited review to determine

⁵ OWCP assigned claim number xxxxxx303 prior to determining that the claim was a duplicate of a prior claim. On March 9, 2012 it deleted claim number xxxxxx303 as it was a duplicate of claim number xxxxxx925.

⁶ OWCP noted receipt of a February 27, 2012 EMG test diagnosing right C6 radiculopathy. A review of the record indicates that one page was received on February 27, 2012, but it appears to be the last page of a duplicate of an August 17, 2000 EMG test.

⁷ The Board notes that, following the March 13, 2012 nonmerit decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁸ *See J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

⁹ 20 C.F.R. § 10.607; *see B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

whether the application presents clear evidence that OWCP's final merit decision was in error.¹⁰ Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,¹¹ if the claimant's application for review shows clear evidence of error on the part of OWCP.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which 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 to merely 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 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. To show clear evidence of error, the evidence submitted 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

OWCP's procedures note 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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration

¹⁰ *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹¹ 20 C.F.R. § 10.607.

¹² *See M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁴ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁵ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 12.

¹⁶ *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (October 2011).

¹⁷ *See M.L.*, *supra* note 12; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006);

begins on the date of the original OWCP decision.¹⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁹ As appellant's February 17, 2012 request for reconsideration was submitted more than one year after the last merit decision, issued on March 25, 2005, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.²⁰

The Board finds that the evidence submitted by appellant in support of her February 17, 2012 request for reconsideration does not raise a substantial question as to the correctness of OWCP's decision terminating her compensation benefits effective June 29, 2004 or shift the weight of the evidence of record in her favor. The evidence submitted by appellant predated the termination of her compensation benefits on June 29, 2004 and was thus irrelevant to the issue of whether OWCP erred in terminating her compensation benefits. The Board finds that these reports are insufficient to show that OWCP's determination that she no longer had any residuals or disability due to her accepted aggravation of cervical degenerative disc disease was erroneous or raised a substantial question as to the correctness of OWCP's decision.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's March 25, 2005 hearing representative's decision affirming the termination of her compensation benefits. Consequently, OWCP properly denied her reconsideration request as it was untimely and failed to establish clear evidence of error.

On appeal, appellant argued that OWCP erred in relying upon Dr. West's opinion in terminating her benefits and that her accepted employment injury had not resolved. However, these arguments were previously considered by an OWCP hearing representative when the termination of her benefits was affirmed. Thus, they are insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ *Robert F. Stone*, 57 ECAB 393 (2005).

²⁰ 20 C.F.R. § 10.607(a); *see D.G., supra* note 10; *Debra McDavid*, 57 ECAB 149 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 13, 2012 is affirmed.

Issued: March 22, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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