

ISSUE

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

FACTUAL HISTORY

On July 2, 2010 appellant, then a 33-year-old maintenance mechanic, filed a traumatic injury claim alleging injury to his left elbow, when he attempted to open a gate using his left arm on June 30, 2010. He did not stop work.

OWCP received a December 6, 2010 treatment note from Dr. Michael S. Petersen, a Board-certified orthopedic surgeon, who indicated that appellant came in for left elbow pain "since about last February." Appellant believed his symptoms began after doing some cement work and then, around June 30, 2010, he heard a pop when closing a large gate and felt pain in his elbow. Dr. Petersen was familiar with appellant based on prior treatment for this problem "before he filed a workers' compensation claim." Dr. Petersen diagnosed chronic left elbow pain consistent with lateral epicondylitis. He advised that appellant had an episode where he felt a sharp pop in his elbow which might represent an oval lesion or tear of the extensor origin. Dr. Petersen advised that appellant could return to modified duty.

In a January 26, 2011 decision, OWCP denied appellant's claim finding that the medical evidence did not establish that a left elbow condition was causally related to the June 30, 2010 work incident.

In a letter dated January 31, 2012, appellant's attorney asked for an updated status on the claim and noted that he was enclosing medical evidence. In an August 26, 2009 report, Dr. Petersen performed a right shoulder arthroscopic bankart repair with capsulorrhaphy and arthroscopic extensive debridement of subscapularis. OWCP received a copy of Dr. Petersen's December 6, 2010 report and physical therapy reports dating from September 23 to October 19, 2010.

In a November 22, 2010 report, Dr. James M. Kim, Board-certified in pain medicine, noted that appellant was seen for medication maintenance. He advised that appellant's onset of pain began as work related. Dr. Kim diagnosed degenerative disc disease of the cervical spine, cervicgia, shoulder pain, depression, sexual dysfunction, insomnia and chronic pain.³

In a January 24, 2012 report, Dr. Petersen explained that he previously saw appellant on December 6, 2010 for his present injury. He treated appellant earlier for left elbow lateral epicondylitis which predated the work injury as well as an unrelated right shoulder condition. At the time, he was concerned about the pop and sharp pain that appellant experienced at the time of injury and recommended a magnetic resonance imaging (MRI) scan to rule out an avulsion tear of the extensor origin. He opined that the MRI scan findings of a partial radial collateral ligament tear were consistent with the described injury where he felt a pop in his elbow

³ A January 18, 2011 report from Dr. Kim provided a similar statement regarding causal relationship.

associated with a sharp pain when closing a large gate. Dr. Petersen advised that appellant had an established condition of lateral epicondylitis but that a separate discernible work injury occurred when he was closing the heavy gate. He explained that as he popped it, he felt it was likely the partial tear to the radial collateral ligament noted on the MRI scan. Dr. Petersen noted that appellant had increased and sharper pain in his elbow after this injury. He stated that six months later the physical examination findings were fairly unremarkable other than tenderness in the left lateral elbow, which was consistent with the long period of time that passed since the injury to his prior examination. Dr. Petersen opined that appellant had preexisting lateral epicondylitis, left elbow, with a subsequent partial radial collateral ligament tear of the left elbow. He opined that “I do believe that the causal relationship of this injury was shutting the heavy gate, which was a work injury. Dr. Petersen likely was predisposed to this injury from his preexisting condition of lateral epicondylitis.”

In an April 5, 2012 report, Dr. Petersen noted appellant’s history of injury and treatment. He examined appellant and determined that there was no obvious swelling of the right shoulder and advised that his point tenderness was pretty minimal; mainly, posterior to the scapular ridge. Appellant had crepitus and popping with range of motion of the shoulder, which appeared to be subacromial. He diagnosed, recurrent injury of the right shoulder and noted that he did not appear to have gross instability, although there was a lot of clicking and crepitus and a strain of the rotator cuff without full thickness tear.

On April 6, 2012 appellant’s counsel requested reconsideration. He argued that appellant secured a report from Dr. Petersen dated January 23, 2012⁴ which established “a clear explanation of the mechanics of injury and causal relationship.” Counsel argued that appellant met the statutory requirements for a merit review although the request was more than one year after the last merit decision. He argued that the report established that OWCP committed error. Counsel also argued that OWCP should have developed the claim.

In a decision dated June 4, 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.

⁴ It appears to be the January 24, 2012 report from Dr. Petersen.

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ 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 his 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.”⁶

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).⁷ 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 provide that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.⁸

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.⁹

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 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

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8128(a).

⁷ *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Id.* at § 10.607(b).

¹⁰ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

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.¹¹

ANALYSIS

In its June 4, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on January 26, 2011. Appellant's representative requested reconsideration on April 6, 2012, which was more than one year after the January 26, 2011 merit decision and was, therefore, untimely.

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

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error in OWCP's January 26, 2011 decision, which found that the medical evidence did not establish that the claimed medical condition was related to established work-related events.

With his April 6, 2012 request for reconsideration, appellant submitted evidence from Dr. Petersen and Dr. Kim, some of which supported that his condition is work related. His attorney argued that the January 24, 2012 report from Dr. Petersen established a "clear explanation of the mechanics of injury and causal relationship." Dr. Petersen noted appellant's history and explained that MRI scan findings of a partial radial collateral ligament tear were consistent with the described injury where appellant felt a pop in his elbow associated with a sharp pain when closing a large gate. He explained that a separate discernible industrial injury occurred when appellant was closing the heavy gate. Dr. Petersen explained that the pop was likely the partial tear to the radial collateral ligament noted on the MRI scan. He indicated that, while appellant had preexisting lateral epicondylitis of the left elbow, he sustained a subsequent partial radial collateral ligament tear, of the left elbow. Dr. Petersen opined that "the causal relationship of this injury was shutting the heavy gate, which was a work injury." However, the Board notes that OWCP procedures provide 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). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would

¹¹ *Id.*

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.¹² Thus, this report is insufficient to establish clear evidence of error. Other reports of Dr. Petersen and Dr. Kim are also insufficient as they either do not address the cause of appellant's condition or do raise a substantial question concerning the correctness of OWCP's decision.

Physical therapy reports were also submitted. However, they do not constitute medical evidence under 5 U.S.C. § 8101(2) and are therefore lacking in probative value. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP.¹³

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP's denial of the claim was erroneous. Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, appellant's counsel asserts that OWCP's decision is in error as appellant should have received a merit review pursuant to the case of *A.B.*¹⁴ However, he has not explained how the Board's ruling in *A.B.* applies in the present case.¹⁵

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.

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ A physical therapist is not a physician within the meaning of section 8101(2) and cannot render a medical opinion. *Vickey C. Randall*, 51 ECAB 357 (2000).

¹⁴ Docket No. 10-1070 (issued March 8, 2011).

¹⁵ In *A.B.*, the underlying claim was for an emotional condition in which the claimant alleged being improperly removed from her job and exposed to retaliation and discrimination. OWCP denied the claim because the claimant did not establish a compensable employment factor. On reconsideration, the claimant submitted an EEOC decision that raised a substantial question as to the correctness of OWCP's decision. The EEOC decision made a specific finding that the claimant's supervisor retaliated against her and deliberately engaged in underhanded and deceitful methods for terminating appellant. As explained, *infra*, the evidence submitted by appellant with her reconsideration request is insufficient to raise a substantial question of OWCP's merit decision.

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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