

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

J.A., Appellant

and

**U.S. POSTAL SERVICE, WESTCHESTER
PROCESSING & DISTRIBUTION CENTER,
White Plains, NY, Employer**

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**Docket No. 13-1319
Issued: November 18, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2013¹ appellant filed a timely appeal of the November 14, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration.² Because more than 180 days elapsed from the most recent merit decision dated September 1, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's nonmerit decision was issued on November 14, 2012, the 180-day computation begins November 15, 2012. One hundred and eighty days from November 15, 2012 was May 14, 2013. Since using May 16, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is May 14, 2013, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² Appellant requested an oral argument. The Board, on September 3, 2013, denied her request under a separate order. *Order Denying Request for Oral Argument*, Docket No. 13-1319 (issued September 3, 2013).

the case pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, appellant contends that OWCP unfairly denied her request for reconsideration as she attempted to timely file a request and it failed to consider her prior employment-related injuries in denying her traumatic injury claim.

FACTUAL HISTORY

On February 2, 2011 appellant, then a 62-year-old automated clerk, filed a traumatic injury claim alleging that on January 30, 2011 she sustained neck, shoulders and arms injuries as a result of her federal employment.

A January 31, 2011 hospital report indicated that appellant was treated in an emergency room for muscle strain and neck injuries.

In a February 8, 2011 letter, the employing establishment controverted the claim, contending that appellant did not submit any medical evidence to establish that she sustained an injury causally related to her employment. It noted that she returned to work on January 28, 2011 following a six-year absence. Appellant was found fit for duty by an OWCP referee physician regarding injuries in her claim under File No. xxxxxx818. The employing establishment contended that she did not like the reasonable accommodation it had provided and requested new reasonable accommodation.

By letter dated February 18, 2011, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional factual and medical evidence.

Appellant submitted medical evidence which addressed her bilateral shoulder and neck conditions and the causal relationship between these conditions to her January 30, 2011 incident, medical treatment and work capacity. She also submitted a March 20, 2011 statement regarding her claim, correspondence regarding her request for reasonable accommodation and pictures of her sorting operations.

In a March 22, 2011 decision, OWCP found the evidence sufficient to establish that the January 30, 2011 incident occurred as alleged. It denied the claim on the grounds that the medical evidence was insufficient to establish a neck or upper extremity condition causally related to the accepted employment incident.

By letter dated April 4, 2011, appellant requested an oral hearing before an OWCP hearing representative. She submitted additional medical evidence which addressed her cervical

³ 5 U.S.C. § 8101 *et seq.*

and shoulder conditions and the causal relationship between these conditions and the accepted January 30, 2011 employment incident, work capacity and medical treatment.

In a September 1, 2011 decision, an OWCP hearing representative affirmed the March 22, 2011 decision. She found that the medical evidence was not sufficiently rationalized to establish that appellant sustained an injury causally related to the accepted January 30, 2011 employment incident.

On September 4, 2012 OWCP received appellant's request for reconsideration. In an August 31, 2011 letter, appellant requested that OWCP consolidate her prior claims under File No. xxxxxx064 regarding an October 31, 1991 injury, File No. xxxxxx371 regarding a March 5, 1996 injury and a 2002 claim for a subluxation aggravation with the instant claim under File No. xxxxxx752. She contended that her current cervical degenerative condition was caused by the numerous injuries she sustained while working at the employing establishment. Appellant further contended that OWCP improperly relied on the opinion of a physician who found that she could perform her date-of-injury position with no restrictions following a March 12, 2004 injury and ignored medical evidence that stated she had certain physical restrictions. She asserted that the repetitive tasks she performed at work on January 30, 2011 aggravated her previous injuries to the same body parts.

An unsigned report dated November 13, 2009 contained the typed name of Dr. Alain De La Chapelle, a Board-certified psychiatrist. It stated that following three physical assaults at work, appellant experienced flashbacks, general nervousness and nightmares about being assaulted, a depressed mood and insomnia due to pain and anxiety.

In a July 23, 2012 attending physician's report, Dr. Christine G. Sapka, a Board-certified physiatrist, diagnosed shoulder internal derangement and indicated with a checkmark that this condition was caused or aggravated by the January 30, 2011 employment incident. She advised that appellant was totally disabled from February 12 to April 9, 2011 and that appellant could return to light-duty work on April 9, 2011.

In an attending physician's report dated September 27, 2012, Dr. Winston C. Kwa, a Board-certified internist, diagnosed cervicgia, trapezius myositis, disc herniation/protrusion and cervical radiculopathy. He indicated with a checkmark that the diagnosed conditions were caused or aggravated by the January 31, 2011 employment incident. Dr. Kwa stated that appellant worked in static and awkward positions for long periods of time for many years. In a work capacity evaluation also dated September 27, 2012, he advised that appellant could not perform her usual job duties as she had post-traumatic stress disorder due to a prior workplace assault. Dr. Kwa concluded that she could work eight hours a day with certain restrictions.

In correspondence dated October 20, 1993 to September 20, 2011, appellant and the employing establishment addressed her request to return to work and work capacity. She submitted pictures of a delivery bar code sorting machine. Appellant resubmitted a duplicate copy of an August 15, 2005 job description for a mail processing clerk.

In a November 14, 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 September 1, 2011 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁵ 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.⁶

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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

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.¹³ The

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.¹⁴

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on September 1, 2011. OWCP received appellant's request for reconsideration on September 4, 2012. The Board finds that the request was untimely as it was outside the one-year time limit.¹⁵ Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁶

The Board further finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of OWCP's September 1, 2011 decision or shift the weight of the evidence of record in her favor. OWCP denied appellant's traumatic injury claim because there was insufficient medical evidence to establish that the claimed medical conditions were related to the accepted January 30, 2011 employment incident.

In a July 23, 2012 report, Dr. Sapka indicated with a checkmark that appellant's shoulder internal derangement was caused or aggravated by the January 30, 2011 employment incident. It is not enough to show that evidence could be construed so as to produce a contrary result.¹⁷ The submission of a well-rationalized medical report which, if submitted before the denial of the claim was issued, would have created a conflict in medical opinion is not clear evidence of error.¹⁸ While Dr. Sapka's report was generally supportive of appellant's claim, it does not establish clear error on the part of OWCP in denying her claim. His report is insufficient as he did not provide a rationalized opinion regarding the causal relationship between the diagnosed shoulder condition and the January 30, 2011 employment incident.¹⁹ This evidence does not raise a substantial question concerning the correctness of OWCP's decision.

In a September 27, 2012 attending physician's report, Dr. Kwa indicated with a checkmark that appellant's cervicgia, trapezius myositis, disc herniation/protrusion and

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Reconsiderations, *Time Limitations*, Chapter 2.1602(e)(6) (August 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

¹⁶ 20 C.F.R. § 10.607(a); see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ *D.E.*, 59 ECAB 438 (2008).

¹⁸ See *A.F.*, 59 ECAB 714 (2008).

¹⁹ Medical conclusions unsupported by rationale are of little probative value. *Willa M. Frazier*, 55 ECAB 379 (2004). A mere checkmark or affirmative notation in response to a form question on causal relationship is not sufficient to establish a claim. See *Gary J. Watling*, 52 ECAB 278 (2001).

cervical radiculopathy were caused or aggravated by the January 31, 2011 employment incident. He stated that she worked in static and awkward positions for long periods of time for many years. Dr. Kwa's report is based on an inaccurate factual history as OWCP accepted that the work incident occurred on January 30, 2011 and not January 31, 2011. Moreover, he did not sufficiently address the underlying deficiency in the claim, the causal relationship between appellant's diagnosed conditions and the accepted work incident. Dr. Kwa did not explain with medical rationale how the performance of her work duties in static and awkward positions caused the diagnosed conditions. The Board finds, therefore, that his report is insufficiently rationalized to establish clear evidence of error.²⁰ In a September 27, 2012 work capacity evaluation, Dr. Kwa found that appellant could not perform her usual job duties because she had post-traumatic stress disorder due to a prior workplace assault, but she could work eight hours a day with certain restrictions. His report is 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 between appellant's claimed injuries in this case and the January 30, 2011 employment incident.²¹ Thus, it is not relevant.

The November 13, 2009 report which contained Dr. De La Chapelle's typed name lacks probative value as it is unsigned.²² It also failed to address the issue of causal relationship between the claimed injuries in the instant case and the January 30, 2011 work incident.²³ The Board finds that this evidence does not establish clear evidence of error.

The correspondence dated October 20, 1993 to September 20, 2011 between appellant and the employing establishment, pictures of a delivery bar code sorting machine and the duplicate copy of a mail processing clerk position description are insufficient to shift the weight of the evidence in favor of her claim. The submission of factual evidence does not show clear evidence of error because it is not relevant to the main issue in the present case, which is medical in nature and should be resolved by the submission of medical evidence.

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 contended that OWCP unfairly denied her request for reconsideration as she attempted to timely file her request. As noted, the one-year period for

²⁰ See *Howard A. Williams*, 45 ECAB 853 (1994).

²¹ 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).

²² *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004); *Merton J. Sills*, 39 ECAB 572 (1988).

²³ See *F.R.*, *supra* note 21.

requesting reconsideration begins on the date of the original OWCP decision.²⁴ The last merit decision of OWCP was issued on September 1, 2011. Appellant did not file her reconsideration request in the present case until September 4, 2012. Therefore, her request was untimely and her claim was properly considered under the clear evidence of error standard.

Appellant also contended on appeal that OWCP failed to consider her prior employment-related injuries in denying her traumatic injury claim. She did not submit any rationalized medical evidence along with her request for reconsideration to establish that the accepted January 30, 2011 employment incident aggravated her prior work injuries. The Board finds that appellant's argument on appeal is insufficient to raise a substantial question concerning the correctness of OWCP's denial of her claim or to *prima facie* shift the weight of the evidence in her favor.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2013
Washington, DC

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

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

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

²⁴ See *supra* note 15.