

boxes of files into a mail cart and strained her back. OWCP accepted her claim for a lumbar sprain. Appellant stopped work on August 22, 2008.

Appellant came under the treatment of Dr. Hampton J. Jackson, Jr., a Board-certified orthopedist, from September 23 to December 4, 2008, for persistent back pain after a lifting incident at work on August 21, 2008. Dr. Jackson noted spasms at L3-4, tenderness over both iliolumbar sacroiliac complexes, no clear cut hypoesthesia and restricted range of motion. He diagnosed lumbar strain and lumbar disc injury superimposed upon degenerative changes in the lumbar area. Dr. Jackson opined that work duties aggravated appellant's condition and advised that she was totally disabled. In an October 13, 2008 electromyogram (EMG), evidence revealed muscle membrane irritability and left gluteal and lumbar paraspinal muscles at L4-5 distribution. A November 12, 2008 lumbar magnetic resonance imaging (MRI) scan revealed a small posterior disc herniation at L5-S1 barely touching the thecal sac.

In a decision dated December 31, 2008, OWCP denied continuation of pay for the period August 22 to September 22, 2008 on the grounds that the medical evidence did not support disability for work as a result of her accepted medical condition.

Appellant continued to submit reports from Dr. Jackson dated January 13 to June 23, 2009, who treated her for a herniated disc at L5-S1. Dr. Jackson opined that conservative care failed and recommended surgery. He diagnosed a sub annular herniated disc at L5-S1 as a result of her work injury of August 21, 2008 and opined that she was totally disabled.

Thereafter, OWCP referred appellant to a second opinion physician and also to an impartial medical examiner. On September 11, 2009 it proposed to terminate all benefits finding that the referee physician established no continuing residuals of her work-related conditions.

Appellant submitted a September 1, 2009 report from Dr. Jackson, who noted appellant had a series of epidural blocks and was awaiting approval for surgery. Dr. Jackson diagnosed sprain and strain of the lumbar and herniated disc at L5-S1 and opined that she was totally disabled.

In a decision dated October 14, 2009, OWCP terminated appellant's medical and compensation benefits effective October 11, 2009 finding that the medical evidence established that she had no continuing residuals of her accepted conditions.

On November 4, 2009 appellant requested an oral hearing. She submitted a September 29, 2009 report from Dr. Jackson who diagnosed herniated disc as a result of the work injury of August 21, 2008. After reviewing appellant's duties as an automation clerk he opined that she could not perform this job.

In a decision dated October 23, 2009, OWCP vacated the October 14, 2009 decision noting that there was a typographical error in the date of the termination of benefits. It issued a new decision terminating appellant's medical and compensation benefits effective October 24, 2009 finding that the medical evidence established that she had no continuing residuals of her accepted conditions. Appellant requested an oral hearing which was held on April 12, 2010.

In a decision dated August 5, 2010, OWCP's hearing representative affirmed the decision dated October 23, 2009.

On August 4, 2011 appellant requested reconsideration. She submitted reports from Dr. Jackson dated April 14 and August 13, 2010, who diagnosed herniated disc causally related to the work incident of August 21, 2008. On June 6, 2011 Dr. Jackson noted that appellant's back pain radiated into her legs which increased with activities. He diagnosed chemical radiculitis. In a July 5, 2011 report, Dr. Jackson noted that appellant's back pain was partially improved with previous epidural blocks, rest and medication. He diagnosed herniated disc at L5-S1 and noted work activities increased her pain and aggravated her condition and she could not work. In a July 28, 2011 prescription note, Dr. Jackson ordered lumbar spine x-rays and an MRI scan. He treated appellant on August 3, 2011 for persistent pain, herniated disc and cytokine tumor necrosis factor-alpha causally related to her August 21, 2008 work injury. Dr. Jackson opined that she was not fit to return to work. In an August 3, 2011 disability certificate, he advised that appellant was totally disabled from August 3 to September 6, 2011. In a September 23, 2011 report, Dr. Jackson treated her for back pain and dysesthesias in the left leg. He opined that appellant sustained a disc injury at L5-S1 and chemical radiculitis and recommended a microdiscectomy at L5. Dr. Jackson indicated that she was totally disabled. Appellant submitted a May 28, 2010 denial of reasonable accommodations from the employing establishment.

In a decision dated November 3, 2011, OWCP denied modification of the August 5, 2010 decision.

In a November 2, 2012 letter, received on November 6, 2012, appellant requested reconsideration. She asserted that she had residuals of her lumbar sprain which was documented by Dr. Jackson. Appellant disagreed with the opinion of referee physician and advised it was not based on a complete and accurate medical history. She submitted reports from Dr. Jackson dated June 6 to September 23, 2011, previously of record. Other reports from him dated September 7 and 15, 2011 noted appellant's symptoms of back pain and giving way of the left leg and knee. Dr. Jackson noted that an MRI scan revealed a disc herniation which encroached upon the left foramen. He advised that appellant's herniated disc and tumor necrosis factor were pain generators and he recommended surgery. Dr. Jackson opined that she could not work. In a September 7, 2011 disability certificate, he noted that appellant was totally disabled due to lumbar disc syndrome. In reports dated October 19 to December 21, 2011, Dr. Jackson opined that the disc herniation was sustained as a result of the incident of August 21, 2008. He recommended disc surgery. Dr. Jackson advised that the damaged tissues from the August 21, 2008 injury caused tumor necrosis factor to be released causing chronic neuropathic pain. On January 19, 2012 he advised that appellant's condition had not changed but she could return to work with a lifting restriction. In a January 19, 2012 disability certificate, Dr. Jackson noted that she was partially disabled from September 6 to January 19, 2012 due to lumbar disc syndrome. A lumbar spine x-ray dated August 22, 2011 revealed mild facet osteoarthritis of the lumbar spine with no evidence of instability. A lumbar spine MRI scan revealed degenerative disc disease at L5-S1, central disc protrusion that displaces the descending right S1 nerve root.

In reports dated September 15 and 20, 2011, Dr. Joseph O'Brien, a Board-certified orthopedist, treated appellant for severe back and left leg pain. He diagnosed neuroforaminal

stenosis, degenerative L5-S1 and lumbago. Dr. O'Brien recommended an anterior lumbar interbody fusion at L5-S1. He opined that due to appellant's severe back and leg pain she could perform sedentary work with restrictions. In a September 15, 2011 sick leave certificate, Dr. O'Brien advised that she could return to work on September 16, 2011 with a lifting restriction.

By decision dated November 19, 2012, OWCP denied appellant's request for reconsideration as it was untimely and did not establish 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 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.”¹

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.² However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. 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 be manifest on its face that OWCP committed an error.³

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(a).

³ *Id.* at 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁴ *Annie L Billingsley*, 50 ECAB 210 (1998).

⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

the evidence could be construed so as to produce a contrary conclusion.⁶ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁷ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.⁸

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues. As appellant's November 2, 2012 request for reconsideration, received on November 6, 2012, was not received within one year after the most recent merit decision of November 3, 2011 it was untimely.¹⁰ Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.

The Board also finds that appellant has not established clear evidence of error on the part of OWCP. Appellant's November 2, 2012 letter asserted that she continued to have residuals of her lumbar sprain which was supported by Dr. Jackson. She disagreed with the opinion of the referee physician and believed it was not based on complete and accurate medical history. While appellant addressed her disagreement with OWCP's termination decision, her general allegations do not raise a substantial question as to the correctness of OWCP's decision. OWCP properly found that her statements of November 2, 2012 did not establish clear evidence of error.

The Board notes that the underlying issue is medical in nature and that, on reconsideration, appellant submitted additional medical evidence. Appellant submitted reports from Dr. Jackson dated June 6 to September 23, 2011, previously of record. OWCP had previously considered this evidence and she, in submitting these documents, did not explain how this evidence was positive, precise and explicit in manifesting on its face that OWCP committed an error in denying her claim for compensation. It is not apparent how resubmission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision.

⁶ *Id.*

⁷ *Id.*

⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ In computing the time for requesting reconsideration, the date of the event from which the designated period of time begins to run shall not be included when computing the time period. However, the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday. One year from November 3, 2011 is Saturday, November 3, 2012. The time for requesting reconsideration of OWCP's November 3, 2011 decision began to run on November 4, 2011, and thus would have expired on November 3, 2012, had this date not been a Saturday. The next business day was Monday, November 5, 2012. As appellant's request for reconsideration was not received until November 6, 2012, it was not timely. See *Debra McDavid*, 57 ECAB 149 (2005); *John B. Montoya*, 43 ECAB 1148 (1992).

Other reports from Dr. Jackson dated September 7 and 15, 2011 noted appellant's symptoms and disability status. In reports dated October 19 to December 21, 2011, Dr. Jackson noted appellant's complaints of back pain and opined that the disc herniation was sustained as a result of the incident of August 21, 2008. He opined that the damaged tissues of August 21, 2008 caused tumor necrosis factor to be released causing chronic neuropathic pain. On January 19, 2012 Dr. Jackson returned appellant to work subject to a lifting restriction. Even though he noted that she had symptoms of her lumbar sprain sustained in the workplace accident, he did not specifically explain the reasons why she had continuing residuals causally related to her accepted employment condition of sprain of the back and lumbar region. Rather, Dr. Jackson attributes appellant's condition to herniated disc at L5-S1 and tumor necrosis factor, conditions not accepted by OWCP as work related. These reports are not rationalized as the physician does not explain the reasons why any residuals were caused by the accepted lumbar sprain. This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. Thus, these reports are insufficient to discharge appellant's burden of proof.

Appellant submitted reports from Dr. O'Brien dated September 15 and 20, 2011, who diagnosed neuroforaminal stenosis, degenerative L5-S1 and lumbago and recommended surgery at L5-S1. Dr. O'Brien opined that she could return to work on September 16, 2011. Although he noted that appellant had symptoms of low back and leg pain, he did not specifically explain the reasons why she had any employment-related residuals causally related to her accepted low back sprain. Rather, Dr. O'Brien attributes her symptoms and disability to neuroforaminal stenosis, degenerative L5-S1 and lumbago, all conditions that were not accepted as related to the August 21, 2008 work injury. Thus, these reports are insufficient to discharge appellant's burden of proof.

The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of 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.¹¹ Other medical evidence submitted by appellant did not specifically address whether she had residuals of her accepted work injury. This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error.

Appellant has not established clear evidence of error by OWCP in its November 19, 2012 decision.

CONCLUSION

The Board finds that appellant's request for reconsideration dated November 2, 2012 was untimely filed and did not demonstrate clear evidence of error.

¹¹ *D.G.*, 59 ECAB 455 Docket No. 08-137 (issued April 14, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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