

She contends that new medical evidence established a causal relationship between a right shoulder condition and accepted injuries.

FACTUAL HISTORY

OWCP accepted that on or before February 3, 1998 appellant, then a 46-year-old service representative, sustained tenosynovitis of the right ring finger, cubital tunnel syndrome of the right elbow and right carpal tunnel syndrome. She underwent surgery on April 27, 1998 for a right ulnar nerve decompression, medial humeral epicondylectomy and right ring finger trigger release. Appellant received wage-loss compensation. On July 19, 1999 she returned to duty as a part-time modified service representative, increasing to eight hours on August 16, 1999.

By decision dated July 25, 2000, OWCP found that appellant had no loss of wage-earning capacity, based on her actual earnings as a full-time modified service representative from August 16, 1999 onward.

Dr. Robert L. Morrow, Jr., an attending Board-certified orthopedic surgeon, stated in a January 4, 2001 report that appellant was disabled for work due to ulcerative colitis. He noted in May 21, 2002 reports that she had been totally disabled since December 4, 2000 due to myofascial pain syndrome of the right shoulder.

Appellant separated from the employing establishment on June 4, 2001 and received disability retirement benefits from the Office of Personnel Management (OPM).

Appellant claimed a recurrence of total disability commencing December 13, 2000. She submitted a position description which she asserted noted a requirement for keyboarding in excess of her medical restrictions. By decision dated November 18, 2002, OWCP denied appellant's recurrence claim on the grounds that the medical evidence demonstrated that she stopped work due to ulcerative colitis, which Dr. Morrow opined was a nonoccupational condition. Following an August 28, 2003 hearing, OWCP issued its November 19, 2003 decision affirming the denial of the recurrence claim.

Appellant submitted five subsequent requests for reconsideration, contending that ongoing reports from Dr. Morrow established that she was totally disabled for work due to an occupational right shoulder condition. OWCP issued January 24 and August 16, 2006, March 7, 2007 and September 19, 2008 decisions denying modification of the wage-earning capacity determination, finding that appellant's statements and Dr. Morrow's reports did not demonstrate error in the original determination, that she had been vocationally rehabilitated or that the accepted injuries had worsened such that she could no longer perform the full-time service representative position.² It found that there was no medical evidence prior to July 25, 2000 of an occupational right shoulder condition.

In an August 25, 2009 letter, appellant requested reconsideration of the original wage-earning capacity determination. She contended that Dr. Morrow's reports were sufficient o

² OWCP also issued a June 4, 2007 decision denying reconsideration.

establish that she sustained myofascial pain syndrome of the right shoulder due to the accepted injuries, disabling her from performing the full-time modified clerk position on which OWCP based the wage-earning capacity determination.

By decision dated September 23, 2009, OWCP denied modification of the wage-earning capacity determination. It found that appellant's statement and Dr. Morrow's reports did not demonstrate that the original wage-earning capacity determination was in error, that she had been vocationally rehabilitated or that the accepted conditions had worsened such that she could no longer perform the full-time service representative position.

In a September 14, 2010 letter, appellant requested reconsideration asserting that OWCP wrongfully denied her claim for right shoulder myofascial pain syndrome. Appellant submitted Dr. Morrow's reports previously of record, and his March 25 and August 18, 2010 reports diagnosing right shoulder myofascial pain.

By decision dated September 30, 2010, OWCP denied reconsideration finding that appellant had failed to provide new or relevant evidence or to raise substantive legal questions.

By reconsideration request received by OWCP on January 10, 2011, appellant asserted that OWCP wrongfully denied her claim for myofascial pain syndrome of the right shoulder handling the matter instead as a request for modification of the wage-earning capacity decision. Appellant submitted copies of Dr. Morrow's reports previously of record and his August 11, 2011 report noting myofascial pain of the right posterior shoulder.

By decision dated October 13, 2011, OWCP denied appellant's January 10, 2011 request for reconsideration on the grounds that her request was not timely filed and failed to present clear evidence of error. It found that her reconsideration was received more than one year after the September 23, 2009 decision, the most recent merit decision in the claim.

In a letter, received by OWCP on October 16, 2012, appellant again alleged that OWCP mishandled her claim by failing to accept myofascial pain syndrome as work related. Appellant asserted that she sustained "a recurrence of the original accepted condition and a new injury caused by the accepted injury." She contended that claim forms and medical reports of record prior to the September 23, 2009 merit decision were sufficient to establish causal relationship. Appellant submitted reports previously of record, and Dr. Morrow's November 10, 2011 and June 14, 2012 chart notes describing myofascial right posterior shoulder pain.

By decision dated October 22, 2012, OWCP denied appellant's request for reconsideration on the grounds that her request was not timely filed and failed to present clear evidence of error. It found that her letter was received on October 16, 2012, more than one year after the September 23, 2009 decision, the final merit decision in the claim.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP 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.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.⁸ OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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 by OWCP.¹⁴ The Board must make an

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 4, *Jesus D. Sanchez*, *supra* note 5.

⁸ *Thankamma Mathews*, *supra* note 4.

⁹ 20 C.F.R. § 10.607(b).

¹⁰ *Thankamma Mathews*, *supra* note 4.

¹¹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5.

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹⁵

ANALYSIS

In its October 22, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review and failed to present clear evidence of error.

In its most recent merit decision, on September 23, 2009, OWCP denied modification of the July 25, 2000 wage-earning capacity determination.

In her October 16, 2012 request for reconsideration, appellant repeated prior arguments that the accepted medical conditions caused myofascial pain syndrome of the right shoulder, disabling her from her full-time modified service representative job as of December 13, 2000. The Board finds that her letter does not raise a substantial question as to whether OWCP's September 23, 2009 decision was in error or *prima facie* shift the weight of the evidence in her favor. Therefore, it is insufficient to establish clear evidence of error. Dr. Morrow's chart notes repeat or duplicate his reports previously of record. The Board has held that evidence that repeats or duplicates evidence previously submitted is insufficient to *prima facie* shift the weight of the evidence in favor of the claimant.¹⁶ Consequently, OWCP properly denied her reconsideration request for failing to establish clear evidence of error.

On appeal, appellant asserts that OWCP misconstrued her request for reconsideration. It was actually a request for reconsideration of the October 23, 2011 decision. The Board notes the October 16, 2012 request for reconsideration. The October 23, 2011 decision clearly and correctly stated that under 20 C.F.R. § 10.625, appellant's only right of appeal was to the Board. Appellant also contends that new medical evidence established a new right shoulder injury due to her employment, but this argument pertains to the merits of the claim, and the Board does not have jurisdiction over the merits of the claim.

¹⁵ *Gregory Griffin, supra* note 6.

¹⁶ *D.E.*, 59 ECAB 438 (2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2012 is affirmed.

Issued: September 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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