

reached up to retrieve scopes from cabinets. The employing establishment noted that she was not requesting time lost from work.

Appellant submitted handwritten employee health records dated December 2008, an October 29, 2008 hospital record and x-ray reports and physical therapy reports.

In a December 6, 2008 report, Dr. Edgardo Marecos, a Board-certified diagnostic radiologist, related appellant's complaints of right shoulder pain while working at the employing establishment. He noted that evaluation of the rotator cuff demonstrated findings suggestive of partial thickness tear at the insertion of the supraspinatus tendon. Dr. Marecos also reported findings suggestive of partial thickness undersurface tear at the distal infraspinatus tendon, medial subluxation of the long head of the biceps tendon, mildly low lying acromion and subdeltoid bursitis.

By letter dated October 21, 2010, OWCP advised appellant that she needed to submit additional evidence to establish her traumatic injury claim.

In a decision dated December 2, 2010, OWCP denied appellant's claim finding that she failed to submit sufficient medical evidence to establish that she sustained a diagnosed condition causally related to the September 29, 2008 employment incident.

Appellant requested a review of the written record. She resubmitted employee health records and physical therapy progress notes.

In a January 5, 2011 attending physician's report, Dr. Phillip Greenberg, a Board-certified internist, indicated that on September 29, 2008 appellant developed severe right shoulder pain. He noted that a December 2008 magnetic resonance imaging (MRI) scan revealed partial thickness tear of the supraspinatus tendon. Dr. Greenberg diagnosed rotator cuff tear injury. He checked "yes" that appellant's condition was caused or aggravated by an employment activity. Dr. Greenberg also submitted a work status report.

By decision dated April 28, 2011, an OWCP hearing representative set aside the December 2, 2010 decision and remanded the case to OWCP for further development. He stated that the factual evidence was insufficient to establish that the alleged incident occurred at the time, place and in the manner described and directed OWCP to request additional factual evidence from appellant and the employing establishment.

In a letter dated May 10, 2011, OWCP requested that appellant complete the attached questionnaire in order to substantiate the factual elements of her claim. It also requested additional medical evidence to establish that she sustained a diagnosed condition causally related to the September 29, 2008 employment incident.

No additional evidence was received.

By decision dated June 20, 2011, OWCP affirmed the December 2, 2010 denial decision based on fact of injury. It determined that appellant failed to provide the requested information in OWCP's May 10, 2011 development letter.

By letter dated May 23, 2011 and received by OWCP on July 18, 2011, appellant stated that on September 29, 2008 she noticed that her shoulder was hurting from constantly reaching up to retrieve scopes out of a cabinet and reaching up for supplies that were up on shelves. She explained that she went to employee health and had x-rays and an MRI scan done. Appellant had three injections in her shoulder. She noted that she continued to have problems with her right shoulder.

In a May 23, 2011 report, Dr. Greenberg, stated that appellant sustained a right shoulder injury at work on September 29, 2008 as a result of overhead reaching and lifting colonoscopy equipment. He described her medical treatment and noted that a December 6, 2008 MRI scan revealed partial thickness tear at the insertion of the supraspinatus tendon, undersurface tear at the distal infraspinatus tendon, medial subluxation of the long head of the biceps tendon, and subdeltoid bursitis. Dr. Greenberg reported that these findings were consistent with appellant's symptoms caused by the overhead movements required in her job. He submitted attending physicians and duty status reports.

In an appeal request form dated February 7, 2014 and received by OWCP on February 21, 2014, appellant requested reconsideration. In an attached letter, she stated that she never received the June 20, 2011 decision and that she continued to suffer from pain in her right shoulder. Appellant included a copy of the June 20, 2011 denial decision and pictures of her work area.

By decision dated February 24, 2014, OWCP denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. It indicated that it had received her request for reconsideration on February 21, 2014, more than one year from the last merit decision. OWCP found that the evidence was insufficient to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.² The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.³ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board.⁴

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must

² 20 C.F.R. § 10.607.

³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁵ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.⁷

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

ANALYSIS

The Board finds that OWCP improperly determined that appellant's request for reconsideration was not timely filed within the one-year time limitation period set forth in section 10.607. OWCP issued its last merit decision denying her traumatic injury claim on June 20, 2011. Appellant had until June 20, 2012 to provide OWCP with a request for reconsideration.¹² OWCP determined that they received appellant's request for reconsideration on February 21, 2014, which was not within the one-year time limitation. The record reveals, however, that appellant submitted a May 23, 2011 letter that was received by OWCP on July 18, 2011, within the required one-year time period.

In its May 23, 2011 letter, appellant indicated that she was submitting documents to support her claim and included OWCP's file number. She submitted additional medical evidence. Appellant was clearly pursuing further review of her claim. Although the May 23, 2011 letter does not mention the word reconsideration, the Board has found that there may be a request for reconsideration in situations where a letter does not contain the word

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

⁸ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Id.*

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *Supra* note 4.

reconsideration.¹³ The Board finds that as appellant submitted new medical evidence under the appropriate file number, her May 23, 2011 letter constituted a request for reconsideration.

Because appellant filed a timely request for reconsideration, the Board finds that OWCP improperly denied her reconsideration request in its February 24, 2014 decision by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board will remand the case to OWCP for review of the evidence under the standard of review for a timely reconsideration request and to undertake any additional development deemed necessary, to be followed by the issuance of an appropriate decision.

CONCLUSION

The Board finds that appellant's May 23, 2011 letter received by OWCP on July 18, 2011 constituted a request for reconsideration which was timely filed within one year of the June 20, 2011 merit decision.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 1, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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

¹³ See *S.A.*, Docket No. 12-1019 (issued October 15, 2012); *Jack D. Johnson*, 57 ECAB 593 (2006); *Vincente P. Taimanglo*, 45 ECAB 504 (1994).