

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case was previously before the Board. By decision dated October 12, 2012, the Board affirmed a February 3, 2012 OWCP merit decision, which found that the medical evidence of record failed to establish appellant's left shoulder injury causally related to the May 9, 2011 employment incident. The Board also affirmed a March 12, 2012 nonmerit decision denying her request for reconsideration finding that she had neither raised substantive legal argument nor included new and relevant evidence.³ The findings of fact and conclusions of law from the prior decisions and order are hereby incorporated by reference.

On April 2, 2012 OWCP received a March 13, 2012 progress note from a registered nurse documenting treatment of appellant's left shoulder.

Appellant also submitted a number of medical reports dated June 3, 2011 through July 22, 2013, which were received by OWCP on September 24, 2013.

In a June 3, 2011 diagnostic report, Dr. A. Nick Awad, a Board-certified diagnostic radiologist, reported that a magnetic resonance imaging (MRI) scan of the left shoulder revealed mild arthritic changes in the left acromioclavicular joint, a grade 2 tendinitis with possible small partial intrasubstance tear of the supraspinatus tendon and tenosynovitis of the long head biceps tendon with associated fluid collection in the bicipital groove.

In a January 31, 2012 medical report, Dr. Theron C. Tilgner, a physician of osteopathic medicine, reported that appellant was being treated for a follow up of her left shoulder. He recommended an isolated open distal clavicle resection due to her complaints of continued shoulder pain.

In reports dated July 27, August 26, November 17, and December 23, 2011, a registered nurse stated that appellant had a previous left shoulder injury and surgery in 2007. She stated that, for the last four years, appellant did not have any incidents, complaints or claims regarding her left shoulder until she sought treatment on May 12, 2011. The registered nurse further noted that appellant lifted a heavy box at work on May 9, 2011 and injured herself.

In a June 13, 2012 diagnostic report, Dr. Bobby Shah, a Board-certified diagnostic radiologist, reported that an MRI scan of the brain revealed eight millimeter area of diffusion restriction involving the right thalamus consistent with acute infarct. Otherwise, the study was unremarkable.

³ Docket No. 12-1096 (issued October 12, 2012). On May 12, 2011 appellant, then a 59-year-old public contract representative, filed a traumatic injury claim (Form CA-1) alleging a left shoulder injury on May 9, 2011 when she was lifting a box to weigh it on a scale.

A June 13, 2012 Havasu Regional Medical Center physician's report from Dr. Michele Butler, an osteopathic physician, provided findings on physical examination. She diagnosed cerebrovascular accident, multiple sclerosis, myalgia, chronic pain syndrome, transient ischemic attack (TIA), neuropathy, and stress reaction.

In a June 14, 2012 diagnostic report, Dr. Shah reported that a computerized tomography scan of the head revealed no evidence of acute intracranial abnormality and mild chronic microvascular ischemic changes involving the centrum semiovale bilaterally.

In a June 14, 2012 report, Dr. M.A. Kazmi, Board-certified in internal medicine, reported that appellant presented to the emergency room on June 13, 2012 with complaints of left-sided numbness and weakness, trouble walking, dragging of the left foot, inability to raise her left arm, and tingling in the left hand and foot. He noted a history of migraines and stated that appellant had a left shoulder injury and surgery three to four years ago. Dr. Kazmi also noted a history of left shoulder pain after picking up a box in May of last year. He diagnosed TIA and complicated migraine.

In a June 14, 2012 admit order, Dr. Kazmi recommended an MRI scan and physical therapy.

In a June 15, 2012 note, Dr. Kazmi noted that appellant could not work until released from treatment.

In a July 26, 2012 unsigned Pro Therapy Note, findings were provided on physical examination.

In May 21 and July 22, 2013 medical reports, Dr. Kazmi provided findings on examination and diagnosed cerebral embolism with cerebral infarction, cervicalgia, pain in shoulder region joint, anxiety, ankle sprain, and insomnia.

By letter dated December 18, 2013, counsel for appellant stated that a request for reconsideration was sent *via* certified mail on September 16, 2013 and was received by OWCP on September 23, 2013. He requested a status update on the reconsideration request.

In a January 9, 2014 OWCP telephone note, the reconsideration examiner contacted counsel's office and informed his assistant that counsel's December 18, 2013 letter was received. However, the record did not contain a reconsideration request and no documents were received on September 23, 2013. The reconsideration examiner stated that medical evidence was received on September 24, 2013 and instructed counsel to resubmit the September 16, 2013 reconsideration request with a copy of the postal return receipt.

On January 9, 2014 counsel for appellant faxed to OWCP a document consisting of 38 pages, including a brief requesting reconsideration dated September 16, 2013. The brief dated September 16, 2013 identified her name and requested reconsideration. The brief generally cited FECA procedures and ECAB case law pertaining to traumatic injury claims. While it noted submission of various medical reports not previously considered, no reference was made to any specific medical evidence or enclosures accompanying the requested reconsideration. Moreover, the brief made no specific reference to appellant's claim other than noting the date of the

October 12, 2012 decision on appeal. Affixed to the first page of the brief was a copy of a blank Certified Mail Receipt (hereinafter P.S. Form 3800), which contained no information other than tracking number: 7011 3500 0002 5336 5902. The receipt did not note appellant's name, OWCP file number, postage fees paid, postmark, addressee, or a corresponding address.

A copy of a Domestic Return Receipt (hereinafter P.S. Form 3811) was also provided containing the same tracking number noted above. The P.S. Form 3811 card was addressed to "[R]econsideration [R]equest"; U.S. Department of Labor DFEC Central Mailroom, P.O. Box 8300, London, Kentucky 40742-8300. The card was stamped as received by Shane Collett on September 23, 2013. Similar to the P.S. Form 3800, the P.S. Form 3811 also failed to note appellant's name, file number, or other identifying information.

The brief with accompanying P.S. Form 3800, P.S. Form 3811, and facsimile cover sheet totaled 11 pages. The remaining documents consisted of 27 pages of medical evidence dated June 3, 2011 through July 22, 2013. The medical evidence was entirely duplicative of the 26 pages received by OWCP on September 24, 2013 and only contained one additional newly submitted page: a March 13, 2013 payment receipt to Havasu Regional Medical Center.

By decision dated January 24, 2014, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵

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 decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.⁶

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁷

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

ANALYSIS

In its January 24, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. Appellant's application for reconsideration should have been received by OWCP within one year of the Board's October 12, 2012 decision, the last merit review of this case.¹² A right to reconsideration within one year also accompanies any merit decision on the issues.¹³ As appellant's December 18, 2013 request for reconsideration was submitted and received on December 23, 2013, more than one year after October 12, 2012, it was untimely.

In the December 18, 2013 reconsideration request, counsel for appellant stated that a reconsideration request had been submitted to OWCP on September 16, 2013 and received on September 23, 2013. The reconsideration examiner informed counsel that, while medical evidence was received on September 24, 2013, the record did not contain a reconsideration request.

On January 9, 2014 counsel faxed 38 documents as proof of a timely reconsideration request. The packet included a 9-page brief requesting reconsideration dated September 16, 2013, a blank certified mail receipt, a green card labeled "reconsideration request", a facsimile cover sheet and 27 pages of medical evidence dated June 3, 2011 through July 22, 2013. The medical evidence was entirely duplicative of the 26 pages received by OWCP on September 24, 2013 but also contained one additional newly submitted page: a March 13, 2013 payment receipt to Havasu Regional Medical Center.

The Board finds, however, that this evidence fails to establish that appellant submitted a timely request for reconsideration on September 23, 2013.¹⁴

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² 20 C.F.R. § 10.607 (2011).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(e)(6) (August 2011).

¹⁴ *S.E.*, Docket No. 14-686 (issued July 28, 2014).

The Board notes that a reconsideration request does not have to be submitted on an appeal request form; letter format is acceptable and the word “reconsideration” does not need to be stated in the request for it to be considered valid.¹⁵ While no special form is required, the request must be in writing, be signed and dated by the claimant or the authorized representative, and be accompanied by relevant new evidence or argument not considered previously. The request should also identify the decision and the specific issue(s) for which reconsideration is being requested.¹⁶

The P.S. Form 8311 addressed to “[R]econsideration [R]equest,” U.S. Department of Labor in London, Kentucky provided no identifying information as to the claimant’s name or OWCP file number.¹⁷ The accompanying blank P.S. Form 3811 also failed to identify appellant’s name or OWCP file number, which would establish that the corresponding P.S. Form 3811 served as a timely reconsideration request for her claim.¹⁸ While a reconsideration request could be discerned from the green card which noted “request for reconsideration,” there is no evidence that this green card accompanied the medical evidence received on September 24, 2013 as the green card was stamped as having been received on September 23, 2013. The dates do not correlate. The Board further notes that counsel for appellant represents multiple claimants before OWCP. Without any identifiable information, OWCP could not have known that this P.S. Form 3811 was associated with her claim.¹⁹

The Board further finds that appellant has failed to establish that the nine-page brief requesting reconsideration dated September 16, 2013 was submitted with the medical evidence received on September 24, 2013. The brief generally cited FECA procedures and ECAB case law and made no reference to any enclosures or evidence submitted in support of appellant’s claim; namely, the 26 pages of medical evidence received on September 24, 2013. The resubmission of this medical evidence with the January 9, 2014 reconsideration packet does not establish that a reconsideration request accompanied the original filing of these documents. While medical evidence was received on September 24, 2013, appellant has failed to establish that it was accompanied with a request for reconsideration.²⁰

In *S.E.*,²¹ appellant argued that she had submitted a timely application for review prior to the one-year time limitation period for requesting reconsideration of the February 29, 2010 merit

¹⁵ See *supra* note 13 at Chapter 2.1602.(3)(a) (August 2011).

¹⁶ *Id.* at Chapter 2.1602.(2)(a).

¹⁷ *John Montoya*, 43 ECAB 1128 (1992).

¹⁸ *Supra* note 14.

¹⁹ *C.f. E.S.*, Docket No. 12-460 (issued November 29, 2012) (appellant’s OWCP file number was noted on the green card as proof of receipt). *Supra* note 16.

²⁰ See *J.M.*, Docket No. 12-1919 (issued February 8, 2013); *J.V.*, Docket No. 12-90 (issued July 2, 2012) (timely receipt of correspondence which referenced specific medical evidence as enclosures failed to establish that this medical evidence accompanied the correspondence. The Board found that appellant failed to provide argument or evidence of sufficient probative value to show that all of the referenced enclosures were ever received by OWCP).

²¹ *Supra* note 14.

decision. The record established that, on January 3, 2011 OWCP had entered numerous factual and medical evidence into the record; however, there was no request for reconsideration among the evidence submitted. Appellant submitted a return receipt showing that OWCP received correspondence from her on December 29, 2010 as proof that she timely requested reconsideration. The Board found that the return receipt failed to establish that a reconsideration request for that case had been timely submitted with the factual and medical evidence. Similar to *S.E.*, the P.S. Form 3811 in this case cannot serve as proof that appellant timely requested reconsideration as there is no identifiable information relating it to appellant's claim, nor can the green card establish that a nine-page brief requesting reconsideration accompanied the medical evidence received. As previously noted, the green card was stamped as having been received on September 23, 2013 while the medical evidence submitted was received on September 24, 2013.

While appellant submitted medical evidence prior to the one-year time limitation, the evidence was not accompanied by any written statement from appellant that could reasonably be discerned as a request for reconsideration.²²

Counsel's letter dated December 18, 2013, which was received on December 23, 2013, was the earliest document that constituted a request for reconsideration of OWCP's October 12, 2012 decision.²³ As appellant's request for reconsideration was untimely, she must demonstrate clear evidence of error by OWCP in denying her claim.²⁴

The Board 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 denial of her claim. The issue is whether she has shown clear evidence of error in the denial of her left shoulder injury claim.

Appellant submitted medical reports already of record, specifically, Dr. Awad's August 3, 2011 diagnostic report, nurse reports of November 17 and December 23, 2011 reports and Dr. Tilgner's January 31, 2012 report. OWCP had previously considered this evidence, as did the Board on appeal. Thus, in resubmitting these documents, appellant 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.²⁵

New evidence submitted included nurse notes dated June 27 and August 26, 2011, and March 13, 2012. Registered nurses, licensed practical nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined under FECA, and thus their opinions

²² *Freddie Hawkins*, Docket No. 04-1642 (issued January 21, 2005).

²³ *Id.*

²⁴ *See Debra McDavid*, 57 ECAB 149 (2005).

²⁵ *J.J.*, Docket No. 13-1363 (issued November 6, 2013).

are of no probative value.²⁶ The remaining evidence, which included Dr. Shah's June 13, 2012 diagnostic report interpreting an MRI scan of the brain and Dr. Kazmi's June 14, 2012 report diagnosing TIA and complicated migraine, is insufficient to establish that OWCP's decision was erroneous or to raise a substantial question as to the correctness of OWCP's decision in denying appellant's claim for left shoulder injury.²⁷

While appellant's attorney addressed his disagreement with OWCP's denial of appellant's claim, his allegations do not establish clear evidence of error. They do not raise a substantial question as to the correctness of OWCP's decision. Counsel only generally cited Board case law pertaining to traumatic injury claims and made no reference to appellant's case specifically to explain how the evidence submitted demonstrated clear evidence of error. The Board notes that the underlying issue is medical in nature and the medical evidence submitted was not sufficient to shift the weight of the evidence in appellant's favor and establish that OWCP erred in denying her claim.

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 provided evidence of sufficient probative value or to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.²⁸

CONCLUSION

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

²⁶ 5 U.S.C. § 8101(2) of FECA provides as follows: (2) "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.

²⁷ *L.D.*, Docket No. 14-132 (issued June 11, 2014).

²⁸ *D.C.*, Docket No. 14-663 (issued June 26, 2014).

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 17, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board