

ISSUE

The issue is whether OWCP properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On November 16, 2012 appellant, then a 49-year-old pharmacy technician, filed a traumatic injury claim alleging that on November 14, 2012 her right thumb got stuck between the totes she was stacking. She returned to modified duty, with no use of her right hand, on December 7, 2012.

In a March 11, 2013 letter, OWCP noted that when appellant's claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and payment of a limited amount of medical expenses was administratively approved as the employing establishment did not controvert continuation of pay or challenge the case. As appellant's medical bills exceeded \$1,500.00, it reopened her claim to formally consider the merits of the case. OWCP stated that the evidence received in support of appellant's claim was insufficient to support her claim. Appellant had failed to provide a physician's opinion explaining how the work incident resulted in the diagnosed right hand condition. OWCP requested that she submit a well-rationalized medical opinion on how the osteoarthritis right hand was caused or aggravated by the work incident. Appellant was provided 30 days to submit the requested information.

Appellant submitted requests for authorization, copies of physical therapy notes and a March 11, 2013 report from Dr. Brodie E. McKoy, a Board-certified orthopedic surgeon, who diagnosed osteoarthrosis involving the hand.

By decision dated April 16, 2013, OWCP denied the claim on the basis that causal relationship of the diagnosed right thumb/hand osteoarthritis had not been established.

On an OWCP form report dated April 10, 2014, which OWCP received on April 18, 2014, appellant requested reconsideration. In support of her reconsideration request, she submitted an authorization request, work status reports, and several medical reports from Dr. McKoy and other physicians dated January 20, 2014, November 26, May 30, and April 22, 2013, December 8, 6, and November 19, 2012, which noted the status of appellant's right thumb/hand.

By decision dated April 28, 2014, OWCP found that appellant's request for reconsideration was untimely filed and failed to present 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 or her application for review within one year of the date of that decision.⁴ Section 10.607(a) of the implementing regulations provide that an application for reconsideration

⁴ 20 C.F.R. § 10.607(a).

must be received within one year of the date of OWCP's decision for which review is sought.⁵ 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.⁶

OWCP will reopen a case for merit review, notwithstanding the one-year filing limitation, if the 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.⁷

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 April 16, 2013 decision, OWCP denied appellant's claim as causal relationship had not been established. Appellant requested reconsideration of this decision on a form letter dated April 10, 2014, which it received on April 18, 2014. In an April 28, 2014 decision, OWCP denied her request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ The Board notes that, for merit decisions issued prior to August 29, 2011, OWCP's procedures provided that the timeliness for a reconsideration request was determined not by the date OWCP received the request, but by the

⁵ *Id.*

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

⁷ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

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 *Supra* note 5.

¹³ *Robert F. Stone*, 57 ECAB 393 (2005).

postmark on the envelope.¹⁴ OWCP's new procedures as of August 29, 2011 require that, for all merit decisions issued on and after August 29, 2011, the timeliness of a reconsideration request is determined by the date the request is received by OWCP.¹⁵ As appellant's April 10, 2014 request for reconsideration was received by OWCP on April 18, 2014, more than one year after the last merit decision of April 16, 2013, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁶

Appellant's claim was denied because she had not established causal relationship. The evidence submitted by her in support of her April 10, 2014 request for reconsideration does not raise a substantial question as to the correctness of OWCP's decision denying compensation or shift the weight of the evidence of record in her favor. The term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which, on its face, shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹⁷ While the submitted evidence could possibly be construed to produce a contrary conclusion, it does not present clear evidence of error in OWCP's decision.

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in denying her claim. Therefore, the Board finds that she has not presented clear evidence of error.

On appeal, appellant contends that the staff of Southern Orthopedics (Dr. Brodie) has stated, "my thumb was not symptomatic until I jammed it. The swelling pain and limited motion are all findings of degenerative changes in the carpometacarpal joint." Appellant stated that her hand injury makes the smallest task nearly impossible for her and that she has little motion and the swelling pain has become unbearable. She also advised that she was developing carpal tunnel syndrome. As noted, none of the evidence submitted on reconsideration raises a substantial question concerning the correctness of OWCP's decision; therefore appellant has failed to establish clear error on the part of OWCP in denying further merit review.¹⁸

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹⁵ *Id.* at Chapter 2.1602.4(e) (August 29, 2011).

¹⁶ See *supra* note 13; see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁸ A.S., Docket No. 11-356 (issued September 16, 2011).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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