

ISSUE

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

FACTUAL HISTORY

On September 23, 2010 appellant, then a 57-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that same date she sustained a right arm injury when she was pulling out a postcon cart which was lodged behind a pole. She notified her supervisor and first sought medical treatment on the date of injury. Appellant stopped work on September 24, 2010.

By letter dated December 8, 2010, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and asked that she respond to the provided questions within 30 days. In support of her claim, she submitted various medical reports from her treating physicians dated September 23 to December 2, 2010.

By decision dated January 13, 2011, OWCP denied appellant's claim finding that the evidence of record failed to establish fact of injury.

By letter dated January 25, 2011, appellant, through counsel, requested an oral hearing before the Branch of Hearings and Review. The hearing was held on May 11, 2011. Following the hearing, appellant submitted medical reports dated September 23 and November 9, 2010 and June 1, 2011.

By decision dated July 22, 2011, the Branch of Hearings and Review affirmed the January 13, 2011 OWCP decision, as modified, finding that appellant established that the September 23, 2010 employment incident occurred as alleged but failed to provide sufficient medical evidence establishing that she sustained a right shoulder injury causally related to the accepted work-related incident.

On April 27, 2012 appellant, through counsel, requested reconsideration of the July 22, 2011 decision. In support of her claim, she submitted prescription notes dated March 8 and April 3, 2011.

In a November 22, 2011 medical report, Dr. Ernest Tolentino, a Board-certified orthopedic surgeon, reported that appellant sought treatment the day following her September 23, 2010 work injury for pain and limited motion of the right shoulder. A November 9, 2010 magnetic resonance imaging (MRI) scan of the right shoulder revealed mild degenerative disease, biceps tenosynovitis, subacromial and subdeltoid bursitis and joint effusion with fluid in subcoracoid recess. Appellant underwent surgery which revealed a completely torn right rotator cuff with bicipital tendinitis. Dr. Tolentino concluded that her injuries were causally related to the work accident on September 23, 2010, noting no prior history or trauma of the right shoulder.

By letter dated May 15, 2012, OWCP requested that Dr. Tolentino provide a rationalized medical opinion regarding how each of appellant's diagnosed conditions were caused by the September 23, 2010 employment incident.

In a June 5, 2012 report, Dr. Tolentino responded to OWCP's request by referencing his previously reviewed November 22, 2011 medical report. He further stated that appellant's shoulder condition was causally related to the September 23, 2010 employment incident because there was no prior history of trauma or treatment.

By decision dated July 26, 2012, OWCP affirmed the July 22, 2011 decision finding that the evidence of record failed to establish that appellant's right shoulder injury was causally related to the accepted September 23, 2010 employment incident. It noted that while Dr. Tolentino stated no history, trauma or treatment of the right shoulder, he failed to provide an explanation regarding the mild degenerative disease of the right shoulder which predated the September 23, 2010 employment incident.

By letter dated July 30, 2013, appellant, through counsel, requested reconsideration of the July 26, 2012 OWCP decision. In support of her request, she submitted a July 12, 2013 medical report from Dr. Tolentino.

In a July 12, 2013 medical report, Dr. Tolentino stated that appellant's torn right rotator cuff was the direct result of her attempt to pull a postcon cart which was stuck behind a post. The November 9, 2010 MRI scan finding of mild degenerative joint disease was a secondary finding and not contributory to the September 23, 2010 injury. Dr. Tolentino noted that this secondary finding had nothing to do with the restriction of shoulder motion caused by the work injury. He concluded that with a reasonable degree of medical probability, appellant's right shoulder condition was causally related to her September 23, 2010 work injury.

By decision dated August 6, 2013, 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 or her application for review within one year of the date of that decision.³ 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.⁴

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

³ 20 C.F.R. § 10.607(a).

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

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.⁵

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.⁶

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

In its August 6, 2013 decision, OWCP determined that appellant failed to file a timely application for review. An application for reconsideration must be received within one year of the date of OWCP's decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹² As appellant's July 30, 2013 request for reconsideration was submitted and received more than one year after the date of the last merit decision of record on July 26, 2012, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹³

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In support of her reconsideration request, appellant submitted a July 13, 2013 addendum report from Dr. Tolentino, who reported that the September 23, 2010 work injury caused her right shoulder injury. Dr. Tolentino noted that the finding of mild degenerative joint disease was a secondary finding and not contributory to the September 23, 2010 injury. However, this evidence is insufficient to establish that OWCP erred in its denial of appellant's

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

⁶ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹¹ 20 C.F.R. § 10.607 (2011).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

¹³ See *Debra McDavid*, 57 ECAB 149 (2005).

claim.¹⁴ Dr. Tolentino did not provide detailed medical rationale explaining how the January 23, 2010 incident caused appellant's injury other than generally stating no prior history of right shoulder injury or injury to the right rotator cuff. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.¹⁵ Although Dr. Tolentino's report is supportive of appellant's claim, it does not rise to the level to establish clear evidence of error on the part of OWCP as it was submitted after the July 26, 2012 merit decision.¹⁶ Thus, the additional medical report does not raise a substantial question as to the correctness of OWCP's July 26, 2012 merit decision or demonstrate clear evidence of error.

On appeal, counsel argues that the reports of Dr. Tolentino establish a causal relationship between appellant's torn rotator cuff injury and the September 23, 2010 employment incident. 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 to establish that OWCP erred in denying her claim.

Counsel further argues that he initially requested reconsideration on November 28, 2011 but the case was not decided until July 26, 2012. His November 28, 2011 reconsideration request has no bearing on the correctness of the July 26, 2012 OWCP decision as appellant's request was deemed timely and she was afforded a merit review. As noted above, counsel's July 30, 2013 reconsideration request was untimely as it was received more than one year after the last July 26, 2012 merit decision.

As none of the evidence raises a substantial question concerning the correctness of OWCP's decision, appellant has failed to establish clear evidence of error on the part of OWCP in denying further merit review.¹⁷

CONCLUSION

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

¹⁴ See *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

¹⁵ *Supra* note 12 at Chapter 2.1602.3(c) (October 2011).

¹⁶ *V.W.*, Docket No. 12-1901 (issued March 5, 2013).

¹⁷ *A.S.*, Docket No. 11-356 (issued September 16, 2011).

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2014
Washington, DC

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

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

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