

**United States Department of Labor
Employees' Compensation Appeals Board**

J.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Angola, NY, Employer**

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**Docket No. 14-34
Issued: March 7, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2013 appellant, through her attorney, filed a timely appeal from a September 10, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed from the last merit decision dated May 8, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review September 10, 2013 nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal, appellant contends that the evidence establishes that she sustained an employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 25, 2011 appellant, then a 47-year-old full-time regular city carrier, filed an occupational disease claim alleging that on that date she first became aware of her elbow and neck conditions and their relationship to her employment duties. In an attached statement, she stated that she felt shooting pain in both elbows on November 25, 2011 while sorting mail. Appellant also experienced pain while casing mail, lifting trays of mail and lifting packages and delivering mail. She began experiencing neck pain in the fall of 2008.

By letter dated December 15, 2011, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised to submit additional medical and factual evidence in 30 days.

On January 3, 2012 OWCP received a December 14, 2011 report from Dr. Thomas McTernan, Jr., a treating Board-certified internist, who provided physical findings and diagnosed cervicgia. A review of an x-ray showed degenerative disc disease.

By decision dated January 25, 2012, OWCP denied appellant's claim finding that fact of injury had not been established. It determined that the evidence was insufficient to establish that the work exposure occurred as alleged as she failed to provide a statement describing how her condition arose. OWCP also found that the record contained no medical evidence providing a diagnosed medical condition causally related to appellant's employment duties.

On February 12, 2012 appellant requested a review of the written record by an OWCP hearing representative.

In a December 8, 2011 letter, Dr. McTernan advised that appellant was capable of working with restrictions and was disabled from working until December 12, 2011. On December 14, 2011 he diagnosed significant neck degenerative disc disease. In February 6, 2012 duty status report, Dr. McTernan noted an injury date of November 25, 2011. He described the injury as occurring due to casing and carrying mail. Dr. McTernan noted pain in the elbows and neck and diagnosed a cervical strain, which he attributed to appellant's employment.

By decision dated May 8, 2012, the hearing representative affirmed the denial of appellant's claim finding insufficient medical evidence which addressed causal relationship. The decision informed appellant that any request for reconsideration had to be made within one year of that decision.

In a June 21, 2012 report, Dr. Loubert S. Suddaby, a treating Board-certified neurological surgeon, diagnosed neck sprains and strains and brachial neuritis or radiculitis. Appellant related that she sustained a work injury on December 1, 2011 when she noted increased neck and arm pain due to her duties as a letter carrier. Dr. Suddaby checked "yes" to the form question as to whether her condition was due to the history of injury she provided.

In progress notes dated June 25 through December 5, 2012, Dr. McTernan provided findings an physical examination and diagnosed cervical disc disorder, ulnar nerve injury, cervicgia and lateral epicondylitis. In a June 25, 2012 report, appellant related having increased levels of pain by the end of her workday. On September 12, 2012 Dr. McTernan

opined that her cervicalgia was due to her work requirements. He again checked “yes” to the questions concerning whether appellant’s complaints were consistent with her injury history.

On September 6, 2012 Dr. P. Jeffrey Lewis, a treating Board-certified neurological surgeon, reported that a review of a magnetic resonance imaging scan revealed C5-6 and C6-7 disc herniation and a C4-5 mild central disc bulge. Appellant stated that her neck pain increased in November and December 2011, which she attributed to her repetitive work duties as well as constant lifting and carrying of mail. Dr. Lewis opined that her preexisting condition had been aggravated by her work activities.

In a September 20, 2012 report, Dr. Lewis stated that appellant complained of severe neck pain due to the C5-6 and C6-7 herniated discs.

In reports dated May 25 and July 28, 2013, Dr. Lewis noted that in January 2012 appellant underwent C5-6 and C6-7 anterior cervical discectomy and fusion. In all the reports, he checked “yes” to the questions concerning whether her complaints were consistent with her injury history.

On August 19, 2013 appellant requested reconsideration. She noted that her reconsideration request was untimely, but argued that she relied on her attorney to timely file the reconsideration request. Appellant stated that she hired an attorney in August 31, 2012 to submit her request, which was not done.

By decision dated September 10, 2013, OWCP denied appellant’s request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.²

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 time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.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 nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁵ OWCP’s regulations and procedures provide that OWCP will reopen a

² The Board notes that, following the September 10, 2013 decision, OWCP received additional evidence. Appellant also submitted this evidence with her appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

³ 20 C.F.R. § 10.607(a).

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

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

claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which 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 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 on the part of OWCP.¹¹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

OWCP's procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹³

ANALYSIS

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 must be received by OWCP within one year of the date-of-the decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵

⁶ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011). OWCP's procedures further provide that 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 that a schedule award was miscalculated). Evidence such as a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.5a.

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

¹³ 20 C.F.R. § 10.607.

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Robert F. Stone*, 57 ECAB 393 (2005).

As OWCP did not receive appellant's August 19, 2013 request for reconsideration until August 23, 2013, which was more than one year after the last merit decision, issued on May 8, 2012 it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim that her cervical condition had been caused or aggravated by her employment duties.¹⁶

The Board finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of her claim was erroneous. Appellant has not shown how OWCP committed any error in denying her claim that her cervical condition had been caused or aggravated by the employment factors identified by appellant. Nothing in her August 19, 2013 request for reconsideration remotely suggests that OWCP's May 8, 2012 decision was erroneous in finding that her cervical condition had been cause or aggravated by her employment duties. The medical evidence received by OWCP subsequent to the May 8, 2012 decision does not contain any medical rationale explaining the causal relationship between appellant's cervical condition and her employment duties. Dr. Suddaby diagnosed neck sprain and strain and brachial neuritis or neuritis and checked "yes" to the question of whether it was due to the injury history provided by appellant. Dr. McTernan opined that her cervicgia was due to her employment duties checked "yes" to the question of whether it was due to the injury history provided by appellant. Lastly, Dr. Lewis diagnosed neck pain which he attributed to her duties of constant lifting and carrying and her repetitive work. He also checked "yes" to the question of whether it was due to the injury history provided by appellant. None of these reports correct the original defect in her claim, as none of reports contain any rationalized medical opinion on the issue of causal relationship. The medical reports from these physicians do not contain any opinion explaining the cause of appellant's current condition or how her employment duties caused or aggravated her cervical condition. Due to these defects, the medical reports are not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of OWCP's decisions.

The Board finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of appellant's claim was erroneous. Appellant has not shown how OWCP committed any error in denying her occupational disease claim.

On appeal, appellant contends that she hired an attorney in August 2012 to pursue her claim and that she was unaware that the attorney had not requested reconsideration or actively pursued her claim. The May 8, 2012 the hearing representative's decision contained clear instructions that any request for reconsideration had to be made within one year of that decision. In her August 19, 2013 reconsideration request, appellant acknowledges that her request was untimely, but that the request was untimely because she thought the attorney had hired had filed a timely request. Appellant was aware of OWCP's requirement that a reconsideration request must be made within one year of the decision in order to be timely. She did not submit her

¹⁶ 20 C.F.R. § 10,607(a); *see D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

request for reconsideration within one year of the May 8, 2012 hearing representative's decision and has not provided any evidence showing why she was unable to timely file her request.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 10, 2013 is affirmed.

Issued: March 7, 2014
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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