

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

R.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jacksonville, FL, Employer**

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**Docket No. 14-1569
Issued: November 6, 2014**

Appearances:
Doris E. Orr-Richardson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 2, 2014 appellant, through her representative, filed a timely appeal from a June 6, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that her request for reconsideration was not timely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the June 6, 2014 decision. Since the Board's jurisdiction is limited to reviewing evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP with a request for reconsideration.

FACTUAL HISTORY

On February 3, 2013 appellant, then a 50-year-old automated mark-up clerk, filed an occupational disease claim alleging a back condition as a result of repetitive lifting and turning in the performance of duty.³ She first became aware of her condition and realized that it resulted from her employment on May 2, 2012. Appellant first reported her condition to the employing establishment on February 3, 2013. The employing establishment controverted her claim contending that she failed to provide, well-reasoned medical evidence which demonstrated that her claimed condition was causally related to factors of her employment.

In a May 5, 2012 report, Dr. Harpreet Singh, Board-certified in internal medicine, related appellant's complaints of upper back and thoracic pain. He stated that the onset of the pain was gradual and attributed to lifting and turning. Dr. Singh reviewed appellant's history and conducted an examination. He observed diffuse, mild tenderness of the thoracic area of the back. Straight leg raise testing was negative. Dr. Singh diagnosed thoracic strain.

By letter dated February 15, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional evidence to establish that her back condition was causally related to her employment.

In a March 18, 2013 report, Dr. Kevin Murphy, a Board-certified orthopedic surgeon, related appellant's complaints of left shoulder pain. Appellant described the pain as gradual to sudden onset on May 2, 2012 and denied any recent injury or trauma. Dr. Murphy reviewed her history and conducted an examination. He observed normal position of both shoulders with no deformities. Neer and Hawkins's tests of the rotator cuff were positive. Dr. Murphy provided range of motion findings and reported painful active and passive range of motion of the left shoulder. He diagnosed left shoulder pain, osteoarthritis, rotator cuff tendinitis, synovitis and shoulder impingement. Dr. Murphy recommended that appellant work light duty with restrictions of no lifting, pushing, pulling or carrying greater than 15 pounds. He also provided a March 18, 2013 work capacity evaluation noting her work restrictions.

OWCP denied appellant's claim on March 21, 2013. It found insufficient medical evidence to establish that she sustained a back or shoulder condition as a result of her employment.

On June 3, 2014 appellant requested reconsideration. She provided a position description for a parcel post distributor. In an undated statement, appellant described the various jobs duties she performed. She first felt discomfort in her right shoulder in August 2011 for which she filed a different claim. On or about May 2, 2013 appellant experienced discomfort in her upper back and left shoulder while working on the nonmechanized flat machine and informed her supervisor. She described her medical treatment, noting she was told that her shoulder was breaking down because of her work. Appellant believed that her condition was caused or aggravated by her job duties of repetitively reaching, pulling, pushing, lifting, grasping above the shoulder and turning and twisting for the past 25 years of employment.

³ Appellant filed a previous traumatic injury claim (File No. xxxxxx307) for an August 6, 2001 work injury.

Appellant included a statement dated May 29, 2014, from Doris Orr-Richardson, a local union officer and appellant's representative. Ms. Orr-Richardson stated that appellant had provided her with documentation in a timely manner, but due to personal medical issues, she fell behind. She requested that OWCP reconsider appellant's case on the merits and not find the appeal untimely as it was not her mistake.

A May 13, 2013 magnetic resonance imaging (MRI) scan examination of the left shoulder, read by Dr. Mark S. Frisk, a Board-certified diagnostic radiologist, found marked osteoarthritis of the glenohumeral joint and flattening of the humeral head medially. Dr. Frisk noted a 1.8 centimeter focus of abnormal signal abutting the medial aspect of the humeral head, which was consistent with superimposed osteonecrosis. He also observed minimal acromioclavicular (AC) joint degenerative change, supraspinatus tendinosis and moderate-sized joint effusion.

In a June 12, 2013 report, Dr. Murphy stated that appellant returned for diagnostic review and an MRI scan. He related that her symptoms were constant and worsening with no relieving factors. Examination of the bilateral shoulders revealed normal position and no deformities. Neer and Hawkin's tests were positive. Dr. Murphy reported normal range of motion findings. He diagnosed shoulder pain, osteoarthritis, synovitis of the shoulder and shoulder impingement. Dr. Murphy recommended further conservative treatment and administered a cortisone injection for pain relief.

In a July 19, 2013 report, Dr. Rahul V. Deshmukh, a Board-certified orthopedic surgeon, examined appellant for left shoulder pain. He related that the onset of pain was gradual but the pain was aggravated by lifting, pushing, reaching, grasping, gripping and daily work activities. Dr. Deshmukh reviewed appellant's history and conducted an examination. He reported tenderness of the left shoulder biceps tendon and AC joint. External rotation and internal rotation were normal, but abduction was normal with mild pain. Dr. Deshmukh noted that a May 13, 2013 MRI scan of the left shoulder revealed marked osteoarthritis of the glenohumeral joint, minimal AC joint degenerative joint disease, supraspinatus tendinosis and moderate-sized joint effusion. He reported that appellant was a 50-year-old right-hand dominant female with several months of progressive right shoulder pain and ache. Dr. Deshmukh stated that his findings were significant for moderate-to-severe glenohumeral degenerative joint disease with partial rotator cuff tearing. He diagnosed shoulder pain, synovitis of the shoulder, osteoarthritis and complete rotator cuff tear.

By decision dated June 6, 2014, OWCP denied appellant's request for reconsideration on the grounds that her request was untimely filed and that she failed to present clear evidence of error on the part of OWCP.

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.⁴ The Board has

⁴ 20 C.F.R. § 10.607.

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.⁵ 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.⁶

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 nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁷ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

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.⁹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

OWCP procedures note 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.¹³ The Board makes an independent determination of whether a claimant has submitted

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

⁶ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Nelson T. Thompson*, 43 ECAB 919 (1992).

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

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5 (a) (October 2011).

clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹⁴

ANALYSIS

The only decision before the Board is the June 6, 2014 nonmerit decision, in which OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error. Appellant's reconsideration request was received by OWCP on June 3, 2014. The Board finds that more than one year elapsed from issuance of most recent OWCP merit decision dated March 21, 2013 to submission of her request for reconsideration received on June 3, 2014. Thus, appellant's request for reconsideration was untimely. She submitted a May 29, 2014 letter from her representative who acknowledged that she mistakenly failed to file for reconsideration in a timely manner. Inattention to the time requirements for filing a request for reconsideration by appellant does not establish that OWCP abused its discretion in finding that the request for reconsideration was untimely filed.¹⁵ The Board has held OWCP's imposition of a one-year time limitation within which to file an application for review does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a). Since section 8128(a) of FECA does not mandate OWCP to review a final decision simply upon request by a claimant, it is well within its authority to grant review subject to certain requirements, including a time-limitation period within which to make the request. The imposition of a one-year filing requirement for an application for review is a limitation placed on the discretionary authority granted OWCP and not a limitation on a claimant's right to request a review.¹⁶

The Board finds that appellant failed to establish clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP.¹⁷ OWCP denied her on the grounds that she failed to submit sufficient medical evidence to establish that she sustained a back or shoulder condition as a result of the alleged factors of her employment.

Appellant submitted medical reports from Drs. Frisk, Murphy and Deshmukh regarding treatment of her left shoulder condition. None of the physicians, however, provided any opinion on the cause of her left shoulder condition. As appellant's claim was denied based upon a lack of medical evidence regarding causal relationship, these new medical reports did not raise a substantial question as to the correctness of OWCP's March 21, 2013 decision. The Board finds that the medical reports are insufficient to shift the weight of evidence in favor of appellant's claim or raise a substantial question that OWCP erred by denying her claim. Therefore, the Board finds that she has not presented clear evidence of error on the part of OWCP.

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

¹⁵ See 20 C.F.R. § 10.100(b)(2).

¹⁶ See *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁷ *Supra* note 9.

On appeal and in her reconsideration request, appellant alleged that she provided all the documentation to her representative who became ill and failed to file for reconsideration within the one-year time limitation. The Board notes that the March 21, 2013 decision contained clear instructions that any request for reconsideration had to be made within one year of that decision. The Board finds that appellant was aware of OWCP's requirement that reconsideration requests must be received within one year of the decision but failed to comply with the one-year time requirement.¹⁸ As appellant did not submit her reconsideration within one year of the March 21, 2013 decision and failed to establish clear evidence of error on the part of OWCP, the Board finds that OWCP properly denied 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 filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁸ See *J.N.*, Docket No. 14-34 (issued March 7, 2014).