

FACTUAL HISTORY

On November 10, 2011 appellant, then a 47-year-old information technology specialist, filed a traumatic injury claim alleging that she sustained pain in her neck and back opening the door leading to her office on November 7, 2011. She attributed her condition to opening a heavy door, sitting in a rigid chair, making adjustments to her chair, and holding a heavy telephone receiver. On November 9, 2011 Dr. Miriam D. Martin, a physician Board-certified in emergency medicine, diagnosed cervical lumbar disc herniations. OWCP denied her claim on January 6, 2012 finding that she had not submitted sufficient medical evidence to establish a causal relationship between her diagnosed condition and her employment incident.

Appellant requested an oral hearing before an OWCP hearing representative on January 11, 2012. The hearing took place on April 18, 2012. Appellant testified on November 7, 2011 that she opened the door to access her work area. She stated that the door was too heavy and she hurt her back and neck with muscle spasms in her back. Appellant stated that it was a metal single door. She pulled the door handle with her left hand. Appellant stated that prior to the November 7, 2011 incident she had no back pain, but had experienced herniated cervical discs. She stated that she was totally disabled due to this injury.

In a report dated December 8, 2011, Dr. Carey-Walter Closson, a Board-certified anesthesiologist, noted appellant's history of opening a door on November 7, 2011 and experiencing pain and spasm in her left arm, neck, and back. She found that appellant had a loss of motor strength in her left upper and lower extremities. Dr. Closson diagnosed cervical strain, left shoulder pain, and possible cervical and lumbar degenerative disc disease.

By decision dated May 24, 2012, an OWCP hearing representative denied appellant's claim finding that the medical evidence was not sufficient to establish a causal relationship between her diagnosed condition and her employment incident.

Appellant requested reconsideration of the May 24, 2012 decision on June 5, 2012. By decision dated August 10, 2012, OWCP denied her request on the grounds that she failed to submit any new and relevant evidence or legal argument in support of her reconsideration request.

Appellant requested reconsideration on September 14, 2012. In a report dated June 27, 2012, Dr. Dexter W. Love, a Board-certified orthopedic surgeon, noted appellant's history of opening a door at work on November 7, 2011 and experiencing cervical, back, and left arm pain. He reviewed x-rays and magnetic resonance imaging (MRI) scans and found mild-to-moderate degenerative disc disease at C5-6 and C6-7 with disc degeneration and foraminal impingement. Dr. Love diagnosed "Probable cervical radiculopathy involving the left upper extremity." He stated that heavy pushing and pulling such as pushing a very heavy door might exacerbate cervical radiculopathy due to the strain placed on the paracervical muscles.

By decision dated January 23, 2013, OWCP denied modification of its prior decisions finding that Dr. Love's report did not include a firm diagnosis and did not explain what condition was related to appellant's November 7, 2011 employment incident.

Appellant requested reconsideration on September 20, 2013 and resubmitted Dr. Love's June 27, 2012 report. By decision dated October 17, 2013, OWCP declined to reopen her claim for consideration of the merits on the grounds that the evidence submitted was repetitious. It informed appellant that any future request for reconsideration must be made within one year of the January 23, 2013 merit decision.

On January 1, 2014 appellant submitted a letter stating that she was requesting reconsideration of her claim and provided the claim number. She stated that she was providing new medical evidence in support of her request. In a report dated December 23, 2013, Dr. Love noted appellant's history of injury at work on November 7, 2011 when attempting to open a heavy door with her left hand while turning the handle. He stated, "She pulled the door but she could not hold the door open. As she tried to pull harder to keep the door from closing she struggled and experienced severe pain in the neck, upper back, and left upper extremity." Dr. Love diagnosed cervical spondylosis with acute exacerbation from injury sustained at work. He stated that appellant's secondary diagnosis was cervical radiculopathy. Dr. Love opined that appellant had a degenerative process that was acutely worsened by the injury sustained at work. He stated that appellant's symptoms were consistent with the work injury.

In a letter dated January 22, 2014, OWCP stated that it was not clear from appellant's letter which decision or issues she wished it to reconsider. It stated that no further action would be taken on her request. In a letter dated January 20, 2014, appellant stated that she was requesting reconsideration of a January 22, 2014 decision and provided her claim number it is noted the date of her letter predates the date of the decision upon which she seeks reconsideration. She argued that she had submitted rationalized medical opinion evidence in support of her claim. On February 26, 2014 OWCP informed appellant that there was no January 22, 2014 decision in her case and stated that no further action would be taken on her letter.

In a report dated June 3, 2013, Dr. Love diagnosed lumbar radiculopathy with facet joint arthritis or possible foraminal encroachment.

Appellant requested reconsideration on March 11, 2014 and stated that she had made a timely request for reconsideration on January 22, 2014 of the January 23, 2013 merit denial of her claim. On May 5, 2014 she submitted an appeal request form from the January 23, 2013 decision and indicated that she was requesting reconsideration of this decision.

By decision dated May 22, 2014, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that her May 5, 2014 request for reconsideration was not timely filed and did not contain clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

Under section 8128(a) of FECA² OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides

² 5 U.S.C. § 8128(a).

that “An application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.”³ In *Leon D. Faidley, Jr.*,⁴ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant’s case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates “clear evidence of error” on the part of OWCP.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁷ Evidence which 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 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.¹⁰ 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 fundamental question as to the correctness of OWCP’s decision.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹²

³ 20 C.F.R. § 10.607.

⁴ 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁶ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ See *Jesus D. Sanchez*, *supra* note 5.

⁹ See *Leona N. Travis*, *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹² *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated May 22, 2014 in which it declined to reopen appellant's case on the merits because the request was not timely filed, and did not show clear evidence of error. Since more than 180 days elapsed from the date of issuance of OWCP's January 23, 2013 merit decision to the date of the filing of appellant's appeal, on October 22, 2014, the Board lacks jurisdiction to review that decision.¹³

The Board finds that the May 22, 2014 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute abuse of discretion. Appellant repeatedly attempted to request reconsideration without complying with OWCP's standards for the information required to perfect a reconsideration request. 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 for which reconsideration is being requested. The request must be received within one year of the date of the contested decision.¹⁴ Appellant did not indicate which decision she wished to have reconsidered or the specific issue within her claim in a letter dated January 1, 2014, received by OWCP on January 22, 2014. On January 20, 2014, received by OWCP on February 18, 2014, appellant indicated that she wished to appeal a January 22, 2014 decision. It was not until May 5, 2014 that appellant submitted an appeal request form from the January 23, 2013 decision and identified decision as the one she wished to have reconsidered. Appellant's May 5, 2014 request for reconsideration was clearly received more than one year after the January 23, 2013 merit decision.

In support of her request for reconsideration, appellant submitted a report from Dr. Love dated December 23, 2013. He provided a description of appellant's November 7, 2011 employment injury stating, "She pulled the door but she could not hold the door open. As she tried to pull harder to keep the door from closing she struggled and experienced severe pain in the neck, upper back, and left upper extremity." Dr. Love diagnosed cervical spondylosis with acute exacerbation from injury sustained at work. He stated that appellant's secondary diagnosis was cervical radiculopathy. Dr. Love opined that appellant had a degenerative process that was acutely worsened by the injury sustained as work. He stated that appellant's symptoms were consistent with the work injury.

While this report is new and relevant, it is not sufficient to establish clear evidence of error on the part of OWCP. Dr. Love's report is not sufficiently detailed and well reasoned to provide 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 decision. Dr. Love failed to provide the biomechanical processes by which opening a door would result in the diagnosed condition. He also failed to provide a clear opinion of whether appellant's back

¹³ See 20 C.F.R. § 501.3(e).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (October 2011).

condition was an aggravation of an underlying condition or a new employment injury. Due to the deficiencies, the Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits on May 22, 2014.

CONCLUSION

The Board finds that appellant did not submit a timely request for reconsideration and that the evidence submitted in support of her request for reconsideration did not establish clear evidence of error on the part of OWCP.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2015
Washington, DC

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

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

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