

employment duties. He described his employment duties of casing mail and parcels weighing up to 70 pounds. Appellant noted that his route had 626 deliveries and that he performed dismounted deliveries from his postal vehicle for a portion of his route. He also parked his vehicle to walk and deliver mail from a satchel weighing up to 35 pounds for 55 residential deliveries.

On September 19, 2012 Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, examined appellant due to pain in his shoulders bilaterally, worse on the left, stiffness in the left shoulder, and difficulty lifting the left arm. He noted that appellant initially sought treatment from another physician who found tenderness in appellant's left shoulder with marked limitation in range of motion. Dr. Bishai reviewed a magnetic resonance imaging (MRI) scan which demonstrated subluxation of the humeral head with bone contusions and chondromalacia at the posterior glenoid. He found complex tears of the glenoid labrum and hypertrophic changes at the acromioclavicular joint and supraspinatus tendinopathy. Dr. Bishai diagnosed internal derangement of the left shoulder with chondromalacia and impingement syndrome. He opined that appellant's left shoulder condition was the result of his employment activities and listed those activities. Dr. Bishai stated that lifting of mail and parcels as well as casing, delivery, and carrying of the satchel combined together to cause appellant's left shoulder condition.

In a letter dated October 18, 2012, OWCP requested additional factual information from appellant. It also requested additional medical evidence and allowed appellant 30 days to respond.

By decision dated November 26, 2012, OWCP denied appellant's claim finding that he failed to submit the necessary medical opinion evidence to establish a causal relationship between his diagnosed condition and his implicated employment duties. Appellant requested an oral hearing from OWCP's Branch of Hearings and Review.

On January 12, 2012 appellant underwent an MRI scan of the left shoulder which demonstrated subluxation of the humeral head with bone contusions, chondromalacia, complex tears of the posterior labrum extending into the superior and inferior labrums, changes at the acromioclavicular joint, supraspinatus tendinopathy, joint effusion, and possible glenohumeral instability lesions.

Appellant submitted reports from Dr. Bishai dated October 11, November 16, and December 20, 2012 repeating his earlier findings and diagnoses. Beginning on November 16, 2012 Dr. Bishai stated that appellant was using his right shoulder and arm more since his left shoulder was disabled and impaired resulting in a consequential injury to the right shoulder. He also found that appellant had loss of range of motion in the right shoulder and diagnosed internal derangement of the right shoulder joint and rotator cuff syndrome of the right shoulder. On February 27, 2013 Dr. Bishai stated that appellant's condition was the same. On March 14, 2013 he noted that appellant reported pain in his neck with radiation down the shoulders and arms and diagnosed the additional condition of cervical disc syndrome with radiculopathy.

Appellant testified at the oral hearing on March 14, 2013 and stated that his neck and shoulders began to bother him in July 2009 and progressively worsened. He stated that he first

received treatment for his left shoulder in January 2012. Appellant testified that he injured his right shoulder in 2007 and sought treatment from a chiropractor.

OWCP's hearing representative denied appellant's claim by decision dated April 30, 2013. He found that appellant had not submitted the medical evidence requested regarding his history of treatment. The hearing representative noted that appellant reported a shoulder condition arising in 2007 and that there were no medical records regarding this injury in the record. He found that Dr. Bishai's reports were not based on an accurate history of injury and that appellant had not established that his neck, bilateral arm, and shoulder conditions were related to his employment duties.

In a report dated April 24, 2013, Dr. Bishai stated that he reviewed nerve conduction studies on March 21, 2013 which suggested entrapment neuropathy at the right elbow as well as carpal tunnel syndrome. He also reviewed a cervical MRI scan and found disc bulges at C4-5, C5-6, and C7-T1. On June 18, 2013 Dr. Bishai disagreed with an OWCP hearing representative's findings and conclusions. He repeated his previous diagnoses. Dr. Bishai opined that appellant's left shoulder condition was directly caused by his work activities as a letter carrier. He noted that appellant's right shoulder condition was a consequential injury resulting from overuse due to the pain in appellant's left shoulder. Dr. Bishai stated that he had reviewed appellant's prior medical treatment with an orthopedic surgeon on February 23, December 12 and 22, 2012. He stated that appellant's shoulder condition could be improved by arthroscopic surgery. Dr. Bishai also opined that it was not necessary to review appellant's right shoulder treatment records from 2007. He stated that he was aware that appellant had experienced his left shoulder condition for years, but that appellant had recently determined that medical treatment was necessary.

Dr. Claude Barosy, a family practitioner, examined appellant on August 6, 2013 and reported his complaints of left shoulder, head, and neck pain. He found loss of range of motion of the cervical spine and left shoulder. Dr. Barosy diagnosed cervical disc disease with radiculopathy, cervical disc syndrome, internal derangement of the left shoulder joint, and left shoulder impingement syndrome.

Appellant's representative submitted a motion to reconsider dated January 14, 2014 and received by OWCP on January 21, 2014. He also submitted a medical report dated December 19, 2013 from Dr. Bishai. In this report, Dr. Bishai again opined that appellant's conditions were work related.

Dr. Eduardo L. Gonzalez, a Board-certified practitioner, examined appellant on March 12, 2014 due to neck and bilateral shoulder pain. He opined that appellant's left shoulder symptoms were produced as part of his work as a letter carrier.

On April 4, 2014 Dr. Robert R. Reppy, an osteopath, stated that appellant's right shoulder pain had mostly resolved. He stated that appellant's neck pain contributed to headaches with nausea.

In a letter dated January 14, 2015, appellant's representative stated that he requested reconsideration on January 14, 2014 of the April 30, 2013 merit decision. He included a copy of

a motion to reconsider dated January 14, 2014 which referenced the December 19, 2013 report from Dr. Bishai.

By decision dated January 23, 2015, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA² does not entitle a claimant to a review of an OWCP decision as a matter of right.³ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁴ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that it will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁶

In those cases where requests for reconsideration are not timely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ OWCP procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in its regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that it committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to

² *Id.* at § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 20 C.F.R. § 10.607(a). The Board has concurred in OWCP's limitation of its discretionary authority. *See Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *Supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ *Supra* note 3 at 770.

⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

⁹ *Supra* note 3 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 4 at 968.

produce a contrary conclusion.¹² 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 it.¹³ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴ The Board must make 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.

ANALYSIS

Appellant had one year from April 30, 2013 to make a timely request for reconsideration. Appellant, through his representative, requested reconsideration through a document entitled motion for reconsideration which was dated January 14, 2014 and which was received by OWCP on January 21, 2014. The request for reconsideration was received by OWCP on January 21, 2014 within one year after the April 30, 2013 decision. OWCP incorrectly found that appellant's request for reconsideration was untimely on its face. It erroneously reviewed the evidence submitted by appellant in support of her reconsideration request under the clear evidence of error standard for untimely requests. The Board remands the case to OWCP for review of this evidence under the proper standard of review for a timely request for reconsideration.

CONCLUSION

The Board finds that the evidence in the record establishes that appellant's representative submitted a timely request for reconsideration and that the evidence must be reviewed by OWCP under the proper standard of review.

¹² *Supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 14, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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