

FACTUAL HISTORY

On June 11, 2012 appellant, then a 35-year-old transportation security officer, filed an occupational disease claim alleging a neck injury due to factors of her employment. She first became aware of her condition on January 15, 2012 and became aware of its relation to her federal employment on January 31, 2012. Appellant stopped work on February 4, 2012.

Appellant submitted a January 17, 2012 report from Dr. Nancy Alicea-Valentin, a Board-certified physiatrist, who diagnosed shoulder pain and cervicodorsal back pain. Dr. Alicea-Valentin advised that the injury occurred after seasonal overuse of the extremity at the work area. She further advised that a magnetic resonance imaging (MRI) scan of the cervical spine had been ordered. In a February 13, 2012 report, Dr. Alicea-Valentin noted that appellant had previously undergone shoulder decompression subacromial surgery in October 2009 and arthroscopic synovectomy and anesthetic manipulation in April 2010. She advised that authorization requests for the MRI scans of the spine and shoulder were still pending. Dr. Alicea-Valentin also advised that paraspinal muscle spasms were evident at the cervicodorsal back, upper trapezius muscles, levator scapulae muscles, and sternocleidomastoid muscle region. In a March 15, 2012 attending physician's report (Form CA-20), she checked the box "yes" indicating that appellant's condition was employment related.

In a February 16, 2012 MRI scan report of the cervical spine, Dr. Diana Fernandez Garcia, a diagnostic radiologist, found muscle spasms, multilevel degenerative changes, and discogenic disease.

In a February 27, 2012 report, Dr. Alicea-Valentin advised that a February 21, 2012 MRI scan of the right shoulder revealed impingement syndrome and mild hypertrophy of the acromioclavicular joint causing a mild mass effect. She also advised that the February 16, 2012 cervical spine MRI scan revealed multilevel degenerative disc changes, tiny anterior osteophytes at multiple levels, and muscle spasm at C3-C4 through C7-T1 and T2-3. Dr. Alicea-Valentin indicated that there was a three- to four-millimeter diffuse posterior disc bulge causing impression of the subarachnoid space anteriorly, but with existing nerve roots appearing intact. In a March 7, 2012 disability status report, she advised that appellant was unable to return to work until March 14, 2012.

In a June 11, 2012 statement, appellant advised that on January 15, 2012 she felt neck and shoulder pain while performing the repetitive activity of checking boarding passes and IDs. In a statement dated June 11, 2012, appellant's supervisor acknowledged notice of appellant's condition on January 15, 2012.

By letter dated July 11, 2012, OWCP notified appellant that the evidence was insufficient to establish her claim and advised her of the type of evidence needed to establish her claim.

In an August 6, 2012 response to OWCP's questionnaire, appellant advised that she injured herself on January 15, 2012 when she was looking up and down to check boarding passes and identifications. She stated that she performed this activity for four shifts on the date of her injury for 30 to 45 minutes each shift. Appellant advised that she began to feel sharp neck pain that was so bad that she could not lift her head. She further advised that she notified her

supervisor who switched her to a position that did not require her to look up and down. Appellant stated that at the end of her shift she could barely stand and that her neck and shoulders were swollen.

By decision dated September 7, 2012, OWCP denied appellant's claim because the medical evidence was insufficient to establish that appellant's condition was causally related to the accepted work events.

On October 3, 2012 appellant requested a review of the written record and provided an October 2, 2012 report from Dr. Alicea-Valentin who diagnosed right cervical radiculitis, cervical spine muscle spasm, cervical spine degenerative changes, and cervical spine discogenic disease. Dr. Alicea-Valentin also noted that appellant sustained a cervical whiplash. She stated that repetitive flexion and extension movements of the neck and trunk, while performing assigned duties at the checkpoint area on January 15, 2012, caused appellant's injury. Dr. Alicea-Valentin further advised that repetitive movements with both upper extremities, reaching above shoulder level in a repetitive fashion, and prolonged standing increased cervical spine axial stress load and forces which may have caused progressive discogenic disease and degenerative cervical radiculitis. She opined that she had no doubt that there was a correlation between appellant's job and the pathological conditions that she described.

Appellant submitted a claim for compensation (Form CA-7) requesting wage-loss compensation for November 1, 2012 through January 3, 2013.

By decision dated January 23, 2013, an OWCP hearing representative denied appellant's claim because medical evidence was not based on a complete factual and accurate history and was insufficient to establish that the diagnosed conditions were causally related to the employment injury.

Appellant continued to submit status reports from Dr. Alicea-Valentin. These included February 19 and May 6, 2013 attending physician's reports noting appellant's status, diagnosis codes, and checking a box "yes," that her condition was employment related. Each report indicated that appellant performed repetitive duties at work. Dr. Alicea-Valentin also submitted work capacity evaluation forms of the same dates, setting forth appellant's work restrictions.

On January 28, 2014 OWCP received appellant's request for reconsideration. In support of her request, appellant submitted an October 23, 2013 report from Dr. Mildred Diaz, a family medicine specialist, who noted that appellant complained of severe neck pain, severe right shoulder pain, and weakness in the upper extremities that was more severe on the right side. Dr. Diaz diagnosed cervical radiculopathy and cervical disc bulge at C2-3, C3-4, C4-5, C5-6, and C-6-7. She opined that appellant's diagnosed conditions were the direct result of repetitive neck movements, including looking up and down to check passenger identifications and boarding passes. Dr. Diaz stated that lifting suitcases and packages weighing up to 70 pounds also contributed to her condition. In her opinion, these tasks put excessive strain on appellant's neck which led to multiple level cervical disc bulges. Those disc bulges led to appellant's secondary condition of cervical radiculopathy.

By decision dated February 12, 2014, OWCP denied appellant's request for reconsideration because it was untimely filed and did not establish clear evidence of error.

On appeal, appellant argued that she postmarked her request for reconsideration within one year of OWCP's January 23, 2013 merit decision. She further argued that a snow storm delayed the delivery of her request.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. 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.² When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.³ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁵

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

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

² 20 C.F.R. § 10.607(a) (2011).

³ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁴ 20 C.F.R. § 10.607(b) (2011).

⁵ *See Alberta Dukes*, 56 ECAB 247 (2005).

⁶ *Robert G. Burns*, 57 ECAB 657 (2006).

evidence of error.⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.⁸

ANALYSIS

The Board finds that OWCP properly found appellant's request for reconsideration untimely filed. The most recent OWCP merit decision in this case was issued on January 23, 2013. Appellant's request for reconsideration was not received by OWCP until January 28, 2014, more than one year after the January 23, 2013 merit decision. Therefore, it was not timely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.

On appeal, appellant argues that she postmarked her request for reconsideration before the one-year time limitation and that a snow storm delayed its delivery. OWCP regulations, however, are clear 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. Thus, the fact that the reconsideration letter was mailed before January 23, 2014 does not constitute a timely filing. The regulatory language unequivocally sets a one-year time limitation for reconsideration requests to be received by OWCP.⁹

The Board finds that appellant has not established clear evidence of error in the denial of her occupational disease claim. On appeal, appellant argues that medical evidence submitted after its January 23, 2013 decision, but prior to her request for reconsideration, was not considered and that such evidence establishes causal relationship. When evidence is submitted in support of an untimely request for reconsideration, OWCP may only undertake a limited review of the evidence to determine whether it amounts to clear evidence of error. The Board finds that OWCP properly undertook a limited review of evidence submitted after its January 23, 2013 decision to determine whether there was clear evidence of error. Appellant submitted February 19 and May 6, 2013 attending physician's reports from Dr. Alicea-Valentin. These reports indicated that appellant performed repetitive duties at work, noted appellant's status, and offered diagnoses. Dr. Alicea-Valentin checked a box "yes" on the form reports to indicate that appellant's condition was employment related. She also submitted work capacity evaluation forms of the same dates, setting forth appellant's work restrictions. The work capacity evaluation did not specifically address causal relationship. While the attending physician's reports provide some support for causal relationship, they do not raise a substantial question as to

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

⁹ 20 C.F.R. § 10.607(a). (Effective August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP decision for which review is sought.)

the correctness of OWCP's decision in its denial of appellant's claim. These reports are insufficient to shift the weight of the evidence in favor of appellant.¹⁰

Appellant also submitted Dr. Diaz's October 23, 2013 report in which the physician opined that appellant's work duties were causally related to her diagnosed conditions. She stated that appellant's duties put excessive strain on her neck which led to multiple level cervical disc bulges and that those bulges led to appellant's secondary condition of cervical radiculopathy. While this report again supports causal relationship and provides some explanation, it is insufficient to establish clear evidence of error on the part of OWCP in its denial of appellant's claim. As noted, it is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹¹ The evidence submitted by appellant after OWCP's January 23, 2013 decision does not manifest on its face that OWCP committed an error in denying appellant's claim.

Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's January 23, 2013 decision. Thus, the evidence is insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹⁰ See *supra* note 7 (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).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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