

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

C.N., Appellant)
and) Docket No. 14-1953
DEPARTMENT OF DEFENSE, DEFENSE) Issued: January 2, 2015
COMMISSARY AGENCY, KIRTLAND AIR)
FORCE BASE, NM, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 9, 2014 appellant timely appealed a July 11, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied reconsideration. The latest merit decision is dated July 31, 2012, which is more than 180 days prior to the filing of the instant appeal. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction extends only to the July 11, 2014 nonmerit decision.

ISSUE

The issue is whether OWCP properly declined to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193 (2006).

FACTUAL HISTORY

Appellant, a 59-year-old store associate, claimed to have injured her left arm and left upper back while pushing carts in the commissary parking lot on March 24, 2012. She filed a traumatic injury claim (Form CA-1) on April 7, 2012 which the employing establishment challenged based on her delay in reporting her injury and the lack of supporting medical evidence.² On April 18, 2012 OWCP advised appellant of the need for additional factual and medical evidence to support her claimed injury. Appellant was afforded 30 days to submit the requested information.

OWCP subsequently received May 1, 2012 treatment records regarding an 82-year-old female with complaints of headaches.³

By decision dated July 31, 2012, OWCP denied appellant's traumatic injury claim finding that she had not provided additional factual information as requested, and thus, it found that she failed to establish that the March 24, 2012 incident occurred as alleged. It also found that the medical evidence failed to establish that the diagnosed condition was employment related.

In October 2012, OWCP received March 28 and April 4, 2012 emergency department treatment records. Dr. W. Michael Garrett, Board-certified in emergency medicine, treated appellant on March 28, 2012 for a left shoulder injury she reportedly sustained on March 21, 2012. The records indicate that appellant complained of left shoulder pain for one week that radiated into the arm to the elbow. Appellant denied any specific injurious event, but indicated that she worked as a grocery cashier at the base commissary, which involved repetitive motion with scanning of groceries. She also reported that she "pushes carts at the end of the workday." Dr. Garrett diagnosed trapezius spasm. He prescribed pain medication, recommended applying heat/ice, and advised to perform frequent gentle stretching exercises. Dr. Garrett indicated that appellant could resume work on April 2, 2012. Appellant returned to the emergency department on April 4, 2012 with complaints of persistent shoulder pain. She was seen by Alicia Pruitt, a certified nurse practitioner, who diagnosed shoulder pain.⁴ Ms. Pruitt prescribed naproxen and norflex for pain and muscle spasm.

After approximately 20 months of inactivity on the claim, appellant telephoned OWCP on June 16, 2014. The call notes (Form CA-110) reflect that she was aware that her claim was denied in 2012, but she never received the letter of denial. During a follow-up conversation on June 18, 2014 OWCP verified that appellant's mailing address had not changed and advised her there was no returned mail on file. It further indicated that it would resend the decision letter.

² Appellant submitted an April 4, 2012 disability certificate signed by Jennifer Dwyer, a registered nurse, requesting that she be excused from work through April 9, 2012. The nurse's disability certificate did not contain a diagnosis, did not provide a reason for appellant's temporary total disability, and did not mention an accident.

³ The May 1, 2012 treatment records pertain to another FECA claimant, which OWCP appears to have inadvertently associated with appellant's file. Although their names are quite similar, the birth date, social security number, and Oregon home address clearly demonstrate that the May 1, 2012 treatment records are not appellant's.

⁴ Ms. Pruitt was aware that Dr. Garrett previously diagnosed trapezius spasm on March 28, 2012.

On July 7, 2014 OWCP received a request for reconsideration dated June 18, 2014. Appellant submitted the appeal request form that accompanied her recent copy of the July 31, 2012 decision. At the bottom of the form there was a handwritten notation “I received this letter [June 18, 2014].” She also submitted one-page hospital admission summary forms regarding her March 28 and April 4, 2012 emergency department visits.

In a July 11, 2014 decision, OWCP denied appellant’s request for reconsideration. The request was untimely, and she failed to demonstrate clear evidence of error on the part of OWCP in denying her traumatic injury claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.⁸

ANALYSIS

OWCP received appellant’s request for reconsideration on July 7, 2014, which was almost two years after the July 31, 2012 merit decision. Appellant claimed that she had not received the original July 31, 2012 decision. The record indicates that OWCP mailed the decision to her last known address, which has remained unchanged since she filed her claim in April 2012. In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.⁹ This presumption is commonly referred to as the “mailbox rule.”¹⁰ It arises when the record reflects that the notice was properly addressed and duly mailed.¹¹ During a June 18, 2014 telephone

⁵ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607 (2012).

⁷ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.607(b).

⁹ *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

¹⁰ *Id.*

¹¹ *Id.*

conversation, OWCP verified that appellant's mailing address had not changed and advised her there was no returned mail associated with her claim file. It is, therefore, presumed that she received the original July 31, 2012 decision in due course. As such, the request for reconsideration OWCP received on July 7, 2014 is untimely.

Because appellant's request for reconsideration was untimely, she must demonstrate "clear evidence of error" on the part of OWCP in denying her traumatic injury claim.¹² As noted, OWCP denied the claim because appellant failed to demonstrate that the March 24, 2012 incident occurred as alleged. It further found that appellant had not submitted evidence of an injury-related medical condition. Since the initial denial, it received medical evidence of a left shoulder condition reportedly sustained on March 21, 2012. However, appellant has not submitted any additional factual information regarding the alleged March 24, 2012 injury, which she attributed to pushing carts in the commissary parking lot. Consequently, the Board finds that she has not demonstrated clear evidence of error. OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and she failed to demonstrate clear evidence of error. Therefore, appellant is not entitled to further merit review.

¹² 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board