

On appeal, appellant contends that she had a recurrence of a prior injury as she has the same problem with her shoulder that had previously been accepted by OWCP. She alleged that she was unable to timely file her reconsideration request because she has been very ill.

FACTUAL HISTORY

On November 19, 2003 appellant, then a 37-year-old custodial worker, filed a traumatic injury claim (Form CA-1) alleging that on November 13, 2003, she injured her left arm and shoulder while mopping the floor with a heavy mop. On January 6, 2004 OWCP accepted her claim for left trapezoid spasm. Appellant stopped work on November 19, 2003 and returned to work on August 16, 2004. The record reflects that she filed several other claims for injury, before and after this alleged injury.

On July 1, 2011 the employing establishment removed appellant from her employment due to her medical inability to perform her assigned duties.

On February 16, 2012 appellant filed a notice of recurrence of disability (Form CA-2a), commencing January 6, 2011, due to the November 13, 2003 employment injury. She alleged that she stopped work on May 21, 2011. Appellant noted that her shoulder had “been hurting [her] off and on for some time now....” In a statement received by OWCP on March 21, 2012, she related that on January 6, 2011 she was working as a clerk and, as she was lifting and carrying packets of papers and boxes, her left shoulder began to hurt. Appellant noted that she did not return to work after May 21, 2011 because her treating physician took her off work for medical reasons.

By decision dated May 14, 2012, OWCP denied appellant’s recurrence claim, noting that she was describing a new injury.

Appellant continued to submit medical evidence. In a December 10, 2014 progress note, Dr. Champ L. Baker, a Board-certified orthopedic surgeon, discussed his first appointment with appellant and his diagnosis of shoulder joint pain and bursitis of the left shoulder region. He noted that she provided a history of a trapezial strain in the early 2000’s. Appellant told Dr. Baker that, after she left her custodial position, she had moved a lot of heavy boxes in a different occupation, but that she had not worked in three years. On December 15, 2014 Dr. Baker noted that he gave appellant an injection in her shoulder region. Thereafter on December 29, 2014 he reviewed her magnetic resonance imaging (MRI) scan, diagnosed disorder of the bursa, shoulder region, and recommended surgery.

A December 29, 2014 MRI scan report was interpreted by Dr. Rourke Stay, a Board-certified radiologist, as showing no high grade or full thickness rotator cuff tearing, low-grade partial tearing of the distal supraspinatus and infraspinatus tendons, small fluid with the subdeltoid bursa which may reflect mild bursitis, and suspected mild tearing of portions of the labrum, possibly on a degenerative basis.

On August 13, 2015 appellant requested reconsideration. At that time she submitted a letter dated May 14, 2012 wherein she indicated that her left shoulder had been hurting her for quite some time. Appellant noted that she had been very sick from 2011 to 2014, and that she had been under medication and therapy that made her loopy and sleepy. She noted that she

would like to see a physician with regard to her left shoulder because it hurt almost every day and that she would like to receive therapy so she could learn to use it in the correct manner.

By decision dated August 17, 2015, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to establish clear evidence of error. It noted that while she contended that her request for reconsideration was untimely filed because she was ill, she had not submitted any medical evidence to substantiate that allegation.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review within one year of the date of that decision.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴ 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.⁵

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 nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁶ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide 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. *Id.* at Chapter 2.1602.3c.

⁸ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

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 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.¹² 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 substantial question as to the correctness of OWCP's decision.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant's August 13, 2015 request for reconsideration was untimely filed, as it was received more than one year after the last merit decision, dated May 14, 2012. Appellant argued that she was unable to file a timely request for reconsideration. Section 10.607(a), however, sets forth the time limitation period of one year. Late filing may not be excused by extenuating circumstances, except if appellant establishes through probative medical evidence that she was unable to communicate in any way, and her testimony is necessary to obtain modification.¹⁴ The evidence of record does not establish any extenuating circumstances. Appellant has not submitted medical evidence to substantiate that she was unable to communicate in any way to request reconsideration.

Because appellant's reconsideration request was untimely filed, she must demonstrate clear evidence of error by OWCP in its denial of her claimed recurrence of disability.¹⁵

The Board finds that appellant has not established clear evidence of error. The underlying claim for compensation was denied as appellant had not established her alleged recurrence of disability, as of January 6, 2011. She subsequently did not submit substantial evidence to shift the weight of the evidence of record and establish that the denial was in error.¹⁶

Appellant submitted a December 10, 2014 progress note in which Dr. Baker discussed his first appointment with her and at which point he diagnosed her with shoulder joint pain and bursitis of the left shoulder region. Dr. Baker noted that she gave him a history of a trapezial strain in the early 2000's. Appellant told him that after her custodial position she had gone back

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁴ 20 C.F.R. § 10.607(c); *Donald Booker-Jones*, 47 ECAB 685 (1996). OWCP regulations do provide that the time to file a request for reconsideration shall not include any periods subsequent to the decision for which the claimant can establish through probative medical evidence that she was unable to communicate in any way and her testimony is necessary to obtain modification. Appellant has not submitted such evidence. See also *I.S.*, Docket No. 08-1020 (issued September 16, 2008).

¹⁵ 20 C.F.R. § 10.607(b).

¹⁶ *I.S.*, *supra* note 14.

to moving a lot of heavy boxes in a different occupation. She informed Dr. Baker that she had not worked in three years. On December 15, 2014 Dr. Baker noted that he gave appellant an injection for her disorder of bursa of shoulder region. On December 29, 2014 he reviewed her MRI scan and recommended surgery. These reports all lacked a medical opinion regarding causal relationship.

The Board has held that even a report such as a detailed, well-rationalized medical report, which if submitted before the denial was issued would have created a conflict in medical evidence requiring further development, is not sufficient to establish clear evidence of error.¹⁷ OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁸ Appellant has not submitted evidence to establish clear evidence of error in the denial of her recurrence claim.

CONCLUSION

OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ A.R., Docket No. 15-1598 (issued December 7, 2015).

¹⁸ See *G.V.*, Docket No. 14-1270 (issued February 1, 2016).