

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and the circumstances from the prior decision are incorporated herein by reference.

On September 24, 2007 appellant, then a 38-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging an injury to her head, back, and left lower leg in the performance of duty on September 21, 2007. In an accompanying statement she related that she fell while squatting to pick up a mail receptacle.

In a decision dated November 9, 2007, OWCP denied appellant's claim as she had not factually established the occurrence of the alleged work incident. On November 15, 2007 appellant requested reconsideration. By decision dated April 18, 2008, OWCP denied modification of its November 9, 2007 decision. It determined that the evidence was insufficient to establish that appellant experienced the described incident while squatting and picking up mail.

Appellant, through her representative, requested reconsideration. By decision dated February 19, 2010, OWCP modified its April 18, 2008 decision and accepted that the September 21, 2007 incident occurred as alleged. It determined, however, that the medical evidence was insufficient to establish a diagnosed condition causally related to the accepted employment incident. OWCP noted that the medical reports did not discuss appellant's preexisting conditions.

On July 22, 2013 appellant requested reconsideration. She asserted that she had previously requested reconsideration of the February 19, 2010 decision by certified mail received by OWCP on December 29, 2010. With her request for reconsideration, appellant submitted a copy of a receipt from OWCP indicating that it had received correspondence from her on December 29, 2010.

In a decision dated October 8, 2013, OWCP denied appellant's request for reconsideration as the request was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated July 28, 2014, the Board affirmed the October 8, 2013 decision.⁴ The Board found that she failed to request reconsideration when she submitted evidence in December 2010 and that her July 22, 2013 request for reconsideration was untimely. The Board further determined that appellant did not submit sufficient evidence to

³ Docket No. 14-0686 (issued July 28, 2014).

⁴ See *supra* note 2.

demonstrate clear evidence of error. On July 22, 2015 the Board denied her petition for reconsideration as there was no error of fact or law warranting further consideration of the Board's decision.⁵

On November 3, 2015 appellant requested reconsideration.⁶ In a letter dated October 19, 2015, she asserted that OWCP did not consider the December 18, 2007 report of Dr. Antoine Robert, a Board-certified orthopedic surgeon, in its February 19, 2010 and October 8, 2013 decisions. Appellant maintained that OWCP erred in finding that the medical evidence did not contain a history of her prior work injury as evidenced by an October 24, 2007 medical report. She noted that OWCP, in its February 19, 2010 decision, found that the evidence provided a connection between the diagnosed condition and the work injury. Citing *R.M.*,⁷ appellant asserted that OWCP should further develop the medical evidence.

With her request for reconsideration, appellant submitted a November 7, 2007 letter from the employing establishment controverting her claim, a December 13, 2007 letter from the employing establishment returning her medical documentation, and a July 19, 2012 letter from OWCP informing her that her claim was denied in 2010, noting there was no evidence she did not receive the decision, and resending her a copy of the decision.

Appellant, in a statement dated October 27, 2015, again argued that her physician discussed her prior work injury in an October 24, 2007 report, that the Board and OWCP failed to review Dr. Robert's September 25, 2007 report, and that OWCP did not discuss his January 7, 2008 report. She also maintained that OWCP found that the diagnosed conditions could be reasonably connected to her injury and thus it should have further developed the medical evidence.

Regarding the medical evidence referenced by appellant in her request for reconsideration, the record contains reports from Dr. Roberts dated September 25 and October 24, 2007, and dated December 18, 2007 and revised January 7, 2008. In the September 25, 2007 report, Dr. Roberts noted that she had a new injury on September 21, 2007 and diagnosed cervical, lumbar, and left shoulder strain. On October 24, 2007 he evaluated appellant for continuing neck and back problems after squatting to pick up mail and striking her head on concrete. Dr. Roberts indicated that she had a low back injury that had been partially treated and that recurrences and exacerbations were "the rule rather than the exception." He advised that appellant's prior back injury was "exacerbated by the subsequent event discussed in the history above." In his report dated December 18, 2007 and revised January 7, 2008, Dr. Roberts discussed her symptoms of back pain radiating into her lower extremity. He diagnosed acute lumbar strain, L4 and L5 lumbar radiculopathy, and a disc bulge at L4-5.

⁵ *Order Denying Petition for Reconsideration*, Docket No. 14-0686 (issued July 22, 2015).

⁶ On August 19, 2015 appellant again argued the Board erred in its July 22, 2015 decision. The Board returned her correspondence, noting that it was not clear if she was requesting reconsideration or a review of the written record by OWCP.

⁷ Docket No. 11-0550 (issued January 13, 2013). In *R.M.*, the Board found that the medical evidence raised an inference of causal relationship sufficient to warrant further development of the issue of whether appellant sustained an injury in the performance of duty.

By decision dated December 10, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It noted that it previously found in its February 19, 2010 merit decision that the medical evidence was insufficient to establish her claim. OWCP determined that appellant had not submitted sufficient evidence to demonstrate clear evidence of error in its denial of her claim.

On appeal appellant, through her representative, argues that OWCP ignored probative medical evidence and cites the legal standard relevant to timely requests for reconsideration. She maintains that she did not receive the February 19, 2010 decision and that she timely requested reconsideration. Appellant's representative further contends that she timely requested reconsideration of the October 8, 2013 decision on January 27, 2014 and that she timely requested reconsideration of the Board's July 28, 2014 decision. She maintains that OWCP erred in failing to consider Dr. Roberts' September 25, 2007 report.

LEGAL PRECEDENT

OWCP, through regulations, has imposed a limitation on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA. As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁸ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁹

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.¹⁰ To demonstrate 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 it committed an error.¹¹

⁸ *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).

⁹ 20 C.F.R. § 10.607(b).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

¹¹ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ As appellant's November 3, 2015 request for reconsideration was received more than one year after the last merit decision of record dated February 19, 2010, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁴

Appellant, on reconsideration, argued that OWCP failed to review Dr. Roberts' December 18, 2007 report, revised January 7, 2008. On January 7, 2008 Dr. Roberts noted that appellant had continued low back pain radiating into her left lower extremity and diagnosed an acute lumbar strain, lumbar radiculopathy at L4 and at L5 on the left side, a disc bulge at L4-5 based on diagnostic studies. He did not address causation and thus his report is irrelevant to the pertinent issue in this case. OWCP did not review the report, this failure would not rise to the level of clear evidence of error. In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP and the evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁵

Appellant thereafter argued that the Board did not review Dr. Roberts September 25, 2007 report. The Board, in its July 28, 2014 decision, did not address the merits of her claim, but instead performed a limited review of the evidence to determine whether she demonstrated clear evidence of error.

Appellant further contended that the October 24, 2007 report from Dr. Roberts established that he was aware of her prior injury and that therefore OWCP erred in finding that the medical evidence was insufficient to establish causation for failing to address her preexisting conditions.¹⁶ On October 24, 2007 Dr. Roberts indicated that her prior injury had not totally healed and was aggravated by the September 21, 2007 employment incident. He provided a history of appellant squatting to lift mail and falling striking her head. OWCP, in its February 19, 2010 decision, found that appellant had not established that she struck her head on concrete on September 21, 2007 and that consequently the October 2007 report from Dr. Roberts was based on an inaccurate factual history. Her contention does not demonstrate clear evidence of error by OWCP.

¹² 20 C.F.R. § 10.607(a).

¹³ See *supra* note 8.

¹⁴ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ See *E.R.*, Docket No. 09-0599 (issued June 3, 2009).

¹⁶ The October 24, 2007 report contains a date at the top of October 3, 2007. However, this appears to be a typographical error.

In support of her request for reconsideration, appellant submitted a November 7, 2007 letter from the employing establishment controverting her claim, a December 13, 2007 letter returning her medical documentation, and a July 19, 2012 letter from OWCP informing her that her claim was denied in 2010 and resending her a copy of the decision. The November 7, 2007 and July 19, 2012 correspondence duplicated evidence already of record and the December 13, 2007 letter did not address the relevant issue of whether she sustained an injury in the performance of duty on September 21, 2007. Evidence which duplicates or repeats evidence already in the case record or is irrelevant does not raise a substantial question as to the correctness of OWCP's decision.¹⁷ Appellant has not sufficiently explained how the resubmission of this evidence demonstrates clear evidence of error.¹⁸

On appeal and before OWCP on reconsideration, appellant maintained that OWCP ignored probative medical evidence. The term "clear evidence of error," however, is intended to represent a difficult standard. The submission of 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.¹⁹ Even if appellant demonstrated that the medical evidence was sufficiently probative to warrant further development of the medical evidence, this would be insufficient to demonstrate clear evidence of error.

Appellant additionally contends that she did not receive the February 19, 2010 decision. However, this is irrelevant to the issue of whether she demonstrated clear evidence of error. She also alleges that she timely requested reconsideration of the February 19, 2010 decision. The Board, however, previously reviewed and ruled upon this contention in its July 28, 2014 decision. Absent further merit review by OWCP this issue is *res judicata*.²⁰

Appellant further argues that she timely requested reconsideration of the October 8, 2013 decision on January 27, 2014 and that she timely requested reconsideration of the Board's July 28, 2014 decision. She did not, however, request reconsideration within one year of a merit decision issued by either OWCP or the Board. The last merit decision in the case was issued February 19, 2010. Consequently, appellant's request for reconsideration was untimely filed as not received within one year of the February 19, 2010 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁷ See *D.B.*, Docket No. 16-0539 (issued May 26, 2016); see also *supra* note 15.

¹⁸ See *A.M.*, Docket No. 10-526 (issued November 8, 2010) (appellant did not sufficiently explain how largely duplicative evidence raised a substantial question as to the correctness of OWCP's decision).

¹⁹ *Joseph R. Santos*, 57 ECAB 554 (2006).

²⁰ See *J.V.*, Docket No. 14-0788 (issued October 19, 2015); see also *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2016
Washington, DC

Christopher J. Godfrey, 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