

FACTUAL HISTORY

On July 1, 2014 appellant, then a 57-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she strained a muscle in her neck and upper back when assisting a nurse move a patient from a bed to a chair. She did not stop work.

Appellant was treated by Dr. Charles Romick, a Board-certified family practitioner, on June 26, July 1, 9, and 14, 2014 for neck, right shoulder, and upper back pain. She reported that on June 24, 2014 she assisted a nurse transfer a patient from a bed to a chair and believed that this action caused her problem. Dr. Romick diagnosed neck and thoracic sprain and recommended physical therapy. He opined that he could not directly relate appellant's condition to the work activity described. Appellant was evaluated for physical therapy on July 22, 2014.

On October 6, 2014 appellant was treated by Dr. Kenneth Pitman, Board-certified in pain medicine, for right neck, shoulder, and scapula pain. Appellant reported that on June 24, 2016 she was assisting a patient from a standing to a sitting position and injured her shoulder and cervical area. Dr. Pitman diagnosed chronic neck pain, status post lifting injury at work on June 24, 2014, remote history of motor vehicle neck injury, and bilateral radiculopathy.

By letter dated November 18, 2014, OWCP advised appellant that her claim was originally received as a simple, uncontroverted case which resulted in minimal or no time loss from work. It indicated that appellant's claim was administratively handled to allow medical payments up to \$1,500.00, but the merits of the claim had not been formally adjudicated. OWCP advised that because a claim for wage loss was received her claim would be formally adjudicated. It requested that appellant submit additional information including a comprehensive medical report from her treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to her claimed neck and upper back injury.

Appellant submitted reports from Dr. Romick dated July 23 to October 2, 2014 who treated her in follow-up for neck, right shoulder, and upper back pain. Appellant reported that on June 24, 2014 she assisted a nurse transfer a patient from a bed to a Geri chair. She did not recall any pain to these areas prior to this time. Appellant noted having exacerbation of pain after physical therapy and after four treatments her therapy was put on hold. Dr. Romick noted tenderness of the right neck, right scapula and trapezius, and intact strength and sensation. He diagnosed neck and thoracic sprain. Dr. Romick opined that he could not directly relate appellant's problems to the work activity described as she performs these activities on a daily basis as part of her position. A magnetic resonance imaging (MRI) scan which revealed C5-6 and C6-7 degenerative disc space narrowing with degenerative retrolisthesis and C5-6 and C6-7 moderate disc osteophyte complex.

By decision dated December 18, 2014, OWCP denied appellant's claim as the medical evidence did not support that she had a medical condition causally related to the accepted factors of her employment incident.

In an appeal form dated March 6, 2015, appellant requested an oral hearing before an OWCP hearing representative. She submitted a February 7, 2015 witness statement from a

registered nurse who assisted appellant transfer the patient on June 24, 2014. Appellant indicated that the patient sat down slowly into the recliner chair while holding on to appellant landing heavily in the chair and she was jolted.

Appellant submitted clinical summaries from an unknown health care provider dated February 5, and 23, and April 20, 2015 where appellant was seen in follow up after epidural steroid block and facet injections. She reported the pain was diminished 10 to 20 percent. The provider diagnosed chronic neck pain, cervicogenic headache, degeneration of the intervertebral disc, cervicothoracic, cervical disc displacement, cervical spinal stenosis, and cervical radiculitis.

By decision dated July 31, 2015, OWCP denied appellant's request for an oral hearing. It found that the request was untimely filed. Appellant was informed that her case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

In an appeal request form dated February 16, 2016, and received on February 23, 2016, appellant requested reconsideration. She submitted reports from Dr. Romick dated June 26 to October 2, 2014 and a June 15, 2015 report from a nonspecific health care provider, all previously of record.

By decision dated May 10, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.² This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.³ The Board has found that imposition of this one-year filing limitation does not constitute an abuse of discretion.⁴

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP must reopen the case for merit review.⁵

² 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

³ 20 C.F.R. § 10.607(a).

⁴ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁶ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁷ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁸

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁹ As appellant's request for reconsideration was not received by OWCP until February 23, 2016, more than one year after issuance of the last merit decision by OWCP on December 18, 2014, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP denying her claim for compensation.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP. In an appeal request form dated February 16, 2016 and received on February 23, 2016, appellant disagreed with OWCP's decision denying her claim for compensation. The Board notes that, while appellant addressed her disagreement with OWCP's decision denying her claim for a traumatic injury, her disagreement does not demonstrate clear evidence of error as it does not raise a substantial question as to the correctness of OWCP's most recent merit decision which denied appellant's claim for a traumatic injury.

The Board notes that the underlying issue is medical in nature and that on reconsideration appellant did not submit additional medical evidence. The Board notes that clear evidence of error 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.¹⁰

Appellant submitted reports from Dr. Romick dated June 26 to October 2, 2014 and a June 15, 2015 report from an unidentified health care provider. OWCP had previously

⁶ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *D.G.*, 59 ECAB 455 (2008).

considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying her claim for compensation.¹¹ This evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and thus, these reports are insufficient to discharge appellant's burden of proof.

The Board finds that OWCP properly found that appellant's February 16, 2016 appeal request form received on February 23, 2016 was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 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

¹¹ See *A.M.*, Docket No. 10-526 (issued November 8, 2010).