

FACTUAL HISTORY

This matter was previously before the Board.²

On August 26, 2011 appellant, then a 22-year-old forester, was injured when her government vehicle tipped as she backed up. She indicated on her traumatic injury claim (Form CA-1) that she had a seatbelt mark on her right thigh and that her right hand knuckles were bruised. Appellant did not stop work.

In an initial medical report on August 27, 2011, Dr. Raymond Hamilton, a Board-certified osteopath specializing in family medicine, advised that appellant was backing up a truck when the truck gently rolled on its right side. He noted that she wrestled with the door to get it open and was able to get out. Dr. Hamilton described the incident as extremely slow paced and low intensity. He noted that appellant had no meaningful injuries besides a small amount of soreness in the thorax and he diagnosed a strain subsequent to mild truck accident. Dr. Hamilton released her to work that date. On January 13, 2012 he advised that appellant had soreness in the thorax region and diagnosed a strain due to the work incident.

On February 7, 2012 OWCP accepted the claim for a thoracic sprain.

On October 8, 2012 Dr. Eric S. Schmidt, a Board-certified orthopedic surgeon, advised that appellant was employed at the employing establishment as a soil conservationist and also worked as a fitness instructor. He noted that she began experiencing left shoulder pain in an abducted position in August 2011 while instructing an exercise program. Appellant denied any specific trauma. Dr. E. Schmidt diagnosed left shoulder subacromial impingement with internal rotation capsular contracture.

In an October 8, 2012 report, Dr. David H. Schmidt, a Board-certified diagnostic radiologist, advised that left shoulder magnetic resonance imaging (MRI) scan revealed a probable posterior inferior labral tear and mild anterior downsloping.

Appellant filed a claim for recurrence of a medical condition (Form CA-2a) on November 9, 2012, attributing her left shoulder injury to the August 26, 2011 work injury. She noted that she began treatment for her shoulder injury on August 27, 2011. Appellant did not stop work.

By report dated November 7, 2012, Dr. E. Schmidt advised that appellant continued to have left shoulder pain with certain movements, particularly with her work as a fitness instructor. On physical examination he noted ranges of motion, mild painful arc of motion, and positive impingement. Dr. E. Schmidt diagnosed left shoulder subacromial impingement.

In a March 8, 2013 report, received by OWCP on April 2, 2013, Dr. E. Schmidt advised that appellant's truck flipped on the passenger side as she was backing up. He noted that she forcibly pushed the driver side door open to remove herself from the truck. Dr. E. Schmidt also noted that appellant initially had pain in her mid-thoracic spine, abdomen, and chest, but that she

² *Order Remanding Case*, Docket No. 15-1413 (issued December 29, 2015).

developed left shoulder pain the next day, August 28, 2011. He related findings on examination. Dr. E. Schmidt diagnosed subacromial impingement with posterior and inferior labral tear with internal rotation capsular contracture.

By decision dated April 3, 2013, OWCP denied appellant's recurrence claim. It specifically listed the medical evidence it had reviewed in making its decision that the medical evidence had not established a worsening of her accepted condition. Although the list of medical evidence included reports from Dr. E. Schmidt, his most recent medical report, dated March 8, 2013, was not referenced.

In a June 9, 2014 statement, appellant requested a monetary settlement from OWCP. She acknowledged that more than a year had passed from OWCP's April 3, 2013 decision, but asserted that she was still within the three-year time limitation for filing a traumatic injury claim. She detailed her treatment history and alleged that her physician erred when he attributed her shoulder injury to working as a fitness instructor.

By letter dated July 18, 2014, received by OWCP on August 1, 2014, appellant's congressman requested reconsideration on appellant's behalf.

In an August 19, 2014 decision, OWCP denied appellant's request for reconsideration as it was untimely filed also because it failed to demonstrate clear evidence of error.

By letter dated September 12, 2014, received by OWCP on September 22, 2014, appellant again requested reconsideration and argued that OWCP had erred because it had not reviewed Dr. E. Schmidt's March 8, 2013 report. She pointed out that the physician's report "was received by [Division of Federal Employees' Central Mailroom] on April 2, 2013 and was not discussed in the denial dated April 3, 2013." Appellant requested "a new decision which discusses the merit of Dr. E. Schmidt's March 8, 2013 report" as she contended that her claim should be expanded to include her left shoulder injury as resulting from the August 26, 2011 employment injury.

Appellant also submitted additional evidence. In a September 19, 2011 report, Dr. Brent Pauls, a chiropractor, noted having seen her for complaints of left shoulder pain for a month. He assessed left shoulder sprain. Appellant submitted January 12, 16, 19, 31, and March 21, 2012 treatment notes from Dr. Pauls regarding her left shoulder. In his January 31, 2012 treatment note, Dr. Pauls related that she reported a sore left shoulder which "[appellant] may have injured while at work." Also provided were a February 16, 2012 treatment note from Dr. Eric Peterson, an osteopath, and an April 18, 2012 treatment note from Dr. Kimberly Thompson, an osteopath and associate of Dr. Peterson, who treated appellant for several conditions, including her left shoulder pain.

By decision dated March 23, 2015, OWCP informed appellant that she "did not present clear evidence of error either with the April 3, 2013 or August 19, 2014 decision[s]." It further informed her that her only right of appeal of the August 19, 2014 decision, "which was a reconsideration decision based on your untimely request for reconsideration of the April 3, 2013 decision," was an appeal to the Board. The decision was signed by a "[c]ommunications [s]pecialist."

Appellant appealed to the Board. In a December 29, 2015 order, the Board set aside OWCP's March 23, 2015 decision as the decision had not been issued by a senior claims examiner or anyone else with proper signature authority.³ The Board remanded the case and directed issuance of an appropriate decision.

On remand, an OWCP senior claims examiner, in a January 13, 2016 decision, denied appellant's request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. The denial advised appellant that although Dr. E. Schmidt's March 8, 2013 report was received by OWCP on April 2, 2013, "this report was not released for viewing in your case file until April 4, 2013, one day after the April 3, 2013 decision was issued." It found that the absence of a discussion of the report of his March 8, 2013 report failed to raise a substantial question concerning the correctness of the April 3, 2013 decision. Therefore, OWCP denied appellant's reconsideration request because it had not been received within the one-year limit.

LEGAL PRECEDENT

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

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates 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 demonstrates clear evidence of error on the part of OWCP.⁷

To demonstrate 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 demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be

³ *Id.*

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

⁷ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

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

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

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

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 demonstrate clear evidence of error, the evidence submitted 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

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 evidence of error.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

In its January 13, 2016 decision, OWCP properly determined that appellant had filed an untimely request for reconsideration of her claim. Appellant's September 12, 2014 reconsideration request, which OWCP received on September 22, 2014, was not filed within one year of OWCP's April 3, 2013 merit decision denying her recurrence of a medical condition claim. Because her reconsideration request was not received within one year of the April 3, 2013 merit decision, she must demonstrate clear evidence of error by OWCP.

In support of her request for reconsideration, appellant contended that OWCP erred by not reviewing Dr. E. Schmidt's March 8, 2013 report. The Board finds that OWCP's failure to address Dr. E. Schmidt's March 8, 2013 report in its April 3, 2013 decision raises a substantial question as to the correctness of OWCP's decision.

To support her recurrence of disability claim, appellant had submitted reports from Dr. E. Schmidt, including a March 8, 2013 report. OWCP has acknowledged that it did not review that report. It explained that although the report reflects that it was received into the record on April 2, 2013, it "was not released for viewing" until April 4, 2013, the day after it issued its April 3, 2013 decision. OWCP then conducted a limited review of the March 8, 2013 report and went on to find that the report did not "raise a substantial question concerning the correctness" of its April 3, 2013 decision.

¹¹ See *supra* note 7.

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

¹³ *B.K.*, Docket No. 14-277 (issued October 8, 2014); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *Supra* note 7; *James R. Mirra*, 56 ECAB 738 (2005).

¹⁵ See *supra* note 12.

The Board can find no precedent to OWCP's declaration that the medical report was "not released for viewing" and finds that OWCP committed error by not reviewing all the evidence in the record before issuing its April 3, 2013 decision. As the report was received by OWCP on April 2, 2013, prior to issuing its decision denying appellant's recurrence claim, it was incumbent upon OWCP to have reviewed it prior to issuing its final decision. The Board has held that when OWCP is adjudicating a claim it is obligated to consider all evidence properly submitted by a claimant and received prior to the issuance of its final decision.¹⁶ The Board finds that appellant's argument that OWCP had not reviewed Dr. E. Schmidt's March 8, 2013 report, even though OWCP had received it prior to issuing its April 3, 2013 merit decision, raises a substantial question as to the correctness of the April 3, 2013 decision and has demonstrated clear evidence of error.¹⁷

Accordingly, the Board finds that appellant has demonstrated clear evidence of error on the part of OWCP. As such, the case must be remanded for consideration of the merits.

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error.

¹⁶ See *William A. Couch*, 41 ECAB 548, 553 (1990). *Supra* note 7 at Chapter 2.1602.4(b) (October 2011) which provides in pertinent part, "Timeliness is determined by the document receipt date (the 'received date' in iFECS)."

¹⁷ See *e.g., B.K.*, Docket No. 14-277 (issued October 8, 2014) (the Board found that appellant's allegation that he was secretly monitored had not been previously adjudicated by OWCP demonstrated clear evidence of error).

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2016 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further development and an appropriate *de novo* merit decision.

Issued: October 19, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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