

ISSUE

The issue is whether OWCP properly denied appellant's February 22, 2016 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On March 7, 2013 appellant, then a 45-year-old rural route carrier, filed an occupational disease claim (Form CA-2) alleging injuries to her neck, right shoulder, right hand, right wrist, and upper and lower back as a result of her repetitive employment duties. She specifically noted that her work duties involved repetitively pushing, pulling, carrying, lifting, bending, stooping, climbing, grasping, casing mail, and overhead reaching for eight years. Appellant first became aware of her condition on February 8, 2013 and realized that it resulted from her employment on February 21, 2013. She stopped work on February 12, 2013. The employing establishment noted that appellant had just returned to full duty and was previously working limited duty for a different work-related condition.

By letter dated March 27, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish her claim and requested that she submit additional factual and medical evidence to support her occupational disease claim. Appellant was afforded 30 days to submit this evidence. A similar letter was sent to the employing establishment.

In an April 3, 2013 statement, appellant explained that she had performed the repetitive duties of a letter carrier for the past eight years. She noted that she had previous job injuries, but had performed the full duties of her position from April 2012 to January 2013. Appellant reported that she had experienced pain off and on in her right hand, wrist, arm, forearm, shoulder, neck, back, and thoracic area for months, but she believed that it would go away in time. She described in detail her employment duties and the physical requirements of each task. Appellant indicated that she did not have any hobbies or other activities outside of her employment that could cause her injuries.

Dr. Leonel Reyes, a family practitioner, related in an April 2, 2013 report that appellant was examined for a repetitive injury to her right hand, wrist, forearm, shoulder, neck, and thoracic area caused by work-related activities. He discussed her employment duties that were repetitive in nature and reviewed various diagnostic examination reports. Dr. Reyes opined that appellant's right lateral epicondylitis, right upper radiculopathy, and right wrist tenosynovitis, right superior labral tear from anterior to posterior, cervical herniated nucleus pulposus (HNP), lumbar HNP, thoracic HNP, and right carpal tunnel syndrome were a direct result of her repetitive duties that she performed as a letter carrier.

Appellant underwent diagnostic examinations. In an April 10, 2013 magnetic resonance imaging (MRI) scan examination report of the lumbar spine, Dr. Gerald York, a Board-certified diagnostic radiologist, noted her history of lower back pain with radiculopathy. He observed a small disc herniation in the lumbar region causing mild narrowing of the right extra foraminal space and large disc herniation in the lower thoracic region at the T11-12 level on the left. In an April 10, 2013 MRI scan examination report of the thoracic spine, Dr. York observed small disc bulge at the T3-4 level and disc herniation at the T11-12 level.

By letter dated April 19, 2013, appellant's supervisor indicated that she reviewed appellant's April 3, 2013 statement and noted her disagreements with the description of appellant's employment duties. She reported that appellant's duties were performed intermittently and at her own pace.

A human resource management specialist for the employing establishment, A.B., submitted a letter dated April 24, 2013 that controverted appellant's claim. She related that appellant had been off work since April 12, 2011 for a work-related ankle injury and returned to full duty on April 10, 2012. A.B. noted that during this time-frame appellant submitted another occupational disease claim alleging injuries to her neck, right shoulder, and bilateral carpal tunnel syndrome. She alleged that appellant's current claim was for the same injuries in her previous claim for which she had already been cleared to return to full duty. A.B. further discussed her disagreements with appellant's description of her employment duties and asserted that she exaggerated the duties she performed.

In a decision dated June 17, 2013, OWCP denied appellant's claim finding that she failed to establish fact of injury. It determined that the factual evidence did not support that she performed the employment duties she alleged contributed to her condition and the medical evidence failed to establish a diagnosed condition related to her employment.

Following OWCP's June 17, 2013 decision, on April 10, 2014, OWCP received a letter dated March 27, 2014 by Dr. Helo Chen, a family practitioner. Dr. Chen requested that OWCP review the attached medical evidence and reconsider appellant's occupational disease claim. She described appellant's duties as a rural letter carrier, performed for over eight years. Dr. Chen discussed appellant's previous work-related injuries and noted that those claims should not affect appellant's current claim. She reviewed appellant's diagnostic examination reports and explained the various upper extremity, lumbar, and thoracic conditions that appellant developed as a result of her employment. Dr. Chen opined that appellant suffered an occupational work-related injury as a result of performing her prolonged job duties.

On September 9, 2014 OWCP received appellant's unsigned appeal request form in which she requested reconsideration. Appellant resubmitted Dr. Chen's March 27, 2014 letter.

A telephone memorandum of September 12, 2014 indicates that OWCP called appellant and advised that it had received her request for reconsideration on September 9, 2014, but that it was unsigned. On September 15, 2014 OWCP received her signed appeal request form, which appears identical to the September 9, 2014 form, except that additional information was added including her address, telephone number, and "today's date" of "July 11, 2013."

Appellant also submitted an e-mail dated October 11, 2013 from H.C., a postal worker. H.C. explained that he had worked for the employing establishment for nearly 30 years and was very familiar with all the areas on the workroom floor. He stated that it was common for a bucket of flat mail to exceed 30 or 40 pounds in weight and that carriers often lifted these buckets above their waist in order to load them into carts or hampers.

In an October 9, 2014 report, Dr. R. Scott Rosenblum, a Board-certified otolaryngologist, observed no active disease of the chest and no significant changes since February 20, 2012.

By decision dated July 9, 2015, OWCP denied appellant's reconsideration request. It determined that her reconsideration request was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP.

In a letter dated February 16, 2016 and received by OWCP on February 22, 2016, counsel alleged that appellant uploaded a request for reconsideration of the June 17, 2013 denial decision on April 10, 2014. However, no evidence was enclosed by him that a request for reconsideration was "uploaded" by her or an authorized representative on April 10, 2014. Counsel requested that OWCP review appellant's file to confirm whether she filed a reconsideration request within one year of the June 17, 2013 denial decision and that OWCP assign her case to a claims examiner for reconsideration.

On February 29, 2016 OWCP issued a letter to counsel advising him to review the appeal rights enclosed with the July 9, 2015 decision and choose which appeal rights were in appellant's best interest.

By letter dated February 26, 2016 and received by OWCP on February 29, 2016, counsel alleged that OWCP ignored appellant's reconsideration request that was uploaded on April 10, 2014. He requested that OWCP review the file and confirm that she responded to OWCP's June 17, 2013 denial decision within one year.

In a decision dated March 11, 2016, OWCP denied further merit review of appellant's claim finding that her February 29, 2016 request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received 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 time limitation begins to run on the date following the date of the original decision.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

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *See S.T.*, Docket No. 15-382 (issued April 3, 2015); *J.J.*, Docket No. 14-0746 (issued October 17, 2014); *C.B.*, Docket No. 13-1732 (issued January 28, 2014).

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

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 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 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

On June 17, 2013 OWCP issued a decision denying appellant's occupational disease claim. Accordingly, appellant had one year from June 17, 2013 to make a timely request for reconsideration.¹⁴ Her February 22, 2016 request for reconsideration was therefore untimely filed.

Counsel alleged in his February 22, 2016 request for reconsideration and in another letter received on February 29, 2016 that appellant had timely uploaded a request for reconsideration on April 10, 2014.

⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (October 2011).

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

⁹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *Id.*

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

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

¹⁴ *See D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997).

The record establishes that, on April 10, 2014, OWCP received a letter from Dr. Chen requesting that OWCP reconsider appellant's occupational injury claim based on her attached medical evidence. There is no evidence of record that Dr. Chen was appellant's authorized representative at that time.

OWCP's regulations at 20 C.F.R. § 10.700 provides:

“(a) The claims process under the FECA is informal. Unlike many workers' compensation laws, the [employing establishment] is not a party to the claim, and OWCP acts as an impartial evaluator of the evidence. Nevertheless, a claimant may appoint one individual to represent his or her interests, but the appointment must be in writing.”

* * *

“(c) A properly appointed representative who is recognized by OWCP may make a request or give direction to OWCP regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts or the law, and obtaining information from the case file, to the same extent as the claimant....”

While counsel alleged that appellant also uploaded a request for reconsideration on April 10, 2014, he has not submitted any evidence to substantiate a request for reconsideration was filed by her or an authorized representative within one year of June 17, 2013.

Counsel argues that the request for reconsideration was timely filed, but offered no evidence or argument to demonstrate clear evidence of error in the denial of appellant's claim. Therefore, the Board finds that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 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