

ISSUE

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

FACTUAL HISTORY

On February 16, 2006 appellant, then a 41-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that, on January 18, 2006, she sustained injuries while lifting and pulling a patient in the performance of duty. She submitted a treatment note from the employing establishment health unit dated January 18, 2006 indicating that she reported aggravating her right shoulder by pulling a heavy patient up in bed. A note from an employing establishment osteopath, Dr. Deborah Edelman, indicated that appellant should not lift more than 20 pounds. In a note dated March 1, 2006, Dr. Daryl Rosenbaum, a family practitioner, reported that appellant could work light duty with a 20-pound lifting restriction and no repetitive use of her wrists.⁴

By decision dated March 28, 2006, OWCP denied the claim for compensation. It found the incident had occurred as alleged, but the medical evidence was insufficient to establish the claim for compensation.

On January 13, 2015 appellant filed a recurrence claim (Form CA-2a) in which she reported the date of original injury, and the date of first medical treatment following recurrence, as January 18, 2006.

OWCP received appellant's request for reconsideration of her claim on March 15, 2016. In a letter of that date, appellant asserted that she injured her right shoulder and neck on January 18, 2006 when lifting and pulling a patient. She wrote that an electromyogram (EMG) in February 2006 showed nerve damage and she had neck surgery in 2006 "and two other dates." According to appellant, she had right shoulder surgeries in 2014 and 2015 for a rotator cuff tear.

As to medical evidence, appellant submitted a February 16, 2006 report, which appears to be the first page of an unsigned report indicating that the nerve conduction showed prolonged median motor terminal latencies. In a report dated June 28, 2006, Dr. William Mason,⁵ indicated that appellant had a history of carpal tunnel syndrome and bilateral shoulder pain. He wrote that the carpal tunnel syndrome and shoulder problems were probably related to the job as a nursing assistant. Appellant also submitted notes from Dr. Mason dated July 26, November 6 and 29, 2006. In the November 29, 2006 note, Dr. Mason indicated that appellant would be unable to continue light-duty work, referring to dizziness and pain in the hands and neck. The record contains the first page of an unsigned report dated October 19, 2009 indicating that appellant had bilateral hand numbness.

⁴ Dr. Rosenbaum also reported in a separate March 1, 2006 note that appellant had evidence of carpal tunnel syndrome.

⁵ Dr. Mason's credentials could not be verified.

In a report dated December 15, 2014, Dr. Robert Humble, a Board-certified orthopedic surgeon, reported that appellant had right rotator cuff surgery five or six weeks earlier. He opined that it was likely the result of repetitive lifting, pulling, and pushing at work. Appellant also submitted a February 13, 2015 report from Dr. Humble. Dr. Humble reported that he first treated appellant in October 2014, and she apparently had an injury on January 18, 2006. He wrote that it could have been an initiating injury that led to ongoing shoulder impingement and ultimately a rotator cuff tear. By report dated June 24, 2015, Dr. Ranjan Roy, a Board-certified neurosurgeon, indicated that he had performed neck and back surgeries on appellant, but the only mention of a workplace injury was in the new patient forms appellant completed.

By decision dated March 18, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁶ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁷

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁸ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁹ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹⁰ As one such limitation, 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.¹¹ 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 evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹²

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.605 (2012).

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

¹⁰ *Supra* note 2.

¹¹ 20 C.F.R. § 10.607 (2012).

¹² *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

claimant and raise a substantial question as to the correctness of OWCP's decision.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶

ANALYSIS

In the present case, OWCP's decision reviewing the merits of the claim was dated March 28, 2006. Appellant's reconsideration request was received on March 15, 2016. As noted above, she had one year from the March 28, 2006 merit decision to timely request reconsideration.¹⁷ Since the reconsideration request was received more than one year after March 28, 2006, it is properly found to be untimely.

As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP. The basis for the denial of the claim on March 28, 2006 was that the medical evidence failed to establish a diagnosed condition as causally related to the January 18, 2006 employment incident. On reconsideration appellant submitted additional medical evidence, but the evidence does not demonstrate clear evidence of error. Dr. Mason did not provide a history of the January 18, 2006 employment incident. He speculated that carpal tunnel syndrome and shoulder problems were related to appellant's job, without further explanation. Dr. Humble did not provide a complete background and referred to repetitive activity, not the January 18, 2006 incident. Dr. Roy did not provide a complete background or an opinion as to a diagnosed condition causally related to the January 18, 2006 incident.

As noted above, the evidence must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁸ The Board finds the evidence does not demonstrate clear evidence of error and, therefore, OWCP properly denied the reconsideration request without merit review.

On appeal, appellant argues that she did sustain injuries as a result of the January 18, 2006 employment incident and that she had submitted medical evidence over the years. She resubmitted medical evidence of record. The Board does not have jurisdiction over the merits of the claim for compensation, as discussed above. Based on the evidence of record, appellant submitted an untimely reconsideration request and failed to demonstrate clear evidence of error.

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁴ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁵ *Id.*

¹⁶ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

¹⁷ *Supra* note 10.

¹⁸ *Supra* note 12.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 18, 2016 is affirmed.

Issued: October 4, 2016
Washington, DC

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

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

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