

**United States Department of Labor
Employees' Compensation Appeals Board**

S.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Beltsville, MD, Employer**

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**Docket No. 16-1107
Issued: February 23, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 29, 2016 appellant filed a timely appeal from a November 5, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated August 7, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.²

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.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant filed a timely request for oral argument. By order dated November 4, 2016, the Board denied her request as her arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 16-1107 (issued November 4, 2016).

FACTUAL HISTORY

On January 4, 2013 appellant, then a 37-year-old clerk, filed an occupational disease, (Form CA-2) alleging that she developed a superior labrum anterior and posterior (SLAP) tear as a result of throwing parcels over a prolonged period of time. She stopped work on December 27, 2012.

Appellant was treated by Dr. Marc E. Rankin, a Board-certified orthopedist, on January 7, 2013, who noted that appellant was totally disabled from December 19, 2012 to January 7, 2013.

By letter dated January 29, 2013, OWCP advised appellant of the type of factual and medical evidence needed to establish her claim. It noted that the evidence submitted was insufficient to support that she was injured while performing work duties. OWCP provided a development questionnaire and asked that she describe in detail all work activities that contributed to her condition and describe how often she performed such activities. It also requested the employing establishment provide comments from a knowledgeable supervisor of the accuracy of all statements from the employee, describe the tasks the employee was to perform and the frequency, the precautions taken to minimize the effects of the activities and a job description. Appellant did not respond to the development questionnaire.

Appellant underwent physical therapy from August 9 to November 16, 2012. She submitted a right shoulder magnetic resonance imaging (MRI) scan dated December 24, 2012 which revealed mild acromioclavicular arthropathic changes, no rotator cuff tendinopathy, and no labral tear.

Appellant was treated by Dr. Rankin on August 8, 2012 for right shoulder pain which developed while working. Dr. Rankin diagnosed rotator cuff sprain and strain and lumbar sprain and strain and recommended physical therapy. In reports dated January 7 and February 14, 2013, he noted that appellant presented with right shoulder pain for 15 months which was affected by overhead activities at work. Dr. Rankin diagnosed SLAP lesion and recommended right shoulder arthroscopy. Appellant submitted a February 6, 2013 certificate of health care provider from Dr. Rankin who noted that appellant was scheduled for right shoulder surgery and would need six to eight weeks of rehabilitation to regain functional mobility. Dr. Rankin indicated that appellant would be unable to reach, lift, carry, push or pull with the right arm. On February 6, 2013 he performed right shoulder arthroscopy with SLAP lesion repair. Dr. Rankin diagnosed rotator cuff capsule sprain and strain, status post right shoulder arthroscopy, and stable postoperative visit.

By decision dated April 18, 2013, OWCP denied appellant's claim because the evidence did not support that the injury and or events occurred as alleged.

On April 17, 2014 appellant requested reconsideration. In an undated statement, she indicated that she believed her activities at work caused the onset of her right shoulder pain. Appellant described her work as a clerk and indicated that her duties included moving pallets of parcels, bundled flats, buckets of flats and all-purpose containers filled with parcels off the dock, lifting 400 to 550 parcels per day which weighed 3 ounces to 30 pounds, lifting buckets of mail,

flats, and parcels to be distributed, sorting mail on a pie cart, stacking bundles of flats above her head, and casing letters and flats.

Appellant submitted an April 10, 2014 report from Dr. Allan H. Macht, a Board-certified general surgeon, who diagnosed status postoperative repair of the horn of the labrum of the right shoulder. She reported developing right shoulder pain over a seven-year period while working as a clerk where she threw hundreds of parcels a day into bins and sorted bundled mail above her head. Dr. Macht opined that appellant sustained a labral tear of her right shoulder due to her work activity of pushing and lifting packages above her head and placing them in slots and throwing packages.

In a decision dated August 7, 2014, OWCP denied modification finding that the medical evidence was insufficient to establish causal relationship.

In a statement dated February 27, 2015, appellant noted popping and clicking of her right shoulder while throwing parcels at work and lifting her right arm above her shoulder. She indicated that she underwent right shoulder surgery which was aggravated by throwing parcels.

In an appeal request form dated August 5, 2015 and received on August 11, 2015 appellant requested reconsideration.

Appellant submitted an undated report from Dr. Rankin who first treated appellant on January 7, 2013 for right shoulder pain. She reported that on March 20, 2012 while repetitively reaching and throwing parcels with her right arm she experienced a tearing sensation in her right shoulder. Since this time appellant reported that her right shoulder was aggravated by any reaching or overhead work with her right arm. Dr. Rankin diagnosed tear of the anterior labrum confirmed by MRI scan and performed a right shoulder arthroscopic anterior labral repair on February 6, 2013. He noted that appellant underwent physical therapy and returned to work on July 17, 2013. Dr. Rankin opined to a reasonable degree of medical certainty that appellant's right shoulder pain was caused by the torn labrum sustained at work on March 20, 2012 which led to surgical repair. He indicated that appellant did not have right shoulder pain prior to the activity on that workday.

Appellant submitted a March 4, 2015 duty status report (Form CA-17) from Dr. Michael V. Williams, a Board-certified family practitioner, who noted findings of shoulder and trapezius pain and diagnosed shoulder sprain. Dr. Williams noted that appellant could return to work full time with restrictions. In a March 4, 2015 work activity status report, he diagnosed shoulder and upper arm strain and returned appellant to work full-time light duty on March 4, 2015.

On March 10, 2015 appellant was treated by a physician assistant who diagnosed shoulder and upper arm strain and returned appellant to work full time with restrictions on March 10, 2015.

By decision dated November 5, 2015, 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.³ 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.⁴ The Board has found that imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

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.⁶

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁸ 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.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ As appellant's request for reconsideration was not received by OWCP until August 11, 2015, more than one year after

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

⁴ 20 C.F.R. § 10.607(a).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *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).

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁰ 20 C.F.R. § 10.607(a).

issuance of the August 7, 2014 merit decision by OWCP, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP denying her claim for compensation.

The Board finds that appellant failed to demonstrate clear evidence of error on the part of OWCP. In her reconsideration request, appellant disagreed with OWCP's decision denying her claim for compensation. In her February 27, 2015 statement, she noted popping and clicking of her right shoulder while throwing parcels at work and lifting her right arm above her shoulder. Appellant indicated that her right shoulder was aggravated by throwing parcels and that she had to undergo surgery. The Board notes that while appellant addressed her disagreement with OWCP's decision denying her claim for an occupational disease, 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 an occupational disease because of insufficient medical evidence addressing causal relationship.

Appellant also submitted medical evidence. Dr. Williams provided March 4, 2015 reports but he did not address causal relationship. Dr. Rankin, in an undated report, noted appellant's work duties and opined to a reasonable degree of medical certainty that appellant's right shoulder pain was caused by the torn labrum sustained at work on March 20, 2012 which led to surgical repair. While he provided support for causal relationship, his report did not demonstrate clear evidence of error. The Board notes that clear evidence of error is intended to represent a difficult standard. 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.¹¹

Appellant also submitted evidence from a physician assistant. However, evidence from a physician assistant does not constitute competent medical evidence under FECA.¹² Appellant has not otherwise explained how this evidence raises a substantial question as to the correctness of OWCP's decision.

For these reasons, the Board finds that appellant has not demonstrated clear evidence of error by OWCP in its August 7, 2014 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.

¹¹ *D.G.*, 59 ECAB 455 (2008).

¹² *See V.C.*, Docket No. 16-0642 (issued April 19, 2016); 5 U.S.C. § 8101(2).

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2017
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