

FACTUAL HISTORY

On March 24, 2015 appellant, then a 61-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured both hands and both shoulders that day when loading and sweeping mail on a processing machine, and lifting trays of mail up onto racks and into containers. She stopped work early but returned at her usual start time the following day. In support of her claim, appellant submitted discharge instructions from Baptist Medical Center emergency department. This provided a discharge diagnosis of shoulder pain, indicated that x-rays of both shoulders had been performed, and advised that medication had been prescribed.

The employing establishment controverted the claim and maintained that it should be a claim for an occupational disease.

By letter dated April 3, 2015, OWCP informed appellant of the evidence needed to support her traumatic injury claim, including a statement from a physician who had examined her explaining how the reported employment incident caused or aggravated a medical condition.

Evidence submitted thereafter included March 24, 2015 x-rays of the right and left shoulder done at the hospital emergency department. Each demonstrated normal alignment without evidence of acute osseous abnormality. A more complete March 24, 2015 emergency department report from Dr. Taylor Burch Barnikel, a family physician, advised that appellant presented with bilateral hand pain and swelling with an onset 1 week prior, and bilateral shoulder pain with an onset 12 weeks prior. She noted that, while appellant had previously been prescribed anti-inflammatory medication by her physician, while it had somewhat helped, the hand pain continued. Physical examination demonstrated painful overhead range of motion of both shoulders with diffuse shoulder tenderness. Dr. Barnikel diagnosed shoulder pain.

Appellant was again examined at Baptist Medical Center's emergency department on April 13, 2015. Dr. Gerald S. Maxwell, a Board-certified family physician, reported a history of pain in both shoulders and hands since December 2014 with associated tingling and numbness and that appellant believed this was due to her work at the employing establishment. Physical examination demonstrated bilateral carpal tunnel region tenderness with no swelling. No discharge diagnosis was recorded.

Medical reports with an illegible signature dated April 16, 2015 noted that appellant complained of bilateral arm and shoulder pain with paresthesias. A diagnosis of cervical radiculopathy was recorded. Physical restrictions were provided.

In an April 27, 2015 report, Dr. Brett Puckett, Board-certified in orthopedic surgery and hand and upper extremity surgery, noted a history of gradual onset of constant aching, and sharp bilateral hand and shoulder pain. He described appellant's report that her work duties involved operating large machinery and managing large bins and trays of mail. Right hand examination demonstrated middle finger A-1 pulley tenderness and prominence of the first carpometacarpal joint of the thumb. Wrist examination demonstrated bilateral positive basal joint grind test. Upper extremity range of motion was full. Tinel's and compression tests were negative bilaterally. Sensation was normal in both arms. Bilateral hand x-rays demonstrated degenerative

joint disease, greater on the right, with no fractures or dislocations. Dr. Puckett recommended an electrodiagnostic study of both hands.

By decision dated May 8, 2015, OWCP accepted that an incident occurred on March 24, 2015, but denied her claim because the medical evidence of record did not contain a medical diagnosis in connection with the March 24, 2015 incident. Appeal rights attached to the decision indicated that a reconsideration request needed to be signed, dated, and received within one calendar year of the date of the decision.

The employing establishment offered appellant a modified assignment on April 17, 2015 which she refused to accept on May 6, 2015.

In a May 4, 2015 report, received on May 11, 2015, Dr. Kevin Murphy, a Board-certified orthopedic surgeon and associate of Dr. Puckett, noted a complaint of bilateral shoulder pain, left greater than right. He found left shoulder tenderness on examination and bilaterally positive O'Brien's SLAP, Neer's, and Hawkin's tests. Range of motion of both shoulders was painful. Shoulder x-rays demonstrated acromion osteophytes and acromioclavicular (ACL) joint degenerative joint disease. Dr. Puckett diagnosed shoulder joint pain, shoulder synovitis, osteoarthritis of the ACL joint, shoulder impingement syndrome, and rotator cuff tendinitis. He recommended bilateral magnetic resonance imaging (MRI) scans of both shoulders. On June 16, 2015 Dr. Puckett noted that an electrodiagnostic study was normal.² He provided physical examination findings and recommended physical therapy.

On March 25, 2016 appellant requested a copy of her file. OWCP forwarded a copy of her file on April 21, 2016.

In a report dated March 31, 2016 and received by OWCP on May 5, 2016, Dr. Richard M. Blecha, a Board-certified orthopedic surgeon, noted a history that in late 2014 appellant developed bilateral hand and shoulder pain. On March 24, 2015 a specific event occurred when appellant was sweeping mail and lifting mail trays weighing approximately 40 pounds over shoulder height. Dr. Blecha indicated that appellant reported that she developed immediate severe, sharp pain in the right shoulder, reported it to her supervisor, and went to an emergency room. He indicated that appellant underwent MRI scans of both shoulders.³

Dr. Blecha also reported that appellant had been in a motor vehicle accident in August 2015 and was now working light duty. He noted a current complaint of constant right shoulder pain, especially with far reaching and above the shoulder movements. Right shoulder examination demonstrated tenderness at the ACL joint and lateral acromion. Neer and empty can testing was positive and her range of motion was diminished. Dr. Blecha reviewed a right shoulder MRI scan report and diagnosed rotator cuff tear of the right shoulder and osteoarthritis of the right shoulder AC joint, preexisting but permanently aggravated by the March 24, 2015

² A copy of the electrodiagnostic study is not found in the case record before the Board. Appellant also submitted June 15, 2015 reports from Andrew T. Braun, a physician assistant who is an associate of Dr. Puckett and Dr. Murphy.

³ Copies of the MRI scan reports are not found in the case record.

incident. He commented that, even though appellant's shoulder soreness began in late 2014, she sustained an acute injury at work on March 24, 2015 when she reported that she picked up a heavy mail tray and, as she lifted it over her shoulder, developed a sudden and severe sharp pain. Dr. Blecha concluded that, based on the history provided him, his physical examination findings, and review of medical records including the MRI scan, the March 24, 2015 incident was the direct and proximate cause of the right shoulder rotator cuff tear and that her preexisting osteoarthritis was permanently aggravated by this incident. He noted that her additional problems involving her hands would fall under an occupational disease claim.

On a form request dated and postmarked May 6, 2016, received by OWCP on May 11, 2016, appellant requested reconsideration. She attached a statement dated March 31, 2016 in which she noted:

“On March 24, 2015 while sweeping mail on the Delivery Barcode Sorter (DBCS), at the Jacksonville Processing and Distribution Center I lifted a tray of mail weighing about 40 [pounds] and felt a sharp pain in my right shoulder. Both hands and the left shoulder were also hurting from repetitive motion during my shift.”

In a May 26, 2016 decision, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP. The decision stated:

“You did not present clear evidence of error. Therefore your request for reconsideration is denied because it was not received within the one-year limit. The basis for this decision is you did not provide any statement at all [that] the initial denial decision dated [May 8, 2015] was done in error. Instead you submitted new evidence to support your appeal but because the appeal request form was received untimely we are now unable to review your new evidence.”

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ 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.⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

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

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

⁵ 20 C.F.R. § 10.607(a).

⁶ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, it will reopen the case for merit review.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 establish 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

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁴ As to appellant's assertion that she timely mailed her reconsideration request, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁵ The appeal rights attached to the May 8, 2015 decision also informed appellant that a reconsideration request must be signed, dated, and received within one calendar year of the date of the decision. Because appellant's request for reconsideration was not received by OWCP until May 11, 2016, more than one year after issuance of the May 8, 2015 merit decision, it was untimely.¹⁶

⁷ See *M.L.*, Docket No. 09-956 (issued April 15, 2010); 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (February 2016).

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

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

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *Id.*

¹³ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁴ *Supra* note 7.

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Id.*; see *D.N.*, Docket No. 15-1182 (issued September 9, 2015).

Nonetheless, the Board finds this case is not in posture for decision. Section 2.1602.5b of OWCP procedures provides that, in denying an application for reconsideration, OWCP should include a brief evaluation of the evidence submitted.¹⁷ In its July 26, 2016 decision, OWCP found that, because the appeal was untimely, it would not review the evidence presented. As this decision did not comport with OWCP procedures, it must be set aside. The case will therefore be remanded for OWCP to prepare an appropriate decision, in accordance with its procedures for reviewing an untimely application for reconsideration.¹⁸

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 12, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁷ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5b (February 2016). *See also Robert M. Pace*, 46 ECAB 551 (1995) (in determining whether an application demonstrates "clear evidence of error" 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).

¹⁸ *Id.*