

FACTUAL HISTORY

On December 11, 2013 appellant, then a 46-year-old bilateral contact representative, filed an occupational disease claim (Form CA-2) alleging that she developed a straightening of her cervical spine due to factors of her federal employment. She indicated that she first became aware of her condition and realized that it resulted from her federal employment on March 8, 2013. The employing establishment noted that appellant had not returned to work since March 11, 2013. OWCP accepted her claim for neck sprain.³

On June 12, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for the period April 21, 2013 to May 17, 2014.

By letter dated June 24, 2014, OWCP advised appellant that the evidence received was insufficient to establish her disability compensation claim for the period April 21, 2013 through May 17, 2014 and ongoing. It requested that she submit additional medical evidence explaining how her accepted condition of neck sprain continued to cause her to be disabled from work over one year from the date of her last exposure to work factors. Appellant was afforded 30 days to submit the additional evidence.

Appellant submitted various examination reports by Dr. Sanjay J. Chauhan, Board-certified in psychiatry and neurology, dated July 2 to August 6, 2014. Dr. Chauhan related appellant's complaints of neck pain and headaches after her March 8, 2013 injury. He indicated that on March 8, 2013 appellant became very anxious after receiving cold treatment from her supervisor, passed out, and fell down onto the floor, causing an injury to her head, cervical spine, and thoracic spine. Dr. Chauhan noted that appellant's neck pain had also bothered her due to her customer service work on the telephone, which required prolonged positioning and repetitive neck movement. He reviewed appellant's history, including diagnostic records, and provided examination findings of appellant's cervical spine. Dr. Chauhan diagnosed cervical strain, cervical radiculopathy, and cervical spine stenosis. He also opined that appellant had continuous trauma or an occupational disease because of the type of work she had done, which required being in a static posture position sitting in front of the computer and using the telephone. Dr. Chauhan noted that appellant was disabled from March 8, 2013 through August 5, 2014, and ongoing.

In a July 8, 2014 narrative report, Dr. Chauhan indicated that appellant was initially diagnosed with cervical spine sprain because that was the most likely diagnosis based on the type of injury that she incurred. He related that when appellant did not improve and her cervical symptoms persisted, along with burning paresthesia, additional diagnoses needed to be added to her claim. Dr. Chauhan explained that the additional diagnoses of cervical spinal stenosis and cervical radiculopathy would justify appellant's periods of disability for a longer term. He reported that because appellant experienced severe pain and difficulty functioning she should be

³ Appellant had previously filed a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx059 for injury on March 8, 2013 when she allegedly fell, hit her head on the floor, and injured her neck. OWCP denied the traumatic injury claim on May 10, 2013 as appellant did not meet her burden of proof to establish an injury in the performance of duty. An OWCP hearing representative affirmed the denial on January 31, 2014.

considered temporarily totally disabled ongoing from March 8, 2013 due to her cervical spine injury.

By decision dated September 3, 2014, OWCP denied appellant's claim for disability compensation for the period April 21, 2013 through May 17, 2014. It found that the medical evidence of record was insufficient to establish that she was disabled from work during the claimed period due to the accepted neck sprain condition. OWCP determined that Dr. Chauhan's medical reports were not sufficiently rationalized to explain how appellant's diagnosed neck sprain had worsened to the extent that she was still unable to work since she had not been exposed to her workplace since March 8, 2013.

On September 19, 2014 appellant requested an oral hearing before an OWCP hearing representative.

Appellant provided diagnostic testing reports from 2013. In a July 25, 2013 x-ray report of appellant's cervical spine, Dr. Donald Fitzgerald, a Board-certified radiologist, noted mild changes of degenerative spondylosis between C4 and C7. In a November 22, 2013 magnetic resonance imaging (MRI) scan report, Dr. Frank Tamura, a Board-certified radiologist, observed left central disc herniation with cord flattening at C6-C7 and left central disc herniation at C7-T1.

Dr. Chauhan continued to treat appellant and provided progress reports dated September 12, 2014 to May 4, 2015, which were substantially similar to his previous reports. He indicated that appellant remained symptomatic and continued to suffer from persistent neck pain due to the type of work she was doing. Dr. Chauhan reviewed appellant's medical records and provided physical examination findings similar to his previous reports. He reported that appellant should remain temporarily totally disabled from March 8, 2013 through June 4, 2015 due to her cervical spine injury. Dr. Chauhan included a duty status report (Form CA-17), which indicated that appellant was temporarily totally disabled beginning March 11, 2013.

Appellant also submitted a consultation report dated October 15, 2014 from Dr. Henry Aryan, a Board-certified neurosurgeon. Dr. Aryan noted that appellant sustained a March 2013 work-related neck injury and still complained of neck pain and upper extremity radiculopathy. He reviewed appellant's history and provided physical examination findings. Dr. Aryan reported mild cranial nerve deficits and no swelling or tenderness. Sensory examination showed significant numbness and tingling radiating down into both arms.

In a December 5, 2014 work status note, Jennifer Roberts, a nurse practitioner, indicated that appellant was unable to work from December 4, 2014 through January 15, 2015.

Dr. Rasheed Amireh, Board-certified in anesthesiology and pain medicine, also treated appellant and in a February 18, 2015 report related appellant's complaints of ongoing neck pain and bilateral upper extremity pain. He reviewed appellant's history and provided findings on physical examination. Dr. Amireh reported no tenderness to palpation and percussion and full range of motion. He diagnosed cervical radiculopathy, cervical degenerative disc disease, and cervical disc displacement.

On March 18, 2015 a telephone hearing was held. Appellant described the neck symptoms she experienced prior to the March 8, 2013 employment incident and indicated that

her symptoms worsened after March 8, 2013. She reviewed the medical treatment that she received and noted that Dr. Chauhan did not realize that her condition was more serious than a neck strain until he reviewed her MRI scan results. Appellant claimed that she had not worked since March 2013, but her neck symptoms continued to worsen. She asserted that she provided objective findings in Dr. Chauhan's reports to establish that OWCP should expand her claim for more serious conditions.

Appellant provided an August 6, 2014 narrative report from Dr. Francisco Dorado, a Board-certified family practitioner, who noted that appellant had cervical stenosis with radiculopathy, which made her dizzy and at risk of falling. Dr. Dorado requested a new walker for appellant.

In a June 1, 2015 decision, an OWCP hearing representative affirmed the September 3, 2014 decision. She determined that the medical evidence of record failed to establish that appellant was disabled from work as of April 21, 2013 due to her accepted condition. The hearing representative found that Dr. Chauhan's reports did not contain sufficient medical rationale explaining how appellant's currently diagnosed cervical condition was related to her exposure to work conditions before March 8, 2013, the date she was last exposed to such work factors.

Following the June 1, 2015 hearing representative's decision, appellant resubmitted Dr. Chauhan's May 4, 2015 medical report and Dr. Amireh's February 18, 2015 medical report.

In reports dated June 18, 2015 to May 3, 2016, Dr. Chauhan related appellant's complaints of bilateral neck pain which radiated to the scapular region, burning paresthesia in the upper extremities, and headaches. He reviewed appellant's history and described her employment duties as a bilingual contact representative and the March 8, 2013 employment incident. Upon physical examination, Dr. Chauhan observed straightening of the cervical spine and moderate muscle spasm or tightness upon palpation. Sensation examination was normal in both upper and lower extremities to light touch. Dr. Chauhan diagnosed cervical strain, cervical radiculopathy, and cervical spinal stenosis. He opined that there was a causative connection between appellant's work injury of March 8, 2013 and her cervical spine conditions and that appellant had an occupational disease in addition to the March 8, 2013 work injury. Dr. Chauhan indicated that appellant remained temporarily totally disabled ongoing from March 8, 2013 through April 10, 2016.

On October 15, 2015 OWCP expanded her claim to include cervical spinal stenosis, cervical radiculopathy, and neck sprain.

In a Form CA-116, appellant called OWCP and inquired whether she would receive wage-loss compensation for the period April 21, 2013 to May 17, 2014 since her claim was expanded. OWCP advised her that she would need to exercise her appeal rights based on the June 1, 2015 hearing representative decision. It clarified that even if her treating physician submitted additional medical reports, OWCP would not reconsider her compensation denial unless appellant exercised her appeal rights.

On November 5, 2015 appellant underwent a physical therapy consultation with Mario Rodriguez, a physical therapist, who noted that appellant demonstrated decreased cervical range of motion, multiple areas of muscular tenderness throughout her cervical region, impaired activity tolerance, and poor posture. Mr. Rodriguez indicated that appellant's prognosis was fair based on chronicity of condition. Appellant continued to receive physical therapy treatments and submit progress notes.

In a December 9, 2015 narrative report, Dr. Chauhan indicated that appellant's claim needed to be revisited now that her claim was expanded to include cervical radiculopathy and cervical spinal stenosis. He noted that because of appellant's conditions she was totally disabled from February 21, 2013 through May 17, 2014 and currently ongoing. Dr. Chauhan opined that appellant's "pain and residual disability are all due to this accepted diagnosis of cervical radiculopathy and cervical spinal stenosis." He requested that, based on this explanation, OWCP reconsider its most recent decision regarding disability compensation in light of appellant's newly accepted conditions.

On June 3, 2016 appellant requested reconsideration of the June 1, 2015 OWCP decision. She noted that Dr. Chauhan's December 23, 2015 medical report established that her current cervical symptoms were causally related to her employment. Appellant also noted that OWCP expanded her claim to include cervical stenosis and cervical radiculopathy in an October 15, 2015 decision. She contended that she was entitled to disability compensation for the period April 21, 2013 to May 17, 2014 because her inability to work was causally related to her accepted conditions of spinal stenosis, cervical region, and radiculopathy.

By decision dated June 16, 2016, OWCP denied appellant's June 3, 2016 reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error. It determined that because appellant's reconsideration request received on June 3, 2016, more than one year after the June 1, 2015 merit decision, it was untimely filed. OWCP further found that appellant's reconsideration request and evidence submitted failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP's regulations provide that to be entitled to a merit review of an OWCP decision, an application for reconsideration must be received within one year of the date of the OWCP decision for which review is sought.⁴ OWCP, however, may not deny an application for review solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.⁵ In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.⁶

⁴ 20 C.F.R. § 10.607(a). 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. 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *See id.* at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *See id.* at § 10.607(b); *Nelson T. Thompson*, 43 ECAB 919 (1992).

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or demonstrate a clear procedural error, but 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.¹⁰ The Board has held that even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is not sufficient to demonstrate clear evidence of error.¹¹ OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹² If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹³

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

OWCP's last merit decision was dated June 1, 2015, which denied appellant's disability compensation claim for the period April 21, 2013 to May 17, 2014. On June 3, 2016 it received appellant's request for reconsideration. By decision dated June 16, 2016, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. By decision dated June 1, 2015, an OWCP hearing representative affirmed OWCP's September 3, 2014 decision, which denied appellant's claim for wage-loss

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

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

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5a (October 2011).

¹³ *Id.*

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

compensation for the period April 21, 2013 to May 17, 2014. OWCP received appellant's letter, which requested reconsideration on June 3, 2016, which was outside of the one-year time limit.¹⁵ It was, therefore, untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁶

The Board finds that the evidence submitted by appellant in support of her reconsideration request does not raise a substantial question as to the correctness of OWCP's June 1, 2015 decision and is insufficient to demonstrate clear evidence of error.

Along with her reconsideration request, appellant resubmitted Dr. Chauhan's May 4, 2015 and Dr. Amireh's February 18, 2015 medical reports. She also provided additional medical reports from Dr. Chauhan dated June 18, 2015 to May 3, 2016, which were substantially similar to his previous reports. As the medical reports were duplicative of reports previously of record, appellant has not explained how the resubmission of these reports raises a substantial question concerning the correctness of OWCP's decision.¹⁷

Appellant also provided a December 9, 2015 report by Dr. Chauhan who related that OWCP should reconsider its most recent decision now that appellant's claim was expanded to include cervical radiculopathy and cervical spinal stenosis. Dr. Chauhan opined that appellant's "pain and residual disability are all due to this accepted diagnosis of cervical radiculopathy and cervical spinal stenosis." The Board finds that this report is insufficient to demonstrate clear evidence of error as it does not show that OWCP's denial of her claim was erroneous, nor does it raise a substantial question as to the correctness of OWCP's determination that appellant's inability to work from the period April 21, 2013 to May 17, 2014 was causally related to her accepted cervical conditions.¹⁸ As previously noted, even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is not sufficient to demonstrate clear evidence of error.¹⁹ Consequently, this report is insufficient to demonstrate clear error by OWCP with respect to the denial of appellant's disability compensation claim.

The additional medical reports submitted by appellant are likewise insufficient to demonstrate clear evidence of error on the part of OWCP as none of the medical reports were sufficient to shift the weight of the evidence in appellant's favor.²⁰

¹⁵ See Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.1602.4 (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought. The Board notes that while appellant submitted various medical reports after the June 1, 2015 decision, appellant did not request reconsideration in writing until June 3, 2016.

¹⁶ *Supra* note 4; *Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ *G.B.*, Docket No. 16-0319 (issued April 6, 2016).

¹⁸ See *P.O.*, Docket No. 13-92 (issued April 4, 2013).

¹⁹ *Supra* note 11.

²⁰ *Supra* note 10.

The Board has found that the term “clear evidence of error” is intended to represent a difficult standard.²¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²²

On appeal appellant argues the merits of her claim and alleges that the new medical reports by Dr. Chauhan establish that her inability to work for the period April 21, 2013 to May 17, 2014 was causally related to her cervical conditions. As previously noted, the Board does not have jurisdiction to review the merits of the claim.

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.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2016 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: July 6, 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

²¹ *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

²² *Supra* note 9.