

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

_____)	
N.C., Appellant)	
)	
and)	Docket No. 18-0459
)	Issued: August 2, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Phoenix City, AL, Employer)	
_____)	

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 January 2, 2018 appellant filed a timely appeal from a July 6, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated February 5, 2016, 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, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The record provided to the Board includes evidence received after OWCP's July 6, 2017 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1). *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

FACTUAL HISTORY

On December 16, 2015 appellant, then a 39-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that her federal employment duties caused left arm and shoulder pain, as well as muscle spasms. In an attached statement she indicated that the pain began approximately two weeks prior and had worsened with time, noting that she saw a physician on December 7, 2015 and was diagnosed with muscle spasms.

In a development letter dated December 24, 2015, OWCP informed appellant of the type of evidence needed to submit to establish her claim. This was to include medical evidence from a qualified physician containing a medical explanation as to how work activities caused, contributed to, or aggravated a medical condition. OWCP afforded appellant 30 days to respond. No additional evidence was received.

By decision dated February 5, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that an injury and/or events occurred as alleged. It noted that she did not respond to its December 24, 2015 development letter.

On May 8, 2017 appellant requested reconsideration. She submitted a statement of certification that had been forwarded by OWCP with the December 24, 2015 development letter, which she signed on April 20, 2017. In statements dated May 1 and June 9, 2017, appellant indicated that she had bilateral shoulder pain that began in November 2015 and increased as time passed, especially during the heavy workload during the holiday season. She related that the pain increased again in November 2016, and that she had constant daily pain at present, and decreased shoulder range of motion. Appellant described medical care and physical therapy, and noted that the severe pain made her miss work.

Medical evidence submitted included a March 23, 2017 report in which Dr. William Allen Whitten, Board-certified in family medicine, noted a complaint of bilateral shoulder pain, right worse than left. Right shoulder examination demonstrated limited range of motion and tenderness to palpation. Dr. Whitten noted that a right shoulder x-ray was normal and diagnosed bursitis of right shoulder, acute pain of right shoulder, and acromioclavicular joint separation, right.

On April 3, 2017 Dr. Robert H. Bush, a Board-certified family medicine physician and associate of Dr. Whitten, noted that appellant was now complaining of neck, left arm, and left shoulder pain that began three to four days prior. Physical examination findings included tenderness over the left scapular region and some restriction to left shoulder range of motion. Dr. Bush diagnosed left anterior shoulder pain.

In a form report dated May 31, 2017, Dr. Kevin D. Lokkesmoe, a family medicine physician, noted a date of injury of May 24, 2017. Under "Description" he wrote, "work-related left shoulder trapezius strain with muscle spasm." Dr. Lokkesmoe referred appellant to an employing establishment physician.

Appellant also submitted laboratory reports, physical therapy notes, patient visit information, and a disability slip signed by a registered nurse indicating that appellant was treated on March 31, 2017 and could return to work on April 2, 2017.³

In a July 6, 2017 decision, OWCP denied appellant's request for reconsideration, finding that it 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, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.⁵ Timeliness is determined by the document receipt date, as indicated by the "received date" in OWCP's Integrated Federal Employees' Compensation System.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted OWCP under section 8128 of FECA.⁷

OWCP 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.⁸ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for 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.⁹

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. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the

³ The signature of the nurse is illegible.

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

⁶ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

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

⁸ *See* 20 C.F.R. § 607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *Id.* at § 607(b); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error. 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 The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely reconsideration request. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.¹³ As appellant's reconsideration request was received on May 8, 2017, more than one year after the February 6, 2016 OWCP merit decision denying her claim, her request for reconsideration was untimely filed.¹⁴ Consequently, she must demonstrate clear evidence of error by OWCP in its February 5, 2016 decision.¹⁵

The Board further finds that appellant failed to demonstrate clear evidence of error. The underlying issue in this case is whether she established a shoulder condition causally related to factors of her federal employment.

With her reconsideration request appellant merely related that she had bilateral shoulder pain that began in November 2015 and described medical care. She submitted evidence including laboratory reports, physical therapy notes, patient visit information, and a disability slip signed by a registered nurse. However, these reports do not constitute medical evidence under section 8101(2) of FECA.¹⁶

¹⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *Supra* note 5 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹² *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Id.*

¹⁵ *M.W.*, Docket No. 17-0892 (issued May 21, 2018).

¹⁶ *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *Sean O'Connell*, 56 ECAB 195 (2004) (reports by nurse practitioners and physician assistants are not considered medical evidence as these persons are not considered physicians under FECA). 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

Appellant also submitted reports from Dr. Whitten and Dr. Bush. None of these reports discussed a cause of any diagnosed condition and are thus insufficient to raise a substantial question as to the correctness of OWCP's decision.¹⁷ While a report from Dr. Lokkesmoe noted a description of work-related left shoulder strain and muscle spasm, this too is insufficient to demonstrate clear evidence of error. He did not describe appellant's work duties and did not explain how or why any diagnosed condition was caused by work.

The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.¹⁸ 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.¹⁹

As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of the February 6, 2016 OWCP decision, appellant has not demonstrated that OWCP committed error.²⁰ OWCP thus properly denied her untimely request for merit reconsideration on that basis.²¹

CONCLUSION

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

¹⁷ See *T.W.*, Docket No. 13-0594 (issued August 5, 2013).

¹⁸ *Supra* note 10.

¹⁹ *E.D.*, Docket No. 16-0708 (issued January 17, 2017).

²⁰ *P.S.*, Docket No. 17-1707 (issued February 9, 2018).

²¹ 20 C.F.R. § 10.607(b); see *D.G.*, 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2018
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