

FACTUAL HISTORY

On February 1, 2016 appellant, then a 44-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on January 24, 2016 she sustained a right shoulder injury when she was assisted by a nurse while turning a patient. She did not stop work, but she began performing limited-duty work for the employing establishment. On the reverse side of the claim form, appellant's immediate supervisor indicated that the nurse who assisted appellant advised that she did not follow the employing establishment's policies/procedures when turning the patient.

Appellant submitted a February 1, 2016 duty status report (Form CA-17) of an attending nurse practitioner with an illegible signature. The nurse practitioner listed the date of injury as January 24, 2016, the mechanism of injury as positioning a heavy patient while bathing, and the diagnosis due to injury as shoulder strain. Appellant was advised that she could return to work, but that she should not use her right arm.

The findings of February 5, 2016 x-ray testing of appellant's right shoulder contained an impression of no acute fracture or dislocation.

In a February 10, 2016 letter, a workers' compensation program manager indicated that the employing establishment was controverting appellant's claim for a January 24, 2016 employment injury because she did not submit sufficient medical evidence to support such an injury.

In a February 10, 2016 development letter, OWCP requested that appellant submit additional evidence in support of her claim, including a physician's opinion supported by a medical explanation as to how the reported employment incident caused or aggravated a medical condition. It requested that appellant complete and return an attached questionnaire which posed various questions regarding the employment incident that she believed caused or aggravated her claimed condition. On February 10, 2016 OWCP also requested additional information from the employing establishment.

On March 9, 2016 OWCP received a response to its February 10, 2016 development letter to appellant in which she provided further description of the January 24, 2016 work incident. Appellant noted that she and a coworker assisted a patient who had a bowel movement and that they grasped opposite ends of a bedsheet upon which the patient was lying. She advised that she felt a pinching pain in her neck, which extended down to her right hand, when she pulled the sheet toward her. In a March 7, 2016 statement, the coworker advised that, after she and appellant provided care to the patient on January 24, 2016, appellant began to complain of right shoulder pain.

OWCP also received a response to its February 10, 2016 letter to the employing establishment in which an official provided information about safety procedures for lifting and turning patients.

Appellant submitted a February 17, 2016 duty status report (Form CA-17) of an individual with an illegible signature who specialized in orthopedics. The individual listed the

date of injury as January 24, 2016, the affected body parts as neck and right shoulder, and the diagnosis due to injury as radiculitis. Appellant was advised that she could return to light-duty work with no lifting using her right arm.²

In a March 17, 2016 decision, OWCP denied appellant's claim for a January 24, 2016 employment injury. It accepted that the employment incident occurred on January 24, 2016 while appellant was in the process of turning a patient, but found that she failed to submit medical evidence establishing a causal relationship between the accepted employment incident and a diagnosed medical condition. OWCP determined that the medical evidence submitted by appellant did not provide sound medical rationale, based on a complete and accurate medical history and supported by objective findings, explaining how the January 24, 2016 employment incident caused a diagnosed medical condition.

In a February 8, 2017 letter received on March 21, 2017, appellant indicated that she was requesting reconsideration of OWCP's March 17, 2016 decision. She noted that she was attaching a report which indicated that her current diagnosis was rotator cuff impingement, rather than neck sprain, radiculitis, and shoulder sprain as previously diagnosed. Appellant advised that, due to the new diagnosis, her physician recommended shoulder surgery to correct the problem.

In support of her reconsideration request, appellant submitted an April 14, 2016 report from Dr. Arnold Goldman, an attending Board-certified orthopedic surgeon. Dr. Goldman noted that appellant presented with a chief complaint of right shoulder pain and reported that she felt pain in her right shoulder while turning a patient she was cleaning at work on January 24, 2016. He detailed the findings of his physical examination on April 14, 2016, noting right shoulder pain and limited range of motion of the right shoulder and diagnosing right shoulder impingement and rule out right rotator cuff tear. Dr. Goldman recommended sedentary work restrictions, including lifting/carrying no more than 15 pounds and avoiding climbing, kneeling, bending, stooping, and twisting. He indicated that he had completed a federal workers' compensation form documenting that "the injury/condition is causally related to the accident of [January 24, 2016]."

In a May 12, 2016 report, Dr. Goldman advised that his physical examination on that date revealed a positive right shoulder impingement sign. He recommended work restrictions, including lifting/carrying no more than 15 pounds, and indicated that he completed a form allowing appellant to answer telephones, but restricting her from taking vital signs in a manner requiring her to lift equipment or a patient's upper extremities. In a May 12, 2016 Form CA-17, Dr. Goldman listed the date of injury as January 24, 2016, the mechanism of injury as turning a patient while engaged in cleaning, and the diagnosis due to injury as right shoulder rotator cuff tear. He advised that appellant could perform sedentary work which did not require lifting more than 10 pounds or taking vital signs.

In June 9 and July 21, 2016 reports, Dr. Goldman reported physical examination findings and diagnosed impingement/rotator cuff arthropathy of the right shoulder and rule out right shoulder rotator cuff tear. In his June 9, 2016 report, he recommended work restrictions,

² Appellant also resubmitted a copy of the February 1, 2016 Form CA-17 of an attending nurse practitioner.

including lifting/carrying no more than 15 pounds and no taking of vital signs in a manner requiring appellant to lift equipment or a patient's upper extremities. In a July 21, 2016 Form CA-17, Dr. Goldman listed the date of injury as January 24, 2016, the mechanism of injury as turning a patient while engaged in cleaning, and the diagnosis due to injury as right shoulder rotator cuff tear. He advised that appellant could answer telephones, but that she could not take vital signs or lift more than 10 pounds.

In a September 1, 2016 report, Dr. Goldman noted that his physical examination revealed that appellant continued to have limited range of motion of her right shoulder. He diagnosed impingement/rotator cuff arthropathy of the right shoulder and continued to recommend work restrictions. Dr. Goldman also expressed his belief that appellant would benefit from diagnostic arthroscopy of her right shoulder. In a September 1, 2016 Form CA-17, he listed the date of injury as January 24, 2016 and the mechanism of injury as turning a patient while engaged in cleaning. Dr. Goldman indicated that appellant could not lift more than 10 pounds with her right arm. On October 11, 2016 he completed another narrative report containing similar examination findings as observed on September 1, 2016. In July 1 and November 29, 2016, and January 24 and February 21, 2017 CA-17 forms, Dr. Goldman provided the same claimed mechanism of the alleged January 24, 2016 injury as provided in previous CA-17 forms and recommended lifting restrictions for the right arm. In the January 24 and February 21, 2017 CA-17 forms, he listed the diagnosis due to injury as right rotator cuff impingement.³

By decision dated April 20, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that her request for reconsideration was untimely filed because it was filed on March 21, 2017, a date more than one year after the issuance of its March 17, 2016 decision. OWCP noted that appellant submitted additional evidence and argument in support of her claim, but it indicated that this evidence/argument did not explain why the March 17, 2016 decision was improperly decided or otherwise demonstrate clear evidence of error in that decision.

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, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System.⁶ The Board

³ Appellant also submitted the findings of an August 19, 2016 magnetic resonance imaging (MRI) scan of her right shoulder which contained an impression of supraspinatus tendinosis.

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).

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 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 (for example, proof that a schedule award was miscalculated). 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 request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹³ As appellant's request for

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

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.5(a).

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

¹¹ Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.5(a); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

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

¹³ *See supra* note 4.

reconsideration was not received by OWCP until March 21, 2017, more than one year after the issuance of its March 17, 2016 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its March 17, 2016 decision.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in issuing its March 17, 2016 decision.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its March 17, 2016 decision denying her claim for a January 24, 2016 employment injury.¹⁴ The evidence and argument she submitted in connection with her untimely reconsideration request did not raise a substantial question concerning the correctness of OWCP's March 17, 2016 decision. Appellant argued that the medical evidence she submitted on reconsideration established her claim for a January 24, 2016 employment injury. The Board notes that this newly submitted medical evidence is similar to the medical evidence previously submitted and considered by OWCP to be insufficient to establish appellant's claim for a January 24, 2016 employment injury. In reports dated between April 14, 2016 and February 21, 2017, Dr. Goldman diagnosed such right shoulder conditions as rotator cuff impingement/arthropathy and rotator cuff tear. In his April 14, 2016 narrative report, he indicated that he had completed a federal workers' compensation form documenting that the diagnosed conditions of right shoulder impingement and rule out right rotator cuff tear were causally related to appellant's turning of a patient on January 24, 2016.¹⁵ In other form reports, Dr. Goldman related various right shoulder conditions to the accepted January 24, 2016 employment incident of turning a patient.¹⁶ These reports would not tend to demonstrate clear evidence of error in OWCP's March 17, 2016 decision because they merely provide an opinion on causal relationship without providing necessary medical rationale in support of such an opinion.¹⁷ Appellant did not explain how this new evidence raised a substantial question as to the correctness of OWCP's March 17, 2016 decision denying her claim for a January 24, 2016 employment injury.

The Board finds that appellant's application for review does not show on its face that OWCP committed error when it found in its March 17, 2016 decision that she failed to establish

¹⁴ See *Robert G. Burns*, *supra* note 10.

¹⁵ The record does not contain a copy of this federal workers' compensation form.

¹⁶ In his May 12, 2016 Form CA-17, Dr. Goldman listed the date of injury as January 24, 2016, the mechanism of injury as turning a patient while engaged in cleaning, and the diagnosis due to injury as right shoulder rotator cuff tear. In his January 24 and February 21, 2017 CA-17 forms, he provided the same claimed mechanism of the January 24, 2016 injury as provided in previous CA-17 forms and listed the diagnosis due to injury as right rotator cuff impingement. Appellant also submitted medical evidence which did not contain an opinion on causal relationship.

¹⁷ The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition. See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017); *D.R.*, Docket No. 16-0528 (issued August 24, 2016). In its March 17, 2016 decision, OWCP determined that the medical evidence submitted by appellant did not provide sound medical rationale explaining how the January 24, 2016 employment incident caused a diagnosed medical condition.

an employment injury on January 24, 2016.¹⁸ As noted, clear evidence of error is intended to represent a difficult standard.¹⁹ Because she simply reiterated her previous arguments and submitted evidence which did not raise a substantial question as to the correctness of OWCP's prior decision, appellant has not met this standard in this case.²⁰

For these reasons, OWCP properly determined that appellant's untimely reconsideration request failed to demonstrate clear evidence of error in its March 17, 2016 decision.²¹

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.

¹⁸ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

¹⁹ See *supra* note 11.

²⁰ See *Robert G. Burns*, *supra* note 10.

²¹ On appeal appellant asserts that she requires additional medical treatment for her right shoulder condition. However, for the reasons explained above, but she did not show clear evidence of error in OWCP's March 17, 2016 decision denying her claim for a January 24, 2016 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2017 decision of the Office of Workers' Compensation Program is affirmed.

Issued: February 16, 2018
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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