

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

_____)	
W.A., Appellant)	
)	
and)	Docket No. 18-0297
)	Issued: July 18, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Palm Desert, CA, 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 November 27, 2017 appellant filed a timely appeal from a June 21, 2017 nonmerit decision Office of Workers' Compensation Programs (OWCP). The last merit decision in this case was an October 17, 2014 decision issued by the Board, which became final after 30 days of issuance¹, and is not subject to further review.² As there is no merit decision by OWCP issued within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

¹ 20 C.F.R. § 501.7(a); *see R.M.*, Docket No. 14-1213 (issued October 15, 2014).

² *Id.* at § 501.6(d); *see R.M., id.*

³ 5 U.S.C. § 8101 *et seq.*

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.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 19, 2012 appellant, then a 56-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a right shoulder injury causally related to repetitive right arm movements required by her federal employment duties.⁵ She indicated that she first became aware of her claimed condition on July 15, 2010 and of its relation to her federal employment on March 11, 2011. Appellant explained that she had worked as a city carrier until October 23, 2010, when she stopped work due to an employment-related back injury.⁶

By decision dated October 16, 2012, OWCP denied appellant's claim. Appellant requested reconsideration and, by decision dated December 19, 2013, OWCP denied modification of its prior decision.

On April 28, 2014 appellant appealed to the Board. By decision dated October 17, 2014, the Board affirmed OWCP's December 19, 2013 decision, finding that the medical evidence of record was insufficient to establish a right shoulder injury causally related to factors of appellant's federal employment.⁷

On September 15, 2015 appellant again requested reconsideration. She argued that the medical evidence submitted was sufficiently rationalized and that common sense and logic required a finding that her employment activities contributed to her diagnosed condition. By decision dated October 28, 2015, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On February 22, 2016 appellant again requested reconsideration, contending that the medical evidence submitted was sufficient to establish her claim. She provided a report dated April 7, 2015 from Dr. Jacob Tauber, a Board-certified orthopedic surgeon, who opined that appellant had an employment-related shoulder condition. Dr. Tauber reviewed appellant's job duties and repeated his September 27, 2013 opinion that these duties were "classic" for contributing to shoulder impingement and a rotator cuff tear. He explained that it was

⁴ Docket No. 14-1192 (issued October 17, 2014); Docket No. 17-0225 (issued May 16, 2017).

⁵ OWCP assigned the claim File No. xxxxxx325.

⁶ The record indicates that appellant previously filed a traumatic injury claim (Form CA-1) alleging a back injury on August 23, 2010. OWCP assigned that claim File No. xxxxxx398, and accepted it for sprain of back, lumbar region. File No. xxxxxx398 has not been administratively combined with the present claim.

⁷ Docket No. 14-1192, *supra* note 4.

inconceivable that appellant's shoulder pathology had no relationship to her work duties given the strenuous nature of her job. Dr. Tauber concluded that appellant's work duties clearly contributed to her right shoulder condition.

By decision dated May 19, 2016, OWCP reviewed the merits of the claim, but denied modification of its prior decision.

On November 9, 2016 appellant appealed to the Board. By decision dated May 16, 2017,⁸ the Board noted that it had issued the last merit decision in the case on October 17, 2014 and that appellant's February 22, 2016 request for reconsideration was, therefore, untimely filed. The Board set aside OWCP's May 19, 2016 merit decision and remanded the case for OWCP to apply the correct standard for untimely requests for reconsideration.

On remand, by decision dated June 21, 2017, OWCP denied appellant's February 22, 2016 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.⁹ 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.¹⁰ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System).¹¹ 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.¹²

OWCP may not deny a request for reconsideration solely because the request was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.¹³ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review,

⁸ Docket No. 17-0225, *supra* note 4.

⁹ 20 C.F.R. § 10.607(a).

¹⁰ 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).

¹¹ *Id.* at Chapter 2.1602.4(b) (February 2016).

¹² 5 U.S.C. § 8128(a); *see S.M.*, Docket No. 18-0075 (issued April 11, 2018); *C.D.*, Docket No. 17-1915 (issued February 21, 2018); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹³ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.¹⁴

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.¹⁵

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.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

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.

OWCP's procedures provide that the one-year time limitation for requesting reconsideration begins on the date of the original decision.¹⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁹ As previously found by the Board in the May 16, 2017 decision, the last decision on the merits of the case was the Board's October 17, 2014 decision, finding that appellant had not established a right shoulder injury causally related to factors of her federal employment. As appellant's request for reconsideration was received by OWCP on February 22, 2016, more than one year after the October 17, 2014

¹⁴ *Id.* at § 10.607(b); *supra* note 11 at Chapter 2.1602.5(a) (February 2016).

¹⁵ *Robert G. Burns*, 57 ECAB 657 (2006).

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

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

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ *Robert F. Stone*, 57 ECAB 292 (2005).

decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP.²⁰

Following the Board's October 17, 2014 decision,²¹ appellant submitted a September 11, 2015 narrative statement and asserted that common sense and logic required a finding that her employment activities contributed to her diagnosed condition. The issue in the case is a medical one of whether appellant has established causal relationship between her diagnosed condition and her employment duties through the submission of rationalized medical opinion evidence. Appellant's arguments regarding the weight of the medical evidence lack probative value. Appellant's honest belief that her work duties caused her medical conditions is not in question, but that belief, however sincerely held, does not constitute the medical evidence to establish causal relationship²² or to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's decision.²³

Appellant also submitted a report dated April 7, 2015 from Dr. Tauber in which he reviewed appellant's job duties and repeated his opinion that these duties were "classic" for contributing to shoulder impingement and a rotator cuff tear. Dr. Tauber explained that it was inconceivable that appellant's shoulder pathology had no relationship to her work duties given the strenuous nature of her job. He concluded that appellant's work duties clearly contributed to her right shoulder condition. The Board notes that this report is largely duplicative of the September 27, 2013 report from Dr. Tauber, previously of record, and reviewed by the Board in the October 17, 2014 decision. Dr. Tauber again noted that appellant's job duties were the "classic" scenario for development of a rotator cuff tear. Moreover, as noted, 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.²⁴ Appellant did not otherwise submit medical evidence addressing the cause of her claimed right shoulder condition.

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 OWCP's last merit decision, appellant has failed to demonstrate clear evidence of error.

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.

²⁰ 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

²¹ Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. *T.D.*, Docket No. 17-1495 (issued January 4, 2018).

²² *H.H.*, Docket No. 16-0897 (issued September 21, 2016).

²³ *Robert G. Burns*, 57 ECAB 657 (2006).

²⁴ *Supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2017 decision Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 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