

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

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

On November 14, 2011 appellant then a 44-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that she experienced constant chronic sharp, burning, and numbing pain in her right shoulder, arm, hand, and neck areas while repetitively accessioning, writing, collecting blood tubes, spinning a machine, packing specimens on 38 patients, reaching, and twisting at work on that day.⁵ She stopped work the next day, on November 15, 2011, and has not returned.

By decision dated March 6, 2012, OWCP accepted appellant's claim for right rotator cuff syndrome of the shoulder and allied disorders. It paid her wage-loss compensation and medical benefits on the supplemental rolls as of January 9, 2012 and on the periodic rolls as of March 11, 2012.

OWCP subsequently expanded acceptance of the claim to include right sprain of the shoulder and upper arm acromioclavicular joint. It authorized right shoulder arthroscopic distal clavicle excision, right shoulder arthroscopic extensive debridement of a superior labral tear, rotator cuff and bursitis, and right shoulder open biceps tenodesis, which were performed on October 9, 2012 by Dr. Robert A. Creighton, an attending Board-certified orthopedic surgeon.

In an undated prescription note, Dr. Creighton indicated that appellant was status post her October 2012 right shoulder arthroscopic surgery.

On January 15, 2015 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Chason S. Hayes, a Board-certified orthopedic surgeon, for a second opinion to determine whether she had residuals of the accepted conditions and whether she could return to work.

In a second opinion evaluation dated April 10, 2015, Dr. Hayes examined appellant and assessed cervical radicular pain and shoulder pain. He advised that the accepted right shoulder conditions had resolved and that appellant could perform her regular medical technician duties, eight hours a day without restrictions. Dr. Hayes noted that she continued to have symptoms of cervical radiculopathy without objective findings and that she may be limited in her ability to return to work. He recommended a functional capacity evaluation (FCE) to delineate her lifting restrictions. In an undated work capacity evaluation (Form OWCP-5c), Dr. Hayes indicated that

⁴ Docket No. 16-0393 (issued June 24, 2016).

⁵ Appellant has a prior claim, in which OWCP accepted that while working as a practical nurse on November 9, 2004 she sustained cervical sprain, peripheral autonomic neuropathy disorders, and permanent aggravation of degeneration of cervical intervertebral disc. OWCP assigned that claim File No. xxxxxx748. Appellant stopped work on the date of injury and returned to work in a modified medical technician position.

appellant was capable of performing her usual job. He also indicated that if she could not perform her usual job she could work eight hours a day with restrictions.

By notice dated May 13, 2015, OWCP informed appellant that it proposed to terminate her wage-loss compensation and medical benefits, based on Dr. Hayes' opinion that the accepted right shoulder rotator cuff syndrome condition had ceased without residuals. It afforded her 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

Medical evidence was received, including a December 17, 2014 FCE report. The report revealed that appellant was qualified to perform work in the "Medium work category within the restricted work plane." It was noted that her previously held practical nurse position also fell within the medium work category. Although appellant was able to function at the medium level, a nursing position in a clinic setting rather than in an inpatient setting would involve working in a light-work category which would place less stress on her right upper extremity.

OWCP, by decision dated July 2, 2015, terminated appellant's wage-loss compensation and medical benefits effective that day. It found that the weight of the medical evidence rested with Dr. Hayes' opinion and established that appellant no longer had residuals or disability causally related to her accepted November 14, 2011 work-related injuries.

Appellant appealed to the Board on December 29, 2015. In a June 24, 2016 decision, the Board affirmed the July 2, 2015 decision, finding that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on July 2, 2015 based on Dr. Hayes' medical opinion.⁶

By letter received on June 27, 2017, appellant requested reconsideration of OWCP's termination decision. She contended that Dr. Hayes' opinion was not entitled to the weight of the medical evidence as it was not supported by medical evidence or rationale. Appellant further contended that he did not perform a test regarding her right shoulder condition. She asserted that enclosed reports from Dr. Creighton and Dr. Donald Asante, an internist, were sufficient to establish that she had continuing residuals and disability related to her accepted employment injury.

In a September 8, 2015 letter, Dr. Creighton noted that since appellant's October 2012 arthroscopic rotator cuff repair, she had reached maximum medical improvement (MMI). He also noted that she had been released to return to work with residuals along with her preinjury and current work restrictions until further examination and diagnostic testing were performed to determine whether she could be released to full laboratory or nursing duty without restrictions.

In an October 16, 2015 report, Dr. Creighton diagnosed right arm and neck pain -- recurrent neck/degenerative disc disease. He checked a box marked "yes" indicating that the diagnosed conditions were work related. Dr. Creighton indicated that appellant could return to light-duty work with restrictions on October 22, 2015.

By letter dated November 20, 2015, Dr. Creighton again advised that appellant could work eight hours a day and listed the work duties that she could perform.

⁶ *Supra* note 4.

Dr. Creighton, in an April 28, 2017 report, noted that appellant had chronic right shoulder and neck pain.

In a May 8, 2017 letter, Dr. Creighton reiterated that appellant had reached MMI regarding her right shoulder condition. He listed her permanent work restrictions and recommended that she follow-up with Dr. Kevin A. Carneiro, who was Board-certified in physical medicine, rehabilitation, and sports medicine, for her continued neck and arm pain.

Dr. Asante, in an attending physician's report (Form CA-20) dated June 19, 2017, diagnosed right shoulder pain, anxiety, and adjustment disorder and opined that the conditions were caused by a May 23, 2017 employment injury. He indicated that she was totally disabled beginning on May 23, 2017.

In an October 16, 2015 report, Dr. Kevin Haddix, an orthopedic surgeon, diagnosed neck pain.

Appellant resubmitted Dr. Creighton's February 13, 2012 Form CA-20 report and the December 17, 2014 FCE results.

By decision dated August 24, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁷ 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.⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

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 a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁰ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹¹ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹² The evidence must not only be of sufficient probative value to create

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

⁸ 20 C.F.R. § 10.607(a).

⁹ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration.

By letter received by OWCP on June 27, 2017, appellant requested reconsideration regarding the termination of her wage-loss compensation and medical benefits. OWCP's regulations¹⁴ and procedures¹⁵ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The last merit decision on this issue was the Board's June 24, 2016 decision.¹⁶ Appellant had one year from the date of this decision to make a timely request for reconsideration, *i.e.*, Saturday, June 24, 2017, to request reconsideration with OWCP. If the last day of the one-year time period falls on a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.¹⁷ Appellant, therefore, had until Monday, June 26, 2017 to timely request reconsideration. Timeliness is determined by the received date in OWCP's Integrated Federal Employees Compensation System (iFECS).¹⁸ As appellant's request for reconsideration was received in iFECS on June 27, 2017, the Board finds that OWCP properly found that appellant's request for reconsideration was untimely filed.¹⁹

The Board further finds that appellant has failed to demonstrate clear evidence of error in the termination of her compensation benefits.

In its June 24, 2016 decision, the Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 2, 2015 because she had no residuals or disability causally related to the accepted November 14, 2011 right

¹³ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁶ OWCP is not authorized to review Board decisions. Although the June 24, 2016 Board decision was the last merit decision, the July 2, 2015 OWCP decision is the appropriate subject of possible modification. *See* 20 C.F.R. § 501.6(d).

¹⁷ Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.1602.4 (February 2016); *see also C.W.*, Docket No. 17-0836 (issued August 7, 2017).

¹⁸ *Id.* at Chapter 2.1602.4b (February 2016).

¹⁹ 20 C.F.R. § 10.607(a).

shoulder conditions. The Board affirmed a July 2, 2015 merit decision of OWCP.²⁰ Absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, the Board's findings are *res judicata*.²¹

With the June 27, 2017 reconsideration request, appellant maintained that the medical evidence, including reports from Drs. Creighton and Asante, established continuing residuals and disability from the employment injuries.

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.²² 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.²³

Even a detailed, well-rationalized medical report which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not demonstrate clear evidence of error.²⁴ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.²⁵

In an October 16, 2015 report, Dr. Creighton without any explanation simply checked a box marked "yes" indicating that appellant's diagnosed right arm and neck pain-recurrent neck/degenerative disc disease were work related. The remaining reports from Dr. Creighton also fail to demonstrate clear evidence of error on the part of OWCP. In these reports, Dr. Creighton addressed appellant's right shoulder and neck pain and work capacity. His reports do not raise a substantial question concerning the correctness of OWCP's termination decision. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.²⁶ For the reasons provided, the Board finds that Dr. Creighton's reports, which did not specifically address the termination of appellant's compensation benefits, are insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Similarly, Dr. Asante's June 19, 2017 report, which attributed appellant's right shoulder pain, anxiety, and adjustment disorder to a May 23, 2017 incident at work and concluded that she was totally disabled, and Dr. Haddix's October 16, 2015 report, which only diagnosed neck pain are insufficient to shift the weight of the medical evidence. These reports did not offer an opinion

²⁰ *Supra* note 4.

²¹ *See T.B.*, Docket No. 15-0001 (issued July 1, 2015). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

²² *Supra* note 10 at Chapter 2.1602.5 (February 2016); *see supra* note 11.

²³ *See A.G.*, Docket No. 18-0555 (issued August 8, 2018).

²⁴ *See D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

²⁵ *See M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²⁶ *See T.G.*, Docket No. 17-0814 (issued October 20, 2017); *F.R.*, Docket No. 09-575 (issued January 4, 2010).

addressing, the underlying issue in this case, whether appellant had continuing residuals or disability causally related to her accepted November 14, 2011 employment injuries.²⁷

The Board finds that appellant has not submitted evidence that manifests on its face that OWCP committed an error in terminating her wage-loss compensation and medical benefits effective July 2, 2015. Appellant has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.²⁸

On appeal appellant contends that her request for reconsideration was timely filed as it was received by OWCP on June 27, 2017. She notes that the Board's decision was issued on June 24, 2016 and asserts that as the one-year time limitation period for filing her reconsideration request began to run on Saturday, June 25, 2016, she had until one year from June 27, 2016 to file her request. However, the next business day time limitation procedure relates to the last day a request for reconsideration is received as timely by OWCP and not to the day the time limitation commences to run.²⁹ As previously noted, OWCP's procedures provide that the timeliness of a reconsideration request is determined by the received date as recorded in iFECS.³⁰ As the date recorded in iFECS was June 27, 2017, more than one year after the Board's June 24, 2016 merit decision, appellant's reconsideration request was untimely filed.

Appellant further contends on appeal that the factual and medical evidence of record is sufficient to establish continuing employment-related residuals and disability and that Dr. Hayes' report did not constitute the weight of the medical opinion evidence. However, as noted, the Board does not have jurisdiction over the merits of the claim. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's termination decision for which review is sought.

CONCLUSION

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

²⁷ *Id.*

²⁸ *See M.B.*, Docket No. 17-1505 (issued January 9, 2018).

²⁹ *Supra* note 17.

³⁰ *Supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 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