

to operating air chisel jackhammers and torque wrenches in the performance of duty. He noted that he had to lie on his back and lift the housing up, and use air wrenches and torque wrenches to install the housing. Appellant indicated that he first became aware of his condition and its relation to his federal employment on March 7, 2008.

In a development letter dated August 16, 2011, OWCP requested additional factual and medical evidence in support of appellant's occupational disease claim. It afforded him 30 days to respond.

On June 1, 2011 appellant completed a narrative statement and described his job duties of utilizing an air chisel jackhammer as well as torque wrenches to disassemble parts. He again noted that he was required to lie on his back to lift up housings on equipment and to use torque wrenches to tighten up the housing. Appellant further noted that he was required to work 11 hours a day, 6 days a week.

On August 2 and 16, 2010 Dr. Morton S. Rickless, an orthopedic surgeon, reported that appellant had pain and decreased sensation in his right hand. He noted that appellant's job duties required repetitive use of power and hand tools, including wrenches and jackhammers. Dr. Rickless diagnosed carpal tunnel syndrome based on an electromyogram (EMG) and physical examination. He concluded, "It is in the opinion of this office that since appellant did repetitive work with his hands that the carpal tunnel is related to his job at the [employing establishment]."

In an October 4, 2010 attending physician's report, (Form CA-20) Dr. Rickless diagnosed carpal tunnel syndrome. He checked a box marked "yes" to indicate that appellant's condition was caused or aggravated by employment activities. In a note dated November 16, 2010, Dr. Rickless repeated his diagnosis of carpal tunnel syndrome.

On September 15, 2011 the employing establishment controverted appellant's claim asserting that he had not reported hand symptoms or carpal tunnel syndrome to his supervisor at any time during his employment from December 18, 2006 through October 14, 2008.

On November 1, 2011 OWCP conducted a conference call with appellant. Appellant reported that he had not worked in any capacity since he stopped work at the employing establishment in October 2008.

By decision dated November 21, 2011, OWCP denied appellant's occupational disease claim finding that the report of Dr. Rickless failed to provide medical rationale establishing causal relationship between his diagnosed carpal tunnel syndrome and the accepted factors of his federal employment.

Appellant submitted an October 2, 2013 treatment note from Dr. Stanley W. Jett, a family practitioner, diagnosing shoulder pain. In a January 22, 2014 note, Dr. Jett diagnosed chronic shoulder pain and carpal tunnel syndrome and median nerve neuropathy. On April 1, May 7, and July 30, 2014 he again diagnosed shoulder pain and carpal tunnel syndrome.

On June 21, 2018 appellant requested reconsideration of the November 21, 2011 OWCP decision.

On March 20 and 30, 2013 Dr. Rickless noted that appellant reported decreased sensation in his hands and diagnosed carpal tunnel syndrome. He examined appellant on September 30, 2014 and found decreased sensation in the median nerve distribution. Dr. Rickless diagnosed carpal tunnel syndrome and recommended surgery. In a note dated November 9, 2015, he diagnosed bilateral carpal tunnel syndrome and right shoulder pain. Dr. Rickless reported that carpal tunnel syndrome was known to be associated with using a jackhammer and that this condition was related to appellant's employment.

Jerry L. Klug, a physical therapist, completed a note on January 4, 2018.

On October 4, 2016 Dr. Jett diagnosed bilateral carpal tunnel syndrome and opined that this condition was the result of appellant's repetitive operation of an air chisel jackhammer in the performance of his federal job duties.

By decision dated July 2, 2018, 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.² 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.³ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it 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.⁶

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP⁷ and is positive, precise, and explicit, and manifests on its

² 5 U.S.C. § 8128(a); *A.F.*, Docket No. 18-0645 (issued October 26, 2018).

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁵ *A.F.*, *supra* note 2; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *A.F.*, *id.*; *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5(a) (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

⁷ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006); *Dean D. Beets*, 43 ECAB 1153 (1992).

face that OWCP committed an error.⁸ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate 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.⁹

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.

By letter received by OWCP on June 21, 2018, appellant requested reconsideration of the November 21, 2011 decision. OWCP's regulations¹⁰ and procedures¹¹ 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 November 21, 2011 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration, *i.e.*, November 21, 2012, to request reconsideration with OWCP. As his request for reconsideration was received on June 21, 2018 more than one year after the November 21, 2011 decision, the Board finds that his request for reconsideration was untimely filed.¹² Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his occupational disease claim.

The Board has reviewed the record and finds that the evidence submitted does not raise a substantial question as to the correctness of OWCP's last merit decision and is therefore insufficient to demonstrate clear evidence of error. The underlying issue in appellant's claim was medical in nature with respect to causal relationship. The Board notes that the term clear evidence of error is intended to represent a difficult standard.¹³ 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, is insufficient to demonstrate clear evidence of

⁸ *J.W., id.*; *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *Robert G. Burns*, *supra* note 7.

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

¹¹ *Supra* note 4 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹² 20 C.F.R. § 10.607(a).

¹³ *Supra* note 4 at Chapter 2.1602.5 (February 2016); *P.W.*, Docket No. 18-0638 (issued October 9, 2018); *Dean Beets*, *supra* note 7.

error.¹⁴ It is not enough to show that evidence could be construed so as to produce a contrary conclusion.¹⁵

The Board further finds that appellant has failed to demonstrate clear evidence of error in the termination of his compensation benefits. The evidence submitted to the record following the November 21, 2011 merit OWCP decision consisted of several medical reports. To demonstrate clear evidence of error in the denial of the claim, the new evidence had to establish the underlying issue of causal relationship. Dr. Jett's January 22, April 1, May 7, and July 30, 2014 notes did not address causal relationship. Appellant also provided notes from Mr. Klug, his physical therapist. These notes are immaterial as physical therapists and physician assistants are not considered physicians under FECA.¹⁶ Their reports and opinions do not constitute probative medical evidence sufficient to demonstrate error by OWCP.¹⁷

The only medical reports discussing causal relationship, the underlying merit issue in this case, are the November 9, 2015 note from Dr. Rickless and the October 4, 2016 note from Dr. Jett. Dr. Rickless reported that carpal tunnel syndrome was known to be associated with using a jackhammer and that this condition was related to appellant's employment. Dr. Jett diagnosed bilateral carpal tunnel syndrome and opined that this condition was the result of appellant's repetitive operation of an air chisel jackhammer in the performance of his federal job duties. While these opinions are generally supportive of causal relationship, the notes do not demonstrate clear evidence of error on the part of OWCP in rendering its November 21, 2011 merit decision.¹⁸

Appellant has not submitted medical evidence sufficient to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of OWCP's decision. Consequently, the Board finds that he has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

CONCLUSION

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

¹⁴ See *id.* at Chapter 2.1602.5(a) (February 2016); *P.W.*, *id.*

¹⁵ *P.W.*, *supra* note 13.

¹⁶ *T.M.*, Docket No. 17-0318 (issued May 29, 2017).

¹⁷ *Id.*

¹⁸ See *P.W.*, *supra* note 13; *C.D.*, Docket No. 17-1915 (issued February 21, 2018).

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2019
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