

FACTUAL HISTORY

On August 23, 2017 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 2, 2017 she injured her right shoulder while in the performance of duty. She explained that her postmaster, K.S., placed his weight on her mail satchel and then snatched it off, causing her to injure her shoulder. On the reverse side of the claim form, appellant's supervisor checked a box marked "yes" to indicate that appellant's injury was caused by her own willful misconduct, intoxication, or intent to injure herself or another. Appellant stopped work on August 3, 2017 and returned on August 9, 2017.

Appellant provided statements to the employing establishment dated July 29 and August 1, 2017 in which she made her second and third formal requests for an occupational disease claim form (Form CA-2). She identified a separate injury that she allegedly suffered on July 21, 2017. Appellant also explained that she had submitted Family and Medical Leave Act forms to her manager, Y.M., which had not been returned after two requests.

In an August 7, 2017 work status report, Dr. Bryan Ney, a Board-certified nephrologist, diagnosed acute stress disorder and held appellant off work through August 8, 2017.

Appellant provided an August 9, 2017 medical note from Dr. Kayvon K. Yadidi, an osteopath Board-certified in internal medicine, which diagnosed pain in her right shoulder and recommended that she perform no pushing, pulling, or lifting over 20 pounds.

In an August 9, 2017 statement to the employing establishment, appellant requested treatment and explained that it was her first day back after her August 2, 2017 injury and that, after she informed her supervisors, C.G. and Y.M., that she needed medical attention, she was left on hold for 20 minutes by Y.M. Appellant again explained that her injury was caused when K.S. snatched her satchel and then put his weight on it while it was still on her shoulder.

In an August 10, 2017 medical report, Dr. Reese Isaacson, Board-certified in hospital medicine, indicated that, after appellant had a disagreement with, her postmaster, K.S. over the weight of her satchel, the postmaster placed his hand inside the bag and pressed heavily down twice while the bag was still on her shoulder, took the bag off her shoulder, and then aggressively placed it back on her shoulder. He noted that she felt dizzy and hot and eventually called paramedics, who diagnosed her with acute stress disorder. When appellant returned to work on August 9, 2017 and placed a 35-pound satchel on her shoulder, she explained that she felt like her shoulder was "separating at the joint." Dr. Isaacson noted that she had an x-ray done that revealed no evidence of a fracture. Upon examination of appellant's shoulder, he noted significant tenderness to palpitation around the capsule. Dr. Isaacson provided a preliminary diagnosis of a right rotator cuff sprain pending further diagnosis testing. He opined that appellant's injury was a direct result of her work as a postal carrier and explained that a drastic increase in weight and pressure placed on the shoulder increases the stress placed on ligaments around the shoulder, which can lead to a tear of the ligaments. Dr. Isaacson further explained that this tear leads to inflammation, pain, swelling, and decreased range of motion, which was all consistent with her symptoms, etiology of injury, and history.

In a duty status report (Form CA-17) of even date, Dr. Isaacson noted pain in appellant's right shoulder and diagnosed a rotator cuff injury.

In an August 11, 2017 diagnostic report, Dr. Jennifer Pedley, a Board-certified chiropractic radiologist, provided a diagnosis of calcific tendinitis adjacent to the lesser tuberosity.

In an August 11, 2017 e-mail, K.S., appellant's postmaster, provided that, on August 2, 2017 while performing an inspection of appellant's vehicle, he asked her if she was combining swings for her next route and appellant explained that she was not because her satchel was already close to 35 pounds. When appellant suggested that he feel the weight for himself, he related that, based on his many years of experience as a letter carrier and delivery manager, her satchel weighed 10 pounds at most. K.S. handed the satchel to D.G., another supervisor, for her to also feel and instructed appellant to combine her swings before delivery. He then noted that appellant claimed that she felt sick and called the paramedics for assistance.

In an August 15, 2017 diagnostic report, Dr. Eric Chen, a Board-certified radiologist, noted that a magnetic resonance imaging scan of appellant's right shoulder revealed supraspinatus and infraspinatus tendinosis and moderate acromioclavicular (AC) joint osteoarthritis.

In an August 28, 2017 medical report, Dr. Hosea Brown, III, Board-certified in internal medicine, noted that appellant's postmaster snatched her satchel from her right shoulder causing it to be pulled abruptly. He also noted that appellant's supervisor reached into her satchel and pressed down hard several times. When she returned to work on August 9, 2017, appellant described persistent pain and discomfort in her shoulder. Dr. Brown also noted her diagnoses of right shoulder calcific tendinitis, right shoulder AC joint arthropathy, and a right shoulder sprain status post trauma and anxiety disorder.

In an accompanying Form CA-17, Dr. Brown provided work restrictions for appellant related to his diagnosis of a right shoulder sprain.

In a development letter dated September 7, 2017, OWCP informed appellant that the evidence of record was insufficient to establish her traumatic injury claim and provided a questionnaire seeking further information related to the alleged August 2, 2017 employment incident and any other preexisting medical condition of her right shoulder for her completion. It afforded her 30 days to submit the necessary evidence.

In response, appellant provided an undated statement explaining she noted that she felt sick, overheated, and dizzy after the incident and eventually called the paramedics to assist her. After receiving treatment from the paramedics, she was taken home by her daughter. Appellant added that on the first day she returned to work and placed a satchel on her right shoulder she felt pain where she was allegedly injured by K.S. on August 2, 2017.

In an August 9, 2017 medical report, Dr. Yadidi and Dr. Vincent Lim, an osteopath specializing in internal medicine, noted appellant's right shoulder injury due to her postmaster K.S. placing all his weight on her satchel while it was on her shoulder, snatching it off her shoulder, and then slamming it back on her shoulder. They provided a diagnosis of right shoulder pain and checked a box marked "yes" to indicate that their findings and diagnosis were consistent with her account of the injury.

In an August 10, 2017 diagnostic report, Dr. Gerald Goldstein, Board-certified in diagnostic radiology, provided the results of an x-ray of appellant's right shoulder revealed no fractures or dislocations. He also noted an impression of mild calcific tendinitis in her right shoulder.

OWCP received an August 19, 2017 e-mail from C.G., an employing establishment customer service representative, in which she explained an incident on the same day where she repeatedly had to tell appellant to stop videotaping the office, managers and other mail carriers with her cellphones. Appellant refused to stop, stated that management was harassing her and disobeying orders to case her mail. C.G. eventually placed appellant on leave without pay for insubordination.

In a September 15, 2017 letter, an employing establishment manager, Y.M., controverted appellant's claim explaining that appellant provided false facts and statements in regard to her alleged August 2, 2017 employment injury. She explained that, after investigating the alleged incident, it was revealed that Postmaster K.S. never came into direct contact with appellant. Y.M. surmised that, because appellant had been investigated for taking additional breaks and having unauthorized stationary events, appellant was attempting to be malicious and vindictive against management.

Attached to Y.M.'s letter, the employing establishment provided an August 18, 2017 statement from D.G., who explained the employment incident and noted that, after the paramedics were called, appellant had not mentioned shoulder pain to them and only related that she was experiencing chest pains.

Appellant provided a signed questionnaire form dated October 4, 2017 and attached to it a copy of K.S.'s August 11, 2017 statement. She also provided a medical report of even date, by Dr. Christopher DeCarlo, a Board-certified physiatrist, wherein he noted her 19-year history as a letter carrier and the physical requirements of her employment. Dr. DeCarlo noted that, on August 2, 2017 while under supervision of appellant's postmaster around 3:00 p.m., the postmaster placed his hand in appellant's satchel and pressed down two times with heavy force and then took the satchel off of her shoulder and aggressively put it back on her. Appellant indicated that, when she returned to work on August 9, 2017 and placed a satchel on her right shoulder, she felt intense pain and that her shoulder was "separating at the joint." Dr. DeCarlo further noted that she denied having any other prior or subsequent injuries to her right shoulder. Upon examination of appellant's shoulder, he reported a positive impingement sign and a positive drop-arm test and also noted her diagnoses of a right shoulder sprain, right shoulder AC arthropathy and right shoulder calcific tendinitis. Dr. DeCarlo explained that tendinosis can result either from an increase in tendon breakdown or a decrease in the tendon healing response. He provided that appellant's tendinosis and AC joint osteoarthritis were indeed preexisting conditions based on her employment duties as a letter carrier for 19 years, including carrying a heavy satchel and repetitively using her right shoulder when engaging in casing, delivering mail, and lifting, pushing and pulling heavy packages. Dr. DeCarlo opined that, the repetitive nature of her job duties caused her conditions and in addition, it was very apparent that her postmaster pressing down on her right shoulder caused increased biomechanical forces to be applied in and around the tendinous tissues and AC joint, which aggravated her inflammatory conditions. He also completed a CA-17 form of even date which provided work restrictions for appellant.

By decision dated October 24, 2017, OWCP denied appellant's traumatic injury claim finding that the evidence she submitted was insufficient to establish the factual component of fact of injury because the evidence did not support that the injury and events occurred as alleged. It explained that she and Postmaster K.S. both provided different accounts of the events, but the employing establishment also provided witness statements from D.G., which refuted her claim that there was direct contact between herself and K.S. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

On June 23, 2018 appellant requested reconsideration of OWCP's October 24, 2017 decision and attached a privacy release and authorization for casework inquiries form from the office of her congressional representative. She provided a statement of even date in which she explained that her physician and all her medical examinations made it clear that her injuries were a direct cause of her 20 years of employment as a letter carrier. Appellant explained that the claimed August 2, 2017 employment incident aggravated her right shoulder conditions. She also explained that Y.M. submitted documentation with no relevance to her CA-1 form and that she had been removed from several mail districts for behavior of like kind. Appellant explained that the documentation submitted was disciplinary action decided in her favor and that she believed that management was interfering with the approval of her claim for personal reasons.

By decision dated July 18, 2018, OWCP denied appellant's request for reconsideration. It explained that the employing establishment provided two statements that refuted her original account of the incident and that her June 23, 2018 statement was irrelevant or immaterial because it offered no further explanation supporting that her version of the August 2, 2017 employment incident occurred in the way she described.

On September 25, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She also submitted copies of medical evidence previously considered by OWCP.

By decision dated November 5, 2018, OWCP denied appellant's request for an oral hearing before a representative of OWCP's Branch of Hearing and Review. It explained that she had previously requested reconsideration under 5 U.S.C. § 8128 and thus was not, as a matter of right, entitled to a hearing on the same issue. OWCP also considered whether to grant a discretionary hearing, and found that the issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered which established that she sustained an injury as defined by FECA.

On April 15, 2019 appellant requested reconsideration of OWCP's November 24, 2017 decision.³

By decision dated April 22, 2019, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

³ Appellant's application for reconsideration identified OWCP's July 18, 2018 decision, however, the Board notes that OWCP's last merit decision was on November 24, 2017.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ 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.⁵ The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁶ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (IFECS)).⁷ 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.⁸

OWCP may not deny a request for reconsideration solely because the application was not timely 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.⁹ OWCP 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 reconsideration request demonstrates clear evidence of error on the part of OWCP.¹⁰

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish 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.¹¹ The Board notes that clear evidence of error is intended to represent a difficult standard.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by OWCP of

⁴ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

⁷ *Id.* at Chapter 2.1602.4(b) (February 2016).

⁸ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

⁹ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

¹⁰ *Id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹¹ *G.G.*, *supra* note 9.

¹² *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 8.

¹³ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹⁴ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁵ In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁶ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

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

A request for reconsideration must be received within one year of the date of OWCP's decision for which reconsideration is sought.¹⁸ As appellant's April 15, 2019 request for reconsideration was made more than one year after the issuance of the last merit decision dated November 24, 2017, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its November 24, 2017 decision.¹⁹

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. Appellant did not submit any evidence or legal argument in support of her reconsideration request to establish that OWCP committed an error in denying that she sustained a traumatic injury while in the performance of duty based on factual inconsistencies. Therefore, she failed to demonstrate clear evidence of error on the part of OWCP in issuing the November 24, 2017 decision.²⁰ Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's April 15, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹⁵ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

¹⁶ *A.F.*, 59 ECAB 714 (2008); *D.G.*, 59 ECAB 455 (2008).

¹⁷ *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

²⁰ *S.J.*, Docket No. 17-1835 (issued December 19, 2018); *C.Z.*, Docket No. 08-2309 (issued June 10, 2009).

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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