

ISSUE

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

FACTUAL HISTORY

On July 31, 2006 appellant, then a 55-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained de Quervain's tenosynovitis of the left and right wrists due to factors of her federal employment. She indicated that she first became aware of her condition on May 25, 2006 and first realized that it was caused or aggravated by her federal employment on July 6, 2006. Appellant described her employment duties as spiking the mail as it comes through machines and using her wrists to flip the mail to examine both sides. She explained that, after she experienced intermittent pain and numbness, her physician diagnosed her with de Quervain's tenosynovitis. Appellant did not stop work.³ OWCP accepted her claim on November 8, 2006 for bilateral de Quervain's tendinitis.

In an August 13, 2007 medical note, Dr. Matthew Sies, Board-certified in occupational medicine, provided permanent modified work restrictions in relation to appellant's condition.

In a December 23, 2008 medical report, Dr. Jimmie Kung, Board-certified in physical medicine and rehabilitation, indicated that appellant retired from federal employment in July 2008.

On February 6, 2018 appellant filed a notice of recurrence (Form CA-2a) for medical treatment.

In a June 29, 2015 attending physician's supplemental report (Form CA-20a) Dr. Bhavesh Pandya, Board-certified in occupational medicine, evaluated appellant for her symptoms related to her bilateral carpal tunnel syndrome.⁴ He checked a box marked "Yes" to indicate his belief that appellant's condition was due to the injury for which she claimed compensation. Dr. Pandya referred to a November 7, 2014 medical report in which Dr. Susan Yu, Board-certified in physical medicine and rehabilitation, noted electromyographic evidence of bilateral moderate median neuropathy and carpal tunnel syndrome, right worse than left.

In an August 22, 2017 primary treating physician's progress report, Dr. Steve Huang, Board-certified in occupational medicine, noted appellant's diagnoses of neck muscle strain and bilateral carpal tunnel syndrome. On evaluation he referred her to physical and occupational therapy to treat her symptoms of pain in both of her hands and wrists.

³ Appellant worked in a modified capacity as recommended by Dr. Kung beginning July 6, 2006.

⁴ Appellant previously filed an occupational disease claim on November 12, 2003 for bilateral carpal tunnel syndrome under OWCP File No. xxxxxx648. OWCP accepted her claim for cervico-muscular strain and bilateral carpal tunnel syndrome on August 5, 2004. On March 7, 2008 it granted appellant a schedule award for "16 percent [permanent] impairment of upper extremity."

In an attending physician's supplementary report of even date, Dr. Huang indicated that appellant had been on permanent modified duty at work and home since 2006. He referred her to physical and occupational therapy for a hand injury.

In a November 15, 2017 medical report, appellant informed Dr. Pandya that she continued to experience swelling and pain in both of her hands. Dr. Pandya noted her permanent instructions and provided her with additional information about requesting disability.

In a January 12, 2018 medical report, Dr. Aliss Markosian, Board-certified in occupational medicine, noted appellant's diagnoses of left and right carpal tunnel syndrome as well as right and left lateral epicondylitis. She provided appellant home care instructions to treat her conditions.

In a development letter dated March 9, 2018, OWCP noted gaps in appellant's medical evidence dating from May 13, 2010 to August 22, 2017 and also that she had been receiving treatment for conditions that it had not accepted.⁵ It advised her of the type of evidence necessary to establish her recurrence claim and attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence. Appellant did not submit any additional evidence.

By decision dated May 11, 2018, OWCP denied appellant's claim for a recurrence of disability. It indicated that she had not provided the evidence requested in the March 9, 2018 development letter and found that the medical evidence failed to establish that she was disabled due to a material change or worsening of her accepted condition.

OWCP continued to receive evidence. In a June 18, 2018 attending physician's supplemental report, Dr. Huang noted appellant's diagnoses of a neck muscle strain, bilateral carpal tunnel syndrome, and right elbow joint pain. He identified May 25, 2006 as her date of injury.

In an undated request form, received by OWCP on June 25, 2018, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 2, 2018, OWCP's Branch of Hearings and Review denied appellant's oral hearing request, finding her request untimely as it was undated and received on June 25, 2018, more than 30 days after its May 11, 2018 decision.

In attending physician's supplementary reports dated from January 8 to April 10, 2019, Dr. Julie Fuller, Board-certified in internal medicine, checked a box marked "Yes" to indicate her belief that appellant's occurrence was the competent producing cause of her injury and disability. Appellant informed her that she experienced pain in her right elbow and wrist and that she believed her symptoms were related to her accepted 2006 injury. On evaluation Dr. Fuller diagnosed neck muscle strain, bilateral carpal tunnel syndrome, and right elbow joint pain and noted that she had been on permanent and stationary status. She explained that she would need to obtain additional

⁵ The Board notes that OWCP recorded appellant's accepted condition as bilateral radial styloid tenosynovitis.

reports from appellant's physician as well as a maximum medical improvement report so that she could know her injury in detail.

In a May 8, 2019 attending physician's supplementary report, Dr. Markosian checked a box marked "Yes" to indicate her belief that appellant's injury was the competent producing cause of her injury and disability. She noted appellant's history of injury and symptoms of hand pain. On evaluation Dr. Markosian diagnosed de Quervain's tenosynovitis. Appellant informed her that she experienced pain and difficulty completing her activities of daily living (ADL). Dr. Markosian opined that appellant appeared to be having a flare-up of her condition and stated that she believed her pain due to her ADLs was caused by her previous work injury. She advised that appellant undergo occupational therapy to treat her condition.

By request form dated May 8, 2019, postmarked with three-day Priority Mail on May 10, 2019 and received by OWCP on May 14, 2019, appellant requested reconsideration of OWCP's May 11, 2018 decision.

In an October 24, 2011 attending physician's supplementary report, Dr. John Barchilon, Board-certified in occupational medicine, checked a box marked "Yes" to indicate his belief that appellant's occurrence was the competent producing cause of her injury and disability. He noted her diagnoses of bilateral carpal tunnel syndrome and right de Quervain's tenosynovitis. Dr. Barchilon provided appellant with prescriptions to treat her pain related to her conditions and recommended that she receive replacement wrist splints.

In response to OWCP's questionnaire, appellant submitted a May 8, 2019 statement in which she explained that she started having flare ups more constantly over the past two years. She stated that she has experienced pain relative to her right hand and right elbow and had not sustained any other injuries or illnesses since her original injury. Appellant provided that she had experienced pain in her right elbow and hand and has experienced flare ups from 2006 to present.

By decision dated August 5, 2019, 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.⁶ This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ 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.⁸ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal

⁶ 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).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

Employees' Compensation System (iFECS)).⁹ 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.¹⁰

OWCP may not deny an application for review solely because the application was not timely 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.¹¹ 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.¹²

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.¹³ The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁶ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁷ 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.¹⁸ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁹

⁹ *Id.* at Chapter 2.1602.4(b) (February 2016).

¹⁰ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

¹¹ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

¹² *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹³ *G.G.*, *supra* note 11.

¹⁴ *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* 10.

¹⁵ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹⁶ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

¹⁷ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

¹⁸ *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

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

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

Appellant had one year from the date of OWCP's May 11, 2018 decision to timely request reconsideration. As OWCP did not receive her reconsideration request until May 14, 2019, more than one year after the May 11, 2018 merit decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.²⁰

In the case of *William A. Couch*,²¹ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. While OWCP referenced an August 22, 2017 report from Dr. Huang in its August 5, 2019 decision, it did not reference a number of additional reports from Drs. Huang, Fuller, Markosian, and Barchilon pertaining to appellant's diagnosed conditions. As the Board's decisions are final as to the subject matter appealed,²² it is crucial that all evidence relevant to the subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.²³ Therefore, the August 5, 2019 decision shall be set aside and the case remanded for OWCP to review and address all evidence contained in the case record.

Following this and other such further development as OWCP deems necessary, it shall issue an appropriate decision.²⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. However, the case is not in posture for decision with regard to whether she has demonstrated clear evidence of error.

²⁰ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

²¹ 41 ECAB 548 (1990); see also *J.C.*, Docket No. 15-1666 (issued October 28, 2015).

²² 20 C.F.R. § 501.6(d).

²³ *T.J.*, Docket No. 14-1854 (issued February 3, 2015); *Yvette N. Davis*, 55 ECAB 475 (2004).

²⁴ Upon return of the case record OWCP should consider administratively combining OWCP File No. xxxxxx648 with the present claim file.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 5, 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