

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that 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 and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On June 29, 2015 appellant, then a 58-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a right shoulder condition in the form of a rotator cuff tear due to performing his work duties as a letter carrier.⁵ He indicated that he had engaged in repetitive motions of casing mail, reaching, and lifting on a daily basis for the past 33¾ years while working as a letter carrier. Appellant advised that he first reported his right shoulder pain when he previously filed a separate claim for an alleged August 18, 2007 right shoulder injury under OWCP File No. xxxxxx964,⁶ and indicated that he continued to experience right shoulder pain consistent with a right rotator cuff tear when casing mail, lifting, and otherwise reaching out with his arms. He noted that he first became aware of the claimed condition on August 18, 2007 and April 16, 2015 and first realized its relation to his federal employment on August 18, 2007 and May 6, 2015. Appellant stopped work on May 5, 2015.

In support of his claim, appellant submitted a report dated July 29, 2013 from Dr. Alex M. Lam, a Board-certified internist and rheumatologist, who diagnosed diffuse arthralgia and primary localized osteoarthritis. In a September 9, 2013 report, Dr. Hugh Fonesca, a Board-certified internist and rheumatologist, diagnosed diffuse arthralgia, primary localized osteoarthritis, sarcoidosis, Crohn's disease, synovitis, and tenosynovitis. In a March 27, 2015 report, Dr. Marc Z. Hammerman, a Board-certified orthopedic surgeon, advised that appellant presented complaining of having right shoulder pain for an unspecified period. He diagnosed right rotator cuff tendinitis/bursitis in the shoulder region, scapular elastofibroma of the right shoulder, with possible tear, as seen on prior diagnostic testing, and degeneration of cervical intervertebral disc.

Appellant also submitted August 20, 2007 and April 10, 2015 magnetic resonance imaging (MRI) scans of his right shoulder.

Appellant also submitted a May 6, 2015 report indicating that Dr. Hammerman performed unauthorized right shoulder surgery on that date, including rotator cuff repair involving the

⁴ Docket No. 17-1536 (issued December 5, 2017); Docket No. 18-1778 (issued April 9, 2019).

⁵ OWCP assigned the present claim OWCP File No. xxxxxx065.

⁶ The Board notes that appellant's prior claim for an August 18, 2007 right shoulder injury was denied under OWCP File No. xxxxxx964 and is not the subject of the present appeal.

supraspinatus muscle, acromioplasty, resection of the distal clavicle, subacromial bursectomy, and arthroscopic labral debridement.

In an August 14, 2015 report, Dr. Hammerman discussed the findings of the April 10, 2015 MRI scan and indicated that, considering appellant's 33 years of engaging in repetitive motion as a letter carrier, it was within all reasonable medical probability that there was a causal relationship between his letter carrier duties and the clinical findings.

By decision dated January 26, 2016, OWCP denied appellant's claim for a work-related occupational right shoulder condition, finding that he had not submitted sufficient medical evidence to establish causal relationship between a diagnosed medical condition and the accepted employment factors, *i.e.*, his letter carrier duties, which included casing mail, carrying a mailbag, delivering mail, and pushing mail gurneys.

On May 6, 2016 appellant requested reconsideration of the January 26, 2016 decision and he submitted a May 4, 2016 report from Dr. Hammerman who provided a discussion of his work duties and the results of right shoulder MRI scans. Dr. Hammerman opined that, considering appellant's 34 years of employment as a letter carrier with the employing establishment, which required a great deal of repetitive motions including lifting tubs and trays of mail and repetitive motion of reaching above shoulder height to case mail, it was within all reasonable medical probability there was a causal relationship between his letter carrier duties and the clinical findings.

By decision dated June 2, 2016, OWCP denied modification of the January 26, 2016 decision.

On March 28, 2017 appellant, through his representative, requested reconsideration of the June 2, 2016 decision. He submitted a March 20, 2017 report from Dr. Martin E. Hale, an attending Board-certified orthopedic surgeon, who indicated that his continued work with overhead reaching for casing, as well as repetitive reaching and twisting of his arm during the delivery portion of his route, "are significantly contributing to his continuing shoulder problems."

By decision dated June 16, 2017, OWCP denied modification of its June 2, 2016 decision. On August 2, 2016 appellant, through his representative, requested reconsideration of the January 26, 2016 decision and presented additional argument. By decision dated December 20, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board and, by decision dated December 5, 2017,⁷ the Board affirmed OWCP's June 16, 2017 decision.

On June 26, 2018 appellant, through his representative, requested reconsideration of the June 16, 2017 decision and submitted a March 1, 2018 report from Dr. Hammerman who noted that appellant's physical findings were consistent with the work activities of reaching above shoulder height, lifting 25- to 30-pound tubs, and casing mail. He opined that the findings of an April 10, 2015 MRI scan of the right shoulder were consistent with the history of the overuse

⁷ *Supra* note 4.

syndrome. Dr. Hammerman noted, “[i]n view of there not being any other history of trauma to the shoulder, and in view of the nature of his work activities resulting in the overuse of his right dominant upper extremity, I find the correlation of his work overuse activities, to the right shoulder pathology, as a causative factor, to be quite consistent.”

By decision dated September 20, 2018, OWCP denied appellant’s claim for an employment-related right shoulder condition. Appellant, through his representative, appealed to the Board and, by decision dated April 9, 2019,⁸ the Board affirmed OWCP’s September 20, 2018 decision.

On December 10, 2020 appellant, through his representative, requested reconsideration of his claim.

Appellant submitted an undated report from Dr. Fernando Jimenez, a Board-certified internist, who discussed his work duties and the history of his complaints of right shoulder symptoms. Dr. Jimenez noted that he examined appellant on June 25, 2020 at which time he reported that he had to case 250 to 700 letters and 800 to 2,000 flats for five to six days per week over the course of the past 34 years. Appellant further reported that he carried a mail pouch weighing up to 35 pounds for approximately four or five miles per day, opened and closed mail boxes with his right arm, and lifted, pushed, and pulled items weighing up to 70 pounds. Dr. Jimenez indicated that, based on the reported work duties, appellant cased approximately 2.652 million letters and 8.4 million flats over a 34-year period. He noted that the motion required to bring a letter from the tub to the table and then into the case for sorting purposes required the use of the bicep working in conjunction with the shoulder joint in order to grasp, pull, extend, and rotate the letter into the slot. Dr. Jimenez advised that appellant reported suffering a slight tear of the distal head of the right deltoid in 2007 and posited that this injury was significant because any interruption in the biomechanics of movement would cause further injury over time. He further noted that, when a muscle is deficient, the other muscles involved in movement would have to compensate and, thus, become injured over time. Dr. Jimenez opined that the 2007 injury caused further damage resulting in his surgery in 2015 and noted that every time appellant lifted his arm past 90 degrees there was undue stress to the muscles and ligaments of the right shoulder, which over time, caused an occupational disease. He indicated, “[f]rom 2007 until 2015 the repetitive movement coupled with the deficient biomechanics was the direct cause of [appellant’s] [o]ccupational [d]isease. The fact that [appellant] was injury free until 2007 and the [MRI scans] taken approximately [seven] years apart as well as the postoperative report that utilize the description of ‘frayed,’ ‘degenerative,’ and chronic illustrate the causative nature of this gentleman’s injury.”

By decision dated December 28, 2020, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁸ *Id.*

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁹ 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.¹⁰ 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).¹¹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹³ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁵ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁶ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁷ It is not enough merely to 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.¹⁸ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the

⁹ 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

¹² *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹⁴ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 11 at Chapter 2.1602.5 (September 2020).

¹⁵ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹⁷ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁸ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁹

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.²⁰ The claimant must present evidence which on its face shows that OWCP made an error.²¹ 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.²² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²³

ANALYSIS

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

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.²⁴ As appellant's request for reconsideration was not received by OWCP until December 10, 2020, more than one year after issuance of the last merit decision, *i.e.*, the Board's April 9, 2019 decision, it was untimely filed.²⁵ Consequently, he must demonstrate clear evidence of error by OWCP in its September 20, 2018 decision.

The Board further finds that appellant has not demonstrated clear evidence of error. The representative argued that the reports of Dr. Hammerman and Dr. Jimenez established appellant's claim for an employment-related right shoulder injury, but the representative's own opinion on the underlying medical issue of the case also does not raise a substantial question as to the correctness of OWCP's September 20, 2018 decision.²⁶

Appellant submitted an undated report in which Dr. Jimenez opined that he had developed an employment-related right shoulder injury due to his repetitive work duties. Dr. Jimenez indicated, "[f]rom 2007 until 2015 the repetitive movement coupled with the deficient biomechanics was the direct cause of [appellant's] occupational disease. The fact that [appellant]

¹⁹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

²⁰ *See supra* note 11 at Chapter 2.1602.5(a) (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²¹ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

²² *Id.*

²³ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²⁴ *See supra* note 14.

²⁵ According to OWCP's procedures, 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. *See supra* note 11 at Chapter 2.1602.4a (September 2020).

²⁶ *See supra* notes 21 and 23.

was injury free until 2007 and the [MRI scans] taken approximately [seven] years apart as well as the postoperative report that utilize the description of ‘frayed,’ ‘degenerative,’ and chronic illustrate the causative nature of this gentleman’s injury.” The Board notes, however, that the submission of this report does not establish clear evidence of error in OWCP’s September 20, 2018 decision. Dr. Jimenez’ report mostly implicated a claimed August 18, 2007 injury, previously denied under a separate OWCP file, which is not the subject of the present case, and Dr. Jimenez failed to explain why the degenerative right shoulder condition observed on diagnostic testing was not the result of the natural progression of a nonwork-related degenerative condition. Therefore, Dr. Jimenez’ report would not tend to raise a substantial question concerning the correctness of OWCP’s September 20, 2018 decision.

As noted, clear evidence of error is intended to represent a difficult standard.²⁷ Even a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. 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.²⁸ Appellant has not met this standard in the present case.

The Board finds that appellant’s request for reconsideration does not demonstrate on its face that OWCP committed error when it found in its September 20, 2018 decision that he had not established an employment-related right shoulder injury.²⁹ Therefore, OWCP properly determined that appellant did not demonstrate clear evidence of error in its September 20, 2018 decision.

CONCLUSION

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.

²⁷ See *supra* note 24.

²⁸ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

²⁹ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board