

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 23, 2014 appellant, then a 59-year-old sheet metal mechanic, filed an occupational disease claim (Form CA-2), alleging that, while using air hammers, vibrating and rotational tools, and equipment while in the performance of duty, he developed a large tear of the left superior aspect of the labrum, a superior labrum anterior and posterior (SLAP) tear and acromioclavicular joint degeneration. On June 14, 2013 he first became aware of his condition and its relation to his federal employment. Appellant stopped work on July 17, 2013 and returned to work on September 17, 2013.

Appellant submitted a June 14, 2013 left shoulder magnetic resonance arthrogram which revealed mild supraspinatus tendinosis, no rotator cuff tear, type 5 SLAP tear associated with a paralabral cyst and mild acromioclavicular joint degenerative disease.

Appellant was treated by Dr. Jeffrey Sorenson, a Board-certified orthopedist, on July 9, 2013 for left shoulder pain. His history was significant for right shoulder rotator cuff repair in April 2012. Dr. Sorenson noted left shoulder findings of positive labral click test and pain and crepitation with shoulder range of motion. On July 17, 2013 he performed a left shoulder arthroscopic anterior labral reconstruction and a SLAP repair. Dr. Sorenson diagnosed left shoulder SLAP tear with a Bankert or anterior labral tear. He noted that appellant was doing well postoperatively but continued to have pain and referred him for physical therapy. On February 10, 2014 Dr. Sorenson performed a left shoulder arthroscopic anterior labral repair with placement of a pain catheter in the subacromial space. He diagnosed left shoulder recurrent anterior labral tear. Appellant also submitted physical therapy notes and records from a nurse practitioner.

By letter dated December 8, 2014, OWCP advised appellant of the type of factual and medical evidence needed to establish his claim. It noted that the evidence submitted was insufficient to support that he was injured while performing work duties. OWCP asked that appellant describe in detail all work activities that contributed to his condition and describe how often he performed such activities.

The employing establishment submitted a notification of personnel action (SF-50) dated July 8, 2013 noting that appellant was furloughed due to the Budget Control Act of 2011.

By decision dated January 12, 2015, OWCP denied appellant's claim because the evidence of record did not support that the injury and or events occurred as alleged.³

Appellant continued to submit medical evidence, including records from a nurse practitioner and a magnetic resonance imaging (MRI) scan of the right shoulder dated August 1,

³ The Board notes that OWCP initially issued a decision on January 9, 2015, but reissued it on January 12, 2015.

2014 which revealed mild articular surface fraying, partial thickness tearing at the infraspinatus attachment and postsurgical artifact along the anterior joint line with evidence of previous laprocapsular repair.

Also provided were reports from Dr. Lonnie Paulos, a Board-certified orthopedist. On September 30, 2014 he performed a right shoulder arthroscopy with debridement, chondroplasty of the capsular release, humeral head resurfacing, anterior Bankert and capsular shift of the shoulder. In reports dated October 8 and 22, and December 17, 2014, Dr. Paulos noted appellant's postoperative progress and recommended physical therapy. He noted that appellant was complaining of left shoulder pain as he was using it more after his recent right shoulder surgery. Dr. Paulos diagnosed traumatic glenohumeral arthritis and left compensatory shoulder pain. In a January 9, 2015 report, he noted treating appellant on May 14, 2014 for right shoulder pain and was last seen on December 17, 2014 at which time he reported having trouble with his left shoulder as well. Dr. Paulos advised appellant to avoid heavy lifting and overhead activities and continue physical therapy. On January 14, 2015 he noted appellant's postsurgical status.

On an appeal form and letter dated January 11, 2016, and received on February 1, 2016, appellant requested reconsideration. In a January 11, 2016 statement, he noted over a year delay in responding to OWCP's decision because he had two right shoulder surgeries and three left shoulder surgeries. Appellant indicated that mishandling and positioning of his body caused his right shoulder to dislocate and he overcompensated with his left shoulder which was now injured. He noted that reinjury while forced back to work too early had prolonged his recovery. Appellant indicated that daily use of tools contributed to his condition and spinal surgery. He asserted that his treatment by OWCP was unacceptable. Appellant attached a copy of OWCP's decision dated January 12, 2015 which was a duplicate of OWCP's decision dated January 9, 2015.⁴ He also submitted a position description for a sheet metal mechanic dated December 14, 1992.

By decision dated March 4, 2016, OWCP denied appellant's request for reconsideration as 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.⁵ 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.⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

⁴ *Id.*

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

⁶ 20 C.F.R. § 10.607(a).

⁷ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, it will reopen the case for merit review.⁸

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁹ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹⁰ The evidence must not only be of sufficient probative value to create 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 establish 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 established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹² As appellant's request for reconsideration was not received by it until February 1, 2016, more than one year after issuance of the January 12, 2015 merit decision by OWCP, it was untimely. Appellant argued that he was unable to file a timely request for reconsideration because he has had six surgeries in four and a half years. Section 10.607(a), however, sets forth the time limitation period of one year. Late filing may not be excused by extenuating circumstances, except if appellant establishes through probative medical evidence that she was unable to communicate in any way, and her testimony is necessary to obtain modification.¹³ The evidence of record does not establish any extenuating circumstances. Appellant has not submitted medical evidence to substantiate that she was unable to communicate in any way to request reconsideration. Consequently, he must demonstrate clear evidence of error by OWCP denying his claim for compensation.

⁸ *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 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹² 20 C.F.R. § 10.607(a).

¹³ *Id.* at § 10.607(c).

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP. In a reconsideration request dated January 11, 2016 and received on February 1, 2016, appellant disagreed with OWCP's decision denying his claim for compensation. In his January 11, 2016 statement, appellant noted that mishandling and positioning of his body caused his right shoulder to dislocate and he overcompensated by using his left shoulder which was now injured. He noted that reinjury while forced back to work too early has prolonged his recovery. Appellant noted that the daily use of hand tools contributed to his condition and spinal surgery. He stated the treatment by OWCP was unacceptable. The Board notes that while appellant addressed his disagreement with OWCP's decision denying his claim for an occupational disease, his general allegations do not establish clear evidence of error as they do not raise a substantial question as to the correctness of OWCP's most recent merit decision which denied appellant's claim for an occupational disease. The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁴

Appellant also submitted evidence from Dr. Paulos, a diagnostic test report, and notes from a nurse practitioner. However, this evidence is insufficient to show clear evidence of error as it does not address the underlying factual issue in this case.¹⁵ Even a well-rationalized medical report which, if timely filed, would have created a conflict in medical evidence is not sufficient to establish error in the prior decision.¹⁶ Appellant also submitted a position description for a sheet metal mechanic dated December 14, 1992. This document is not germane to the reason for the denial of the claim as it does not address how the claimed injury occurred. This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. Therefore, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision.

For these reasons, appellant has not established clear evidence of error by OWCP in its January 12, 2015 decision.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁴ *D.G.*, 59 ECAB 455 (2008).

¹⁵ *See F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

¹⁶ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(e) (December 2011).

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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