

FACTUAL HISTORY

On September 12, 2014 appellant, then a 62-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on August 19, 2014 she sustained a right shoulder injury when she was lifting a large seat for shipping. She first received medical care on the date of injury. Appellant did not stop work.

In September 23 and October 28, 2014 progress notes, Bonnie Eck, a certified nurse practitioner (CNP), reported that appellant injured her right shoulder on August 19, 2014 when she was lifting a package to slide into her car and heard a pop in her shoulder. She diagnosed right shoulder pain and recommended a magnetic resonance imaging (MRI) scan.

On November 14, 2014 Dr. Jonathan Fish, a Board-certified diagnostic radiologist, reported that a right shoulder MRI scan revealed rotator cuff tendinosis with no rotator cuff tear demonstrated, subacromial/subdeltoid bursitis, and chronic arthropathy at the acromioclavicular joint.

By letter dated February 4, 2015, OWCP notified appellant that her claim was initially administratively handled to allow medical payments, as her claim appeared to involve a minor injury resulting in minimal or no lost time from work. However, the merits of her claim had not been formally considered and her claim had been reopened because the medical bills exceeded \$1,500.00. Appellant was advised that the evidence of record was insufficient to establish her traumatic injury claim. OWCP provided her a development questionnaire and notified her of the medical and factual evidence needed in support of her claim. Appellant was afforded 30 days to submit the necessary evidence.

By letter dated February 16, 2015, appellant responded describing the circumstances surrounding the August 19, 2014 employment incident and her subsequent medical treatment. She reported that she first consulted her physician, Ms. Eck, on September 23, 2014.

By decision dated March 5, 2015, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that she sustained an injury because it did not contain a medical diagnosis in connection with the accepted August 19, 2014 employment incident. It noted that the medical evidence submitted was from Ms. Eck, a certified nurse practitioner, who is not considered a qualified physician under FECA.

Following the March 5, 2015 decision, on April 6, 2015, appellant resubmitted the September 23 and October 28, 2014 progress notes from Ms. Eck which were countersigned by Dr. Esther Roth, a Doctor of Osteopathic Medicine.

On January 26, 2016 OWCP received a January 16, 2016 letter, wherein appellant identified her OWCP file number and the March 5, 2015 OWCP decision. She reported that she received a notice from OWCP informing her that the medical reports were signed by a nurse practitioner and needed to be countersigned by a physician. Appellant reported that she took the form to Sanford Bagley Clinic and informed them that it needed to be signed by a physician. She reported that she had not heard from OWCP since the March 5, 2015 notice and wanted to have her case resolved. Appellant identified the medical and factual documents she was

submitting in support of her claim and also referenced inclusion of an appeal request form which was signed as required for her workers' compensation claim. She requested that her case be resolved immediately. Appellant submitted an appeal request form dated January 15, 2016. The form did not select a specific appeal.

In another appeal request form dated September 12, 2016, received by OWCP on September 20, 2016, appellant requested reconsideration of the March 5, 2016 OWCP decision noting that she had previously filed a reconsideration request on January 15, 2016.

An October 28, 2014 Sanford Health Certification of Health Care Provider form was submitted and countersigned by a physician.

By decision dated October 5, 2016, OWCP denied appellant's reconsideration request finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.³ 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.⁴

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit and it must manifest on its face that OWCP committed an error.⁵

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.⁶

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

demonstrates clear error on the part of OWCP.⁹ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

In its October 5, 2016 decision, OWCP denied appellant's request for reconsideration of the March 5, 2015 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error. The Board finds, however, that OWCP improperly determined that her request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.¹¹

On March 5, 2015 OWCP issued a decision denying appellant's traumatic injury claim. Accordingly, appellant had until March 5, 2016 to make a timely request for reconsideration.¹² OWCP determined that she submitted a request for reconsideration that was not received until September 20, 2016. The Board finds, however, that appellant submitted a request for reconsideration of the March 5, 2015 decision and submitted evidence and argument in support of her request, within the required one-year time period.¹³

The record contains a January 16, 2016 letter received on January 26, 2016, from appellant which was addressed to OWCP, identified her claim number, and noted the March 5, 2015 decision. Appellant informed OWCP that that she received the March 5, 2015 decision which informed her that the medical reports signed by a nurse practitioner needed to be countersigned by a physician. She discussed resubmission of the reports after being cosigned by a physician, noted she had heard nothing from OWCP, and demanded resolution of her claim. Appellant further noted that she was submitting additional medical and factual evidence in support of her claim, as well as a signed appeal request form for resolution of her workers' compensation claim. A signed January 15, 2016 appeal request form was provided which did not identify a specific appeal requested.

Although appellant's January 16, 2016 letter does not mention the word reconsideration, the Board has found that there may be a request for reconsideration in situations where a letter does not contain the word reconsideration.¹⁴ No special form is required as long as the request is made in writing, identifies the decision and specific issue to be considered, and is accompanied

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹¹ *J.L.*, Docket No. 12-1181 (issued November 1, 2012).

¹² OWCP's procedures were changed effective August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP. 20 C.F.R. § 10.607 (2011).

¹³ *D.S.*, Docket No. 15-1841 (issued June 8, 2016).

¹⁴ *Jack D. Johnson*, 57 ECAB 593 (2006); *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

by relevant and pertinent new evidence not previously considered.¹⁵ The word reconsideration does not need to be stated in the request for it to be considered valid, but sufficient detail should be provided to discern the decision being contested.¹⁶ In this case, appellant explicitly noted that she wanted a review of her claim and submitted medical evidence from a physician as instructed in the March 5, 2015 OWCP decision. She identified the date of the March 5, 2015 OWCP decision, submitted an appeal request form, and specifically addressed the issue of whether her claim should be accepted by resubmitting the prior medical evidence of record accompanied with a physician's signature. Accordingly, the Board finds that appellant's January 16, 2016 letter, received by OWCP on January 26, 2016, submitted with the medical reports, constituted a timely request for reconsideration.¹⁷

Thus, appellant filed a request for reconsideration within one year of the March 5, 2015 OWCP decision. The Board finds that OWCP improperly denied her reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).¹⁸ Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.¹⁹

CONCLUSION

The Board finds that OWCP improperly found that appellant's request for reconsideration of OWCP's March 5, 2015 decision was untimely filed.

¹⁵ *Id.*

¹⁶ See *M.H.*, Docket No. 14-1389 (issued October 22, 2014).

¹⁷ *C.M.*, Docket No. 11-1988 (issued June 6, 2012).

¹⁸ 20 C.F.R. § 10.606(b)(3) of OWCP's regulations provide that an application for reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

¹⁹ *Dewayne C. Davis*, Docket No. 94-2346 (issued August 14, 1997).

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with this decision.

Issued: July 14, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board