

**United States Department of Labor
Employees' Compensation Appeals Board**

D.S., Appellant)	
)	
and)	Docket No. 13-1972
)	Issued: January 24, 2014
U.S. POSTAL SERVICE, DOMINICK V.)	
DANIELS PROCESSING & DISTRIBUTION)	
CENTER, Kearney, NJ, Employer)	

Appearances:
Robert D. Campbell, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 26, 2013 appellant, through his attorney, filed a timely appeal from a February 27, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his untimely request for reconsideration. Because more than 180 days elapsed from the most recent merit decision dated January 23, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, counsel contends that a January 29, 2013 medical report of Dr. Robin R. Innella, an orthopedic surgeon, is sufficient to establish that appellant sustained a left knee injury causally related to the accepted July 31, 2010 employment incident. He further contends that

¹ 5 U.S.C. § 8101 *et seq.*

appellant's request for reconsideration was timely filed and, thus, a merit review of his claim should have been conducted.

FACTUAL HISTORY

This case has previously been before the Board.² In a January 23, 2012 decision, the Board affirmed OWCP's April 12, 2011 denial of appellant's traumatic injury claim on the basis that the medical evidence did not establish that the accepted employment incident, being hit in the left knee by a registry mail cage door on July 31, 2010, caused or contributed to a left knee condition.³ Following this decision, counsel, by letter dated January 23, 2013 and received on January 29, 2013, requested reconsideration before OWCP and submitted new evidence.

In a December 4, 2012 report, Dr. Innella noted that appellant presented with a two and one-half-year history of left knee pain after an injury at that time. A magnetic resonance imaging scan performed at that time showed meniscal tears in both menisci of the left knee and chondromalacia patella. Appellant currently complained about worsening knee pain and stiffness in the morning and grinding within the knee. He denied any instability. Dr. Innella listed findings on physical and x-ray examination of the left knee. He diagnosed osteoarthritis that was localized primarily in the lower leg. On January 29, 2013 Dr. Innella reviewed appellant's medical records. He advised that appellant was status post contusion of the left knee with exacerbation of degenerative changes. Appellant had an exacerbation of a torn medial meniscus and a tear of the lateral meniscus of the left knee. His prognosis was fair. Dr. Innella opined that the above-noted injuries were causally related to the July 31, 2010 employment incident and were permanent in nature. He noted that appellant had a preexisting medial meniscal tear and chondromalacia; however, appellant was functioning and able to work with this condition. Dr. Innella concluded that he had developed progressive symptomatology since that time.

In a February 27, 2013 decision, OWCP denied appellant's request for reconsideration, without a merit review. It found that the request was not filed within one year of the Board's January 23, 2012 decision and did not otherwise establish clear evidence of error.⁴

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵

² Docket No. 11-1577 (issued January 23, 2012).

³ This case was previously on appeal before the Board with respect to appellant's emotional condition claim under OWCP File No. xxxxxx798. In a July 14, 2009 decision, the Board set aside OWCP's July 28, 2008 decision on the grounds that appellant filed a timely request for reconsideration of the denial of his emotional condition claim and remanded the case to OWCP for review under the proper standard for a timely reconsideration request. Docket No. 09-184 (issued July 14, 2008). In a February 22, 2011 decision, the Board affirmed a September 25, 2009 OWCP decision denying appellant's claim. Docket No. 10-1189 (issued February 22, 2011).

⁴ The Board notes that OWCP stated that the decision for which appellant sought review was dated January 22, 2012 rather than January 23, 2012.

⁵ 20 C.F.R. § 10.607(a).

The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ 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 application for review shows clear evidence of error on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴

OWCP procedures were changed effective August 29, 2011. Section 10.607 of the applicable 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.¹⁵

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

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). 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. *Id.* at Chapter 2.1602.3c.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ 20 C.F.R. § 10.607.

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The most recent merit decision in this case was issued by the Board on January 23, 2012. While appellant's request for reconsideration was dated January 23, 2013, it was not received by OWCP until January 29, 2013. Because more than one year elapsed from the January 23, 2012 merit decision to the filing of his request on January 29, 2013, the Board finds that his request was not timely filed.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. In its January 23, 2012 decision, the Board affirmed OWCP's April 12, 2011 denial of his traumatic injury claim on the grounds that the medical evidence did not establish that the accepted July 31, 2010 employment incident caused or contributed to a left knee condition. Thereafter, counsel submitted reports from Dr. Innella. As noted, the question of whether a 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. None of Dr. Innella's reports, however, manifested on its face that an error was made in the denial of appellant's claim. In a December 4, 2012 report, he found that appellant had osteoarthritis that was localized primarily in the lower leg, but he did not provide any medical opinion addressing how being hit in the left knee by a registry mail cage door on July 31, 2010 caused or contributed to the diagnosed condition.¹⁶ Dr. Innella's January 29, 2013 report found that appellant was status post contusion of the left knee with exacerbation of degenerative changes, and he had an exacerbation of a torn medial meniscus and a tear of the lateral meniscus of the left knee due to the accepted employment incident. He noted appellant's capacity to function and work while having a preexisting medial meniscal tear and chondromalacia and that his symptomatology had progressed. A detailed, well-rationalized medical report which could have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.¹⁷ The Board notes that, while Dr. Innella's January 29, 2013 report is generally supportive of appellant's claim, it is not sufficiently probative to *prima facie* shift the weight of the evidence in appellant's favor. Although it might be construed to produce a contrary result, it does not demonstrate clear error on the part of OWCP in denying his traumatic injury claim. Dr. Innella offered no medical rationale to explain how appellant's diagnosed left knee condition was causally related to the July 31, 2010 employment incident.¹⁸ Since his reports did not address the issue of whether the diagnosed conditions were caused by the July 31, 2010 employment incident or raise a substantial question as to the correctness of the denial of appellant's claim, the Board finds that appellant's untimely request failed to establish clear evidence of error.¹⁹

¹⁶ 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).

¹⁷ *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁸ Medical conclusions unsupported by rationale are of little probative value. *Willa M. Frazier*, 55 ECAB 379 (2004).

¹⁹ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

On appeal, appellant's attorney contended that Dr. Innella's January 29, 2013 report was sufficient to establish that appellant sustained a left knee injury causally related to the accepted July 31, 2010 employment incident. As discussed, his report was not sufficient to *prima facie* shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of OWCP's decision denying appellant's traumatic injury claim.

Counsel further contended that appellant's request for reconsideration was timely filed and, thus, a merit review of his claim should have been conducted by OWCP. He stated that OWCP's assertion that the request was not timely could only be explained as a failure in its receiving and filing system. As discussed above, the evidence establishes that appellant's reconsideration request was filed after the one-year time period had elapsed.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board