

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Honolulu, HI, Employer**

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**Docket No. 15-0393
Issued: July 1, 2015**

Appearances:
Kevin L. Card, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 9, 2014 appellant, through his representative, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated July 14, 2014. Because more than 180 days has elapsed between the last merit decision dated May 16, 2013 and the filing of this appeal on December 9, 2014, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

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

¹ 5 U.S.C. §§ 8101-8193.

² Appellant thereby requested oral argument pursuant to section 501.5(6) of the Board's *Rules of Procedure*; 20 C.F.R. § 501.5(6). The Board denied appellant's request in a May 27, 2015 order, finding that his arguments could be fully and fairly addressed based on a review of the case record. Order Denying Request for Oral Argument, Docket No. 15-0393 (issued May 27, 2015).

FACTUAL HISTORY

This is the second appeal before the Board.³ Appellant, a 56-year-old letter carrier, filed a Form CA-2 claim for benefits on August 13, 2007, alleging that his preexisting right knee condition was aggravated by factors of his employment. He worked 28 years standing and walking in his job as a letter carrier. Appellant underwent total right knee arthroplasty surgery on May 29, 2007. The procedure was performed by Dr. John C. Baker, Board-certified in orthopedic surgery.

By decision dated February 27, 2008, OWCP denied the claim, finding that appellant failed to submit medical evidence sufficient to establish that his claimed right knee condition was causally related to factors of employment. By decision dated September 19, 2008, an OWCP hearing representative set aside the February 27, 2008 denial and remanded the case to OWCP to refer appellant to an orthopedic specialist for a second opinion examination on whether the claimed aggravation of osteoarthritis of the right knee was causally related to employment factors and whether the total knee replacement performed on May 29, 2007 was necessitated by a work-related condition.

In order to determine whether appellant's preexisting right knee arthritis was aggravated by employment factors, and whether the May 2007 right knee arthroplasty was necessitated by his employment, OWCP referred him to Dr. Lawrence Blumberg, Board-certified in orthopedic surgery, for a second opinion examination. He found that appellant's complaints of right knee pain were due to his preexisting right knee osteoarthritis, not his work duties. Dr. Blumberg, noting x-ray results dated October 4, 2006, stated that appellant's right knee arthritis developed over years and probably began with the 1977 anterior cruciate ligament injury. He stated that appellant's degenerative arthritis of the knee had progressed over time with normal activities of daily living and was not causally related to his job as a postal worker. Dr. Blumberg opined that appellant's arthritis condition was due to the development of degenerative changes consistent with his age and level of activity, and the prior, nonwork-related anterior cruciate ligament tear. He further found that his May 2007 total knee replacement surgery was not related to any work-related condition, but was due to age and the onset of degenerative osteoarthritis.

By decision dated January 13, 2009, OWCP denied appellant's claim, finding that the medical evidence was not sufficient to establish that appellant's claimed preexisting, right knee osteoarthritic condition was causally related to factors of his employment and that his May 2007 knee surgery was not necessitated by an accepted condition. By decision dated April 12, 2010, an OWCP hearing representative affirmed the January 13, 2010 decision.

In a May 20, 2010 report, Dr. Samy F. Bishai, Board-certified in orthopedic surgery, stated that appellant's work as a letter carrier entailed a great deal of walking and standing, which caused him to have intermittent, progressively worsening symptoms in his right knee over the years, which culminated in the May 29, 2007 total right knee replacement surgery. He advised that appellant's job required him to walk for long distances on his mail route, while carrying a satchel of mail, and that this type of work resulted in the development of his right knee degenerative arthritis condition. Dr. Bishai further opined that appellant's May 29, 2007

³ See Docket No. 11-196 (issued November 3, 2011).

total right knee replacement surgery was directly related to and caused by his work-related degenerative arthritis condition.

By decision dated January 21, 2011, OWCP denied modification. In a decision dated November 3, 2011,⁴ the Board set aside the January 21, 2011 decision, finding that there was a conflict in the medical opinion evidence between Dr. Bishai and Dr. Blumberg regarding whether appellant's preexisting, arthritic right knee condition was causally related to employment factors, and whether his May 29, 2007 surgery was necessitated by a work-related condition. It therefore remanded the case to OWCP for referral to an impartial medical specialist to resolve the conflict, to be followed by a *de novo* decision. The complete facts of this case are set forth in the Board's November 3, 2011 decision and are herein incorporated by reference.

In order to resolve the conflict in the medical evidence, OWCP scheduled appellant for a referee medical examination with Dr. Lawrence M. Gnage, Board-certified in orthopedic surgery. In a report dated January 25, 2012, he stated that there was no established medical certainty showing a link between a great deal of walking and the development of osteoarthritis in any joint. Dr. Gnage asserted that there was a well-known medical relationship between previous trauma to the knee and the development of traumatic or early osteoarthritis and that appellant clearly had a preexisting condition in his right knee that was predisposed to the development of osteoarthritis. He further opined that the anterior cruciate injury appellant sustained earlier in his life would be expected to increase his probability of developing osteoarthritis. Dr. Gnage stated that, regardless of how much walking appellant did in his job as a letter carrier or in any other capacity, this would not provide a basis for evaluating long-term walking as a cause for the development of osteoarthritis. He noted that there was no evidence of any osteoarthritis in appellant's left leg. Dr. Gnage concluded that there was no evidence that appellant's job as a letter carrier was the cause of the development of his osteoarthritis or the need for a total knee replacement.

By decision dated February 14, 2012, OWCP denied the claim based on Dr. Gnage's impartial medical opinion, finding that appellant did not establish that his right knee condition was causally related to factors of employment and that his total right knee replacement was causally related to an accepted condition.

In a report dated May 7, 2012, Dr. Bishai essentially reiterated the findings, conclusions, and opinions he expressed in his May 20, 2010 report.

On December 12, 2012 appellant requested an oral hearing, which was held on April 3, 2013.

By decision dated May 16, 2013, an OWCP hearing representative affirmed the February 14, 2012 decision.

Appellant's representative requested reconsideration on May 14, 2014.

⁴ *Id.*

By decision dated June 9, 2014, OWCP denied appellant's application for review, finding that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

On July 1, 2014 OWCP received a letter dated June 23, 2014, from appellant's congressional representative. This letter noted that appellant's right knee claim had been denied. He advised OWCP that he was seeking "thorough consideration" of appellant's case.

In a letter received by OWCP on July 1, 2014, appellant provided a description of his job duties as a letter carrier, his employment history, and his own explanation as to why he believed his federal employment caused his diagnosed conditions. He also indicated that he had been given cortisone injections to ameliorate the pain in his right knee.

In an October 4, 2006 report, received by OWCP on July 7, 2014, Dr. Lawrence A. Gaulkin, a specialist in family medicine, related that appellant was experiencing increasing, aching pain in the infrapatellar anterior areas of both legs with walking. He stated that on examination of the lower extremities he showed no significant deformity, edema, discoloration, tenderness, or effusion of the knee joints.

In a report dated November 2, 2006, received by OWCP on July 7, 2014, Dr. Baker stated that appellant worked as a mailman and had a nonservice-connected right knee problem. He advised that appellant had undergone multiple surgeries on his right knee after being involved in an automobile accident about six years prior. Dr. Baker rated his pain as a level 4 on a scale of 1 to 10.

In a report dated October 13, 2008, received by OWCP on July 7, 2014, Dr. David Thompson, Board-certified in orthopedic surgery, stated that appellant underwent a right total knee replacement in July 2007 and had ruptured his patellar tendon four months later while playing golf. He advised that appellant underwent ameliorative surgery in December 2007. Dr. Thompson stated that he had sustained no additional injuries since that time but had a profound weakness of knee extension. Appellant believed that the deformity he acquired while golfing in December 2007 had persisted despite his subsequent surgery. Dr. Thompson advised that on examination appellant had a slightly antalgic gait but did not have a significant limp. He felt functional in his motion. Appellant was not in any pain, but did experience difficulty getting up from his chair, squatting down, or getting low. Dr. Thompson noted that appellant's patella was quite high and that there was an obvious gap between the patella and the tibial tubercle.

In an April 3, 2009 report, received by OWCP on July 7, 2014, Dr. Baker noted that appellant underwent a right total knee arthroplasty on May 29, 2007 due to arthritis in his right knee. He opined that the arthritis was exacerbated due to 28½ years walking a mail route with a heavy mailbag and many years of overtime abusing the same knee while performing his duties.

In addition to the medical reports listed above, appellant submitted an April 10, 2012 online article from the Arthritis Foundation, received by OWCP on July 7, 2014, which discussed the causes of arthritis.

By letter dated July 11, 2014, OWCP informed appellant's congressional representative that it had received appellant's request for reconsideration and was in the process of assigning

the case for review, along with any supporting evidence and/or legal argument, and would render a new decision in accordance with applicable laws, regulations, and procedures.

By decision dated July 14, 2014, OWCP denied appellant's request for reconsideration without a merit review, finding that it was untimely and failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that appellant was required to present evidence which showed that OWCP made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ does not entitle an employee to a review of an OWCP decision as a matter of right.⁶ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ As one such limitation, OWCP has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).⁹

In those cases where a request for reconsideration is not timely filed, the Board had held however that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁰ OWCP procedures state that it will reopen an appellant's case for merit review, notwithstanding the one-year filing

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ Thus, although it is a matter of discretion on the part of OWCP as to whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by it; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. See 20 C.F.R. § 10.606(b).

⁸ 20 C.F.R. § 10.607(b).

⁹ See cases cited *supra* note 4.

¹⁰ *Rex L. Weaver*, 44 ECAB 535 (1993).

limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of OWCP.¹¹

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must be manifested on its face that it committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁸

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on May 16, 2013. OWCP received appellant's request for reconsideration on July 1, 2014. Thus, the request was untimely as it fell outside of the one-year time limit.

The Board finds that appellant's July 1, 2014 request for reconsideration failed to show clear evidence of error. Appellant submitted reports from Drs. Gaulkin, Baker and Thompson, who stated findings on examination, advised that they had treated appellant for right knee pain, and generally indicated that his right knee condition was aggravated by his years of working as mail carrier. These reports are of limited probative value as they did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant sustained a right knee condition caused or aggravated by employment factors. None of the reports appellant submitted with his

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, *supra* note 6.

¹⁵ *See supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁸ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

request are 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.

The Board also finds that the April 10, 2012 online article from the Arthritis Foundation which appellant submitted does not constitute medical evidence under section 8101(2) and has no probative value. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP.

On appeal appellant's representative argues that OWCP erred by not addressing the May 14, 2014 request for reconsideration submitted by his representative, and by addressing the documentation submitted by appellant which it received on July 1, 2014 instead. This assertion is not correct, as the record reflects that OWCP issued a nonmerit decision on June 9, 2014 in response to the May 14, 2014 request for reconsideration.

OWCP reviewed the evidence appellant submitted and properly found it to be insufficient to shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review. The Board finds that OWCP properly denied further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in his reconsideration request dated July 1, 2014. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on July 14, 2014.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2015
Washington, DC

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

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

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