

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

E.B., Appellant)	
)	
and)	Docket No. 18-1091
)	Issued: December 28, 2018
)	
DEPARTMENT OF DEFENSE, DEFENSE)	
LOGISTICS AGENCY, Tracy, CA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 2, 2018 appellant filed a timely appeal from an April 9, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days had elapsed from the last merit decision, dated June 26, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted new evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 3, 2013 appellant, then a 63-year-old distribution process worker, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2013 he lost his balance and fell onto the floor, pinning his left knee behind him and experiencing pain in both knees, while changing the position of forks on a forklift in the performance of duty.

On January 24, 2014 OWCP accepted the claim for bilateral knee and leg sprain of unspecified sites.

Appellant was placed off work on February 5, 2014 by Dr. Gary R. Wisner, an attending Board-certified orthopedic surgeon. He stopped work on that date. OWCP paid appellant wage-loss compensation for temporary total disability on the supplemental rolls as of February 6, 2014.

On May 2, 2014 OWCP expanded acceptance of appellant's claim to include left knee meniscus tear, current. It authorized arthroscopic left knee surgery performed by Dr. Wisner on July 8, 2014. OWCP continued to pay appellant wage-loss compensation for temporary total disability.

Dr. Wisner subsequently advised that appellant had continuing residuals of his accepted employment-related bilateral knee injuries that required medical treatment and that he remained totally disabled from work due to his work-related injuries.

In a December 4, 2014 medical report, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and OWCP referral physician, opined that appellant had no residuals of his accepted work-related conditions and, while he could not perform his usual job, he could work eight hours a day with restrictions.

OWCP found a conflict in medical opinion between Dr. Wisner and Dr. Swartz regarding whether appellant had continuing employment-related residuals or disability necessitating referral to an impartial medical examiner, pursuant to 5 U.S.C. § 8123(a). In an August 25, 2015 report, Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, selected as the impartial medical examiner, opined that appellant no longer had residuals of his accepted November 29, 2013 employment injuries and, while he could not perform his usual job, he could work eight hours a day with permanent restrictions.

By decision dated January 21, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, based on Dr. Auerbach's August 25, 2015 opinion that appellant no longer had residuals or disability stemming from his work-related injuries.

In an appeal request form postmarked February 29, 2016 and received by OWCP on March 7, 2016, appellant requested a telephone hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP, by decision dated March 23, 2016, denied appellant's request for a hearing, finding that his request was untimely filed because it was not made within 30 days of its January 21, 2016 decision. It further indicated that it had exercised its discretion and further denied the request as the relevant issue of the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

In an appeal request form received by OWCP on December 20, 2016, appellant requested reconsideration of the January 21, 2016 termination decision. By decision dated March 16, 2017, OWCP denied modification of its January 21, 2016 decision. It determined that appellant failed to submit rationalized medical evidence from a qualified physician as defined under FECA establishing causal relationship between the diagnosed medical condition and accepted employment injuries.

Appellant, in an appeal request form and letter received by OWCP on March 20, 2018, requested reconsideration of the March 16, 2017 decision. In his letter, he contended that enclosed reports from Dr. Qasim Aslam Barra and Dr. Yee Hisang Jeffrey Wang, Board-certified radiologists, were sufficient to establish that he had continuing residuals and disability related to his accepted injuries and to rebut the opinions of Dr. Swartz and Dr. Auerbach.

In a February 7, 2018 left knee magnetic resonance imaging (MRI) scan report, Dr. Barra provided an impression of severe patellofemoral compartment chondromalacia, focal thinning of the lateral aspect of the patella retinaculum which may be iatrogenic or represent sequela of prior injury, mild lateral compartment chondromalacia, and small joint effusion.

In a February 7, 2018 right knee MRI scan report, Dr. Wang provided an impression of lateral meniscal degenerative tearing with grade 3 chondromalacia lateral tibial plateau. He further provided an impression of focal grade 3 patellar chondromalacia and trace popliteal cyst.

By decision dated April 9, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System.⁴ The Board

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

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.⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP⁷ and is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.⁸ 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 demonstrate 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 demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration.

As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ As appellant's request for reconsideration was not received by OWCP until March 20, 2018, more than one year after issuance of the March 16, 2017 decision, the last merit decision by OWCP on the termination issue, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP denying his claim for compensation.

The Board further finds that appellant has failed to demonstrate clear evidence of error.

With the March 20, 2018 reconsideration request, appellant maintained that the medical reports from Drs. Barra and Wang established continuing residuals and disability from his accepted November 29, 2013 employment injuries. The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise,

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

⁶ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

¹⁰ See *supra* note 3.

and explicit evidence which manifested on its face that OWCP committed an error.¹¹ Even a detailed, well-rationalized medical report, which would 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.¹² 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.¹³

The MRI scan reports dated February 7, 2018 from Drs. Wang and Barra noted appellant's right and left knee conditions. The reports do not raise any error in the underlying March 16, 2017 OWCP decision to terminate appellant's wage-loss compensation and medical benefits as they do not address the relevant issue of whether appellant had any continuing residuals or disability causally related to his accepted November 29, 2013 employment injuries.¹⁴

The Board finds that appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in terminating his wage-loss compensation and medical benefits effective January 21, 2016. Appellant has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.¹⁵

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹¹ See *supra* note 4 at Chapter 2.1602.5 (February 2016); see *Dean D. Beets, supra* note 7.

¹² See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

¹³ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

¹⁴ See *B.C.*, Docket No. 16-1404 (issued April 14, 2017); *F.R.*, Docket No. 09-0575 (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).

¹⁵ See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2018
Washington, DC

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

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

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