

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

I.L., Appellant	)	
	)	
and	)	Docket No. 23-0329
	)	Issued: August 1, 2023
U.S. POSTAL SERVICE, KINGSBRIDGE	)	
STATION, Bronx, NY, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 3, 2023 appellant filed a timely appeal from an October 12, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 7, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. § § 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the October 12, 2022 decision, and on appeal, appellant submitted additional evidence. 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 denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

On October 26, 2020 appellant, then a 56-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on August 26, 2020, she sustained an injury to her right knee due to frequent stepping on and off the postal truck while in the performance of duty. She stopped work on September 2, 2020 and returned to work on September 5, 2020.

In an undated statement, appellant indicated that she hurt her right knee as she stepped off her truck. She noted that she felt a sharp pain in her right knee that radiated down the front of her right leg onto the top of her right foot. Appellant also related that it hurt when she walked.

In support of her claim, appellant submitted medical evidence.

OWCP, by development letter dated November 3, 2020, advised appellant of the deficiencies of her claim. It notified her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

OWCP subsequently received additional medical evidence.

By decision dated December 4, 2020, OWCP accepted that the August 26, 2020 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim, finding that she had not submitted medical evidence containing a medical diagnosis in connection with the accepted employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

A September 1, 2020 x-ray of the right knee read by Dr. Kari Schlessinger, a Board-certified diagnostic radiologist, revealed no acute bone abnormality, no fracture or dislocation, and no significant osteoarthritic changes.

A September 18, 2020 magnetic resonance imaging (MRI) scan of appellant's right knee read by Dr. Jonathan Weiss, a Board-certified diagnostic radiologist, revealed a radial tear of the medial meniscus near the root of the posterior horn which was not present on a prior MRI scan of June 1, 2020; a Grade 1 sprain of the medial collateral ligament; horizontal intrasubstance tear of the lateral meniscal body, unchanged from the prior examination; and moderate chondromalacia patella of the upper pole.

In reports dated December 4 and 10, 2020, Dr. Michael Cushner, an orthopedic surgeon, diagnosed right knee internal derangement and noted that a request was pending for approval of right knee arthroscopic surgery.

On January 4, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on April 21, 2021. During the hearing, appellant alleged that she did not seek medical treatment following her August 26, 2020

injury, and that she then sustained a new injury on September 1, 2020, when she heard her right knee pop.<sup>3</sup>

In an October 13, 2020 report, Dr. Cushner noted that appellant was seen for follow up of a workers' compensation case with a September 1, 2020 date of injury. He noted that a May 19, 2020 x-ray of the right knee revealed no significant osteoarthritis and a slight lateral tilt to the patella. A June 1, 2020 MRI scan of appellant's right knee revealed intrasubstance tear of the lateral meniscus, grade III chondromalacia patella, and small knee effusion. A September 18, 2020 MRI scan of the right knee revealed radial tear of the medial meniscus near the root of the posterior horn, which was not present on the June 1, 2020 MRI scan, grade I sprain of the medial collateral ligament, unchanged intrasubstance tear of the lateral meniscal body, and moderate chondromalacia patella. Dr. Cushner related that appellant denied constant popping but confirmed that she "had 2 episodes of popping -- once during the initial injury and another time when she presented to urgent care." He diagnosed derangement of the right knee.

In a February 7, 2021 report, Dr. Cushner noted that appellant was initially seen on August 26, 2020, when she stepped off her truck and felt a pop in her right knee. He related that she had immediate pain and discomfort and was reevaluated on September 14, 2020. Dr. Cushner noted that appellant reported two separate injuries, the initial injury on August 26, 2020, and a reinjury on September 1, 2020. He explained that appellant had an MRI scan on September 18, 2020, which revealed a radial tear of the medial meniscus near the root of the posterior horn that was not present on the June 1, 2020 MRI scan, prior to the injury. Dr. Cushner diagnosed a sprain of the medial collateral ligament and opined, "In conclusion, patient with underlying right knee injury, with new onset injury from this date of accident. This is confirmed both with clinical examination, as well as MRI scan findings. The patient will need a knee arthroscopy for treatment of the meniscal tear. There is a direct causal relationship with the injury from August 26, 2020."

In a March 16, 2021 report, Dr. Cushner assessed derangement of right knee.

In a May 21, 2022 statement, appellant related that she had undergone right knee surgery on May 19, 2021, that she informed her physician that she had pain and tightness in her right knee, and that a June 1, 2020 MRI scan of the right knee "showed a lateral meniscus on my right knee." She described her August 26 and September 1, 2020 injuries and confirmed that she did not go to a doctor for her August 26, 2020 injury, but went to urgent care for her September 1, 2020 injury. Appellant explained that she was referred to Dr. Cushner, that he saw her on September 14, 2020, that she had an MRI scan on September 18, 2020, which showed that she had a radial tear of the medial meniscus near the root of the posterior horn, and that she needed right knee surgery.

By decision dated June 7, 2021, OWCP's hearing representative affirmed, as modified, the December 4, 2020 decision. The hearing representative explained that appellant had submitted sufficient medical evidence to establish diagnosed conditions, however, the claim remained denied as she did not provide a rationalized medical opinion explaining how her diagnosed conditions were causally related to the accepted August 26, 2020 employment incident.

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<sup>3</sup> The Board notes that appellant claimed recurrences of disability causally related to the alleged August 26, 2020 employment injury.

On June 7, 2022 OWCP received a request for reconsideration dated May 13, 2022, and signed on June 7, 2022 by Dr. Lisa Corrente, a Board-certified diagnostic radiologist. Dr. Corrente provided assessments of other tear of medial meniscus, current injury, right knee, initial; and sprain of medial collateral ligament (MCL) of right knee, initial. She opined that appellant's right knee MCL sprain was a direct result of the August 26, 2020 employment incident.

On August 26, 2022 appellant requested reconsideration of the June 7, 2021 decision. She noted that her doctor had appealed on her behalf on June 7, 2022.

OWCP subsequently received additional reports dated June 24, July 22, and August 19, 2022 by Dr. Corrente who reiterated her prior diagnoses of tear of medial meniscus, right knee, initial; and sprain of MCL of right knee, initial. She also noted that the radial tear of the medial meniscus near the root of the posterior horn was not present on the prior MRI scan of June 1, 2020. Dr. Corrente advised that appellant was incapacitated.

By decision dated October 12, 2022, OWCP denied appellant's August 26, 2022 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. It simply noted: "You did not present clear evidence of error." It thereafter noted that the medical documentation received was not received in a timely manner.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>4</sup> To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).<sup>6</sup> The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>8</sup> OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the

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<sup>4</sup> *Id.* at § 8128(a); *see M.M.*, Docket No. 21-1203 (issued December 22, 2022); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

<sup>7</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *See* 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

claimant's request demonstrates clear evidence of error on the part of OWCP.<sup>9</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</sup>

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.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> 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 evidence of error on the part of OWCP.<sup>13</sup> To demonstrate clear evidence of error, 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 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.<sup>14</sup> The Board makes an independent determination of whether a claimant has demonstrated 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.<sup>15</sup>

### ANALYSIS

The Board finds that OWCP properly found that appellant's request for reconsideration was untimely filed.

The most recent merit decision addressing appellant's traumatic injury claim was the June 7, 2021 decision of OWCP's hearing representative. As her request for reconsideration was not received until August 26, 2022, more than one year after the June 7, 2021 decision, the Board finds that it was untimely filed. In her August 26, 2022 reconsideration request, appellant referenced a report filed by her physician, Dr. Corrente, on June 7, 2022, and argued that her physician timely requested reconsideration on her behalf. However, Dr. Corrente was not authorized to request reconsideration on appellant's behalf. OWCP's regulations and procedures,

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<sup>9</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *see also id.* at § 10.607; *supra* note 6 at Chapter 2.1602.5a (September 2020).

<sup>10</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>12</sup> *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>13</sup> *B.W.*, *supra* note 11.

<sup>14</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 10.

<sup>15</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

and Board precedent,<sup>16</sup> provide that a request for reconsideration must be in writing, be signed and dated by the claimant or the authorized representative, be accompanied by relevant new evidence or argument not considered previously, and identify the decision and the specific issues for which reconsideration is requested. Dr. Corrente was not appellant's authorized representative. As such, his report does not constitute a request for reconsideration.<sup>17</sup>

Because appellant's request for reconsideration was untimely filed, she must demonstrate clear evidence of error by OWCP in the denial of her traumatic injury claim.

The Board further finds that OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.<sup>18</sup> As noted, section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>19</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the director of OWCP shall contain findings and facts and a statement of reasons.<sup>20</sup> As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>21</sup>

In denying appellant's August 26, 2021 request for reconsideration, OWCP acknowledged appellant's reconsideration request and receipt of the May 13, June 24, July 22, and August 19, 2022 reports from Dr. Corrente. However, it failed to analyze this evidence as to whether it was sufficient to demonstrate clear evidence of error and did not make findings explaining the basis of its decision.<sup>22</sup> The case must, therefore, be remanded for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.<sup>23</sup>

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<sup>16</sup> *S.C.*, Docket No. 13-0738 (issued July 8, 2013); *I.C.*, Docket No. 14-0170 (issued June 3, 2014).

<sup>17</sup> *M.P.*, Docket No. 19-0674 (issued December 16, 2019).

<sup>18</sup> *See Order Remanding Case, F.K.*, Docket No. 22-1239 (issued December 13, 2022); *M.G.*, Docket No. 21-0893 (issued December 27, 2021); *T.J.*, Docket No. 21-0586 (issued September 30, 2021); *see also* 20 C.F.R. § 10.607(b).

<sup>19</sup> 5 U.S.C. § 8124(a).

<sup>20</sup> 20 C.F.R. § 10.126.

<sup>21</sup> Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

**CONCLUSION**

The Board finds that OWCP properly found that appellant's request for reconsideration was untimely filed. The Board further finds that the case is not in posture for decision regarding whether appellant has demonstrated clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 12, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 1, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board