

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

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E.W., Appellant)	
)	
and)	Docket No. 24-0279
)	Issued: April 24, 2024
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Detroit, MI,)	
Employer)	
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Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 25, 2024 appellant, through counsel, filed a timely appeal from a December 19, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last merit decision was a January 14, 2019 decision of OWCP. As there was no merit decision by OWCP issued within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 2, 2015 appellant, then a 68-year-old training technician, filed a traumatic injury claim (Form CA-1) alleging that on August 31, 2015 she strained her left knee and leg when she fell in a hallway while in the performance of duty. She stopped work on August 31, 2015 and returned to part-time modified employment on February 1, 2016. OWCP accepted the claim for unspecified lateral meniscus derangements of the left knee and left knee sprain. It paid appellant wage-loss compensation on the supplemental and periodic rolls.

A September 11, 2015 magnetic resonance imaging (MRI) scan of the left knee demonstrated fraying of the lateral and medial meniscus without a discrete tear and edema of the anterior cruciate ligament which was described as either degenerative or posttraumatic.

In a March 22, 2016 report, Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed a resolved soft tissue injury of the left knee. He found that appellant could return to her date-of-injury employment without restrictions.

On May 18, 2016 Dr. Jeffrey H. DeClaire, a Board-certified orthopedic surgeon, performed a left knee chondroplasty of the patellofemoral joint, major synovectomy, and resection of fibrotic medial plica.

In an addendum report dated December 7, 2016, Dr. Obianwu opined that the August 31, 2015 employment injury had not aggravated or accelerated appellant's left knee osteoarthritis. He further found that the May 18, 2016 surgery was unrelated to the accepted employment injury.

In a March 2, 2017 report, Dr. DeClaire opined that appellant's employment injury had permanently accelerated her preexisting knee arthritis. He advised that she was scheduled for patellofemoral joint replacement on March 27, 2017 and attributed her need for surgery to her employment injury.

OWCP determined that a conflict in medical opinion existed between Dr. Obianwu and Dr. DeClaire and referred appellant to Dr. Paul Drouillard, an osteopath and Board-certified orthopedic surgeon, for an impartial medical examination. It requested that Dr. Drouillard address appellant's current employment-related condition and disability, whether the May 18, 2016

³ Docket No. 21-0118 (issued July 7, 2022).

surgery was necessary and causally related to the accepted employment injury, and whether she required continued treatment, including the proposed left knee replacement.

In a report dated May 22, 2017, Dr. Drouillard diagnosed status post a left total knee arthroplasty due to nonemployment-related degenerative joint disease, right knee degenerative joint disease, and narcotic habituation. He found that appellant's left knee condition had resulted from a degenerative condition. Dr. Drouillard opined that she had no residuals from the accepted August 31, 2015 left knee derangement, which he indicated was "more accurately described as a contusion." He related that appellant's May 8, 2016 surgery was not warranted and that she had undergone a knee replacement due to a degenerative process. Dr. Drouillard found that she could resume her usual employment.

By decision dated July 26, 2018, OWCP, based on Dr. Drouillard's opinion, terminated appellant's wage-loss compensation and medical benefits, effective that date, as the weight of the evidence established that she had no further employment-related disability or need for further medical treatment due to her left knee internal derangement and left knee sprain. It further noted that he had found that her additional diagnoses were not causally related to or aggravated by the August 31, 2015 employment injury.

On August 1, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on December 11, 2018.

By decision dated January 14, 2019, OWCP's hearing representative affirmed the July 26, 2018 decision.

On November 23, 2022 appellant's counsel advised that he had requested expansion of the acceptance of the claim on August 24, 2022, and on January 26, 2023 he requested a decision on claim expansion. On May 15, 2023 he advised that he had submitted a motion to expand the acceptance of appellant's claim to include osteoarthritis of the left knee on August 24, 2022. Counsel submitted additional medical evidence.

On September 25, 2023 appellant, through counsel, requested reconsideration of the January 14, 2019 decision. Counsel argued that he had repeatedly requested that OWCP expand its acceptance of the claim to include left knee osteoarthritis but had received no response. Counsel maintained that OWCP should rescind its January 14, 2019 decision and issue a new merit decision after considering the newly submitted evidence. He noted that OWCP could reopen a case based on changed circumstances.

By decision dated December 19, 2023, OWCP summarily denied appellant's request for reconsideration of its January 14, 2019 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁸ 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 claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision 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. 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.¹²

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted

⁴ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

⁷ *W.B.*, Docket No. 23-0473 (issued August 29, 2023); *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (September 2020).

¹⁰ *S.D.*, Docket No. 23-0626 (issued August 24, 2023); *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *J.M.*, Docket No. 22-0630 (issued February 10, 2023); *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

¹² *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 10.

before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

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

OWCP's regulations¹⁵ and procedures¹⁶ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷ The most recent merit decision was OWCP's January 14, 2019 decision. As appellant's request for reconsideration was received on September 25, 2023, more than one year after the January 14, 2019 decision, the Board finds that it was untimely filed. Consequently, she must demonstrate clear evidence of error on the part of OWCP in its January 14, 2019 decision.¹⁸

The Board finds that OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.¹⁹ 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.²⁰ Its regulations at 20 C.F.R. § 10.126 specify that the decision of the director of OWCP shall contain findings and facts and a statement of reasons.²¹ 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.²²

¹³ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (September 2020).

¹⁴ *L.J.*, Docket No. 23-0282 (issued May 26, 2023); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁵ 20 C.F.R. § 10.607(a); *see L.T.*, Docket No. 21-0844 (issued April 21, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ *Supra* note 6 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ *Id.* at § 10.607(b); *see W.B.*, *supra* note 7; *M.W.*, Docket No. 17-0892 (issued May 21, 2018).

¹⁹ *See I.L.*, Docket No. 23-0329 (issued August 1, 2023); *L.J.*, *supra* note 14; *M.G.*, Docket No. 21-0893 (issued December 27, 2021); *see also* 20 C.F.R. § 10.607(b).

²⁰ 5 U.S.C. § 8124(a).

²¹ 20 C.F.R. § 10.126.

²² 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).

In denying appellant's request for reconsideration, OWCP did not address the arguments raised by counsel or conduct a limited review of the medical evidence.²³ The Board shall therefore remand the case for an appropriate decision, which provides detailed reasons for finding that appellant's reconsideration request failed to demonstrate clear evidence of error.²⁴

CONCLUSION

The Board finds 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's request for reconsideration demonstrated clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2023 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: April 24, 2024
Washington, DC

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

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

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

²³ See *J.T. (J.T)*, Docket No. 23-0863 (issued December 29, 2023); *L.J.*, *supra* note 14.

²⁴ See *L.J.*, *id.*; *V.R.*, Docket No. 19-0536 (issued February 22, 2021).