

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

_____)	
E.W., Appellant)	
)	
and)	Docket No. 24-0714
)	Issued: August 30, 2024
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Detroit, MI,)	
Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 25, 2024 appellant, through counsel, filed a timely appeal from a June 6, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision is a Board decision dated July 7, 2022, which became final after 30 days of issuance and is not subject to further review.² As there is no merit decision by OWCP issued within 180

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 20 C.F.R. § 501.6(d). See also *J.H.*, Docket No. 23-0055 (issued January 30, 2024); *J.T.*, Docket No. 21-0844 (issued April 21, 2023); *M.D.*, Docket No. 22-0542 (issued August 17, 2022).

days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's untimely request for reconsideration of the merits of her claim as it failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions 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 rolls from October 16 through November 14, 2015, on the periodic rolls from November 15, 2015 through January 9, 2016, and on the supplemental rolls from January 10 through 31, 2016. Thereafter, OWCP paid her wage-loss compensation for intermittent disability from February 1 to May 17, 2016.

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 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 position without restrictions.

An MRI scan of the left knee obtained March 22, 2016 revealed near full-thickness cartilage loss and subchondral edema within the patellofemoral compartment and intact menisci and ligaments.

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. OWCP did not authorize the surgery.

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.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 21-0118 (issued July 7, 2022); Docket No. 24-0279 (issued April 24, 2024).

In a report dated March 2, 2017, Dr. DeClaire opined that appellant's employment injury had permanently accelerated her preexisting knee osteoarthritis. 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 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 telephonic hearing was held on December 11, 2018.

By decision dated January 14, 2019, OWCP's hearing representative affirmed the July 26, 2018 decision.⁵

In an impairment evaluation dated May 23, 2019, Dr. Sami E. Moufawad, a Board-certified physiatrist, discussed appellant's history of an August 31, 2015 employment injury and subsequent February 2016 knee arthroscopy and March 2017 total knee replacement. He diagnosed left meniscus derangements, unspecified lateral meniscus, and a sprain of the lateral collateral ligament. Dr. Moufawad advised that appellant had "arthritis of the left knee that was aggravated by the work injury" and had necessitated a total left knee replacement. He asserted that the fall and left knee contusions had destabilized her knee arthritis such that the condition progressed faster than usual with osteoarthritis. Dr. Moufawad attributed all diagnoses to the August 31, 2015 employment injury with the "chain reaction of the fall aggravating the preexisting

⁵ By decision dated May 30, 2019, OWCP denied appellant's claims for compensation (Form CA-7) beginning May 18, 2019.

osteoarthritis, which did not respond to conservative treatment with the injection and therapy and eventually led to total knee replacement.” He opined that appellant had 31 percent permanent impairment of the left lower extremity.

In an October 10, 2019 addendum report, Dr. Moufawad opined that appellant had preexisting left knee osteoarthritis at the time of her August 31, 2015 employment injury, accepted for left knee sprain. He asserted that the employment injury had aggravated and accelerated her left knee osteoarthritis and resulted in her need for a total knee replacement. Dr. Moufawad noted that prior to her injury appellant engaged in dancing, riding a bicycle, and walking. He indicated that the sudden loss of her ability to participate in these activities supported that she had sustained an aggravation of preexisting degenerative changes due to her August 31, 2015 employment injury. Dr. Moufawad disagreed with the opinions of Dr. Drouillard and Dr. Obianwu that appellant’s knee condition had resolved with no residuals. He reiterated that appellant had 31 percent permanent impairment due to her total knee replacement, which he found causally related to the August 31, 2015 employment injury.

On August 24, 2022 counsel requested that OWCP expand its acceptance of appellant’s claim to include left knee osteoarthritis. He resubmitted the May 23, 2019 impairment evaluation from Dr. Moufawad.

On November 23, 2022 counsel advised that on August 24, 2022 he had requested expansion of the acceptance of appellant’s claim. On January 26, 2023 he requested a decision on claim expansion. On May 15, 2023 counsel asserted 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. He submitted additional medical evidence.

In correspondence dated May 16, 2023, OWCP advised that the January 14, 2019 OWCP hearing representative’s termination decision had also found that the weight of the medical evidence supported that appellant’s preexisting left knee arthritis was not employment related. It indicated that it would consequently not expand its acceptance of the claim and enclosed copies of its prior decisions terminating wage-loss compensation and medical benefits.

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. He 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. Counsel reviewed the medical evidence of record and noted that on August 24, 2022 he had submitted a May 23, 2019 report from Dr. Moufawad finding that appellant sustained an aggravation of left knee arthritis leading to the need for a total knee replacement as a result of the August 31, 2015 employment injury. He asserted that Dr. Moufawad also found that she had continued residuals of her accepted employment injury.

By decision dated December 19, 2023, OWCP denied appellant’s request for reconsideration of its January 14, 2019 decision as it was untimely filed and did not demonstrate clear evidence of error. It indicated that she had based her request on medical evidence that had not been received at the time of the decision, and that it was thus insufficient to show error.

Appellant appealed to the Board. By decision dated April 24, 2024, the Board affirmed in part and set aside in part OWCP's December 19, 2023 decision.⁶ It found that OWCP properly determined that appellant's request for reconsideration was untimely filed. The Board further found, however, that OWCP had summarily denied appellant's request for reconsideration without providing the reasoning behind its determination. The Board remanded the case for OWCP to provide an appropriate decision with detailed reasons for its findings.

By decision dated June 6, 2024, OWCP denied appellant's request for reconsideration, finding that she had not demonstrated clear evidence of error in her untimely reconsideration request.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁷ 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.⁸ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

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.¹¹ 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.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

⁶ Docket No. 24-0279 (issued April 24, 2024)

⁷ 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).

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

¹⁰ *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).

¹¹ *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).

¹² *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 9 at Chapter 2.1602.5 (September 2020).

¹³ *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).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ 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.¹⁵

OWCP 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 (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.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's untimely request for reconsideration of the merits of her claim as it failed to demonstrate clear evidence of error.

On prior appeal, the Board determined that appellant's September 25, 2023 request for reconsideration was untimely as it was received more than one year after the January 14, 2019 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁸ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying the claim.

In the September 25, 2023 request for reconsideration, counsel contended that OWCP should expand its acceptance of appellant's claim to include left knee osteoarthritis, as supported by the May 23, 2019 report from Dr. Moufawad. He noted that Dr. Moufawad also found that she had residuals of her employment injury. However, the underlying issue of the case is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits. As this issue is medical in nature, it can only be resolved through the submission of probative medical evidence.¹⁹ Counsel's lay opinion regarding causal relationship does not constitute probative

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

¹⁵ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 13.

¹⁶ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 9 at Chapter 2.1602.5(a) (September 2020).

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

¹⁸ *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *A.A.*, Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹⁹ *See W.M.*, Docket No. 18-0565 (issued August 14, 2018); *S.J.*, Docket No. 17-1214 (issued April 16, 2018); *George C. Vernon*, 54 ECAB 319 (2003).

medical evidence.²⁰ Therefore, his contentions are insufficient to raise a substantial question concerning the correctness of OWCP's last merit decision.

In support of her request for reconsideration, appellant submitted May 23 and October 10, 2019 reports from Dr. Moufawad, who found that the accepted August 31, 2015 employment injury aggravated her left knee osteoarthritis and resulted in the need for a total left knee replacement. He explained that the injury had worsened her underlying arthritis, causing it to progress faster, as shown by her loss of the ability to engage in activities. The Board finds, however, that the submission of these reports does not establish clear evidence of error as they do not raise a substantial question concerning the correctness of OWCP's decision.²¹ It is not enough merely to show that the evidence could be construed to produce a contrary conclusion.²² Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to establish clear evidence of error.²³ Consequently, these reports are insufficient to demonstrate clear evidence of error.

Accordingly, the Board finds that OWCP properly denied appellant's untimely request for reconsideration as it failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's untimely request for reconsideration of the merits of her claim as it failed to demonstrate clear evidence of error.

²⁰ See *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *E.H.*, Docket No. 19-0365 (issued March 17, 2021); *James A. Long*, 40 ECAB 538 (1989).

²¹ *C.M.*, Docket No. 23-0958 (issued May 10, 2024).

²² *W.R.*, Docket No. 24-0244 (issued May 22, 2024); *A.N.*, Docket No. 24-0503 (issued July 15, 2024); *C.M.*, Docket No. 23-0958 (issued May 10, 2024); *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

²³ *M.W.*, Docket No. 24-0340 (issued May 13, 2024); *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 30, 2024
Washington, DC

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

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

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