United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 11-1988**
	)	**Issued: June 6, 2012**
FEDERAL JUDICIARY, FEDERAL PUBLIC DEFENDERS, Little Rock, AR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 27, 2011 appellant filed a timely appeal from a February 28, 2011 merit decision of the Office of Workers' Compensation Programs terminating her compensation benefits and a July 21, 2011 merit decision denying authorization for left knee surgery. On September 2, 2011 she filed a timely appeal of a March 3, 2011 nonmerit decision denying her request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits effective March 14, 2010; (2) whether OWCP properly denied reconsideration of its January 13, 2010 decision on the grounds that it was untimely and failed to establish clear evidence of error; and (3) whether OWCP properly denied authorization for left knee surgery.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 6, 2006 appellant, then a 41-year-old investigator, filed a traumatic injury claim alleging that she sustained a left knee injury when she fell from a ladder retrieving a file. The claim was initially accepted for left knee meniscus tear; left knee arthroscopy and anterior cruciate ligament (ACL) disruption and ACL reconstruction.

Appellant returned to light duty on February 10, 2007. She was terminated by the employing establishment on May 22, 2007 due to its inability to accommodate her medical restrictions. OWCP accepted appellant's claim for a recurrence of disability effective May 23, 2007 and placed her on the periodic rolls.

Appellant was treated by Dr. John Vander Schilden, a Board-certified orthopedic surgeon, who performed left knee arthroscopic surgery, with medial and lateral meniscectomies on October 29, 2008. On June 10, 2009 Dr. Vander Schilden performed left knee arthroscopic meniscectomy and ACL revision surgery.

On January 27, 2009 appellant requested that her claim be expanded to include conditions involving her neck, upper and lower extremities and back to include: thoracic outlet syndrome; subluxation to C4 to C7; bilateral hand numbness; right shoulder rotator cuff tear and subluxation; back, bowel and bladder disturbances; right lower extremity radiculopathy; left knee tibia fracture; complete ACL disruption, lateral meniscus tear and bone contusion. The record contains numerous medical reports relating to appellant's claimed back, bowel and carpal tunnel conditions.[2]

Appellant was treated by Dr. Syad Ashfaq Hasan, a Board-certified orthopedic surgeon, for her left shoulder condition. In a March 9, 2009 report, Dr. Hasan diagnosed acromioclavicular (AC) joint arthritis and type-two superior labral tear of the right shoulder, based on the results of a February 9, 2009 magnetic resonance imaging (MRI) scan.

On September 11, 2009 OWCP expanded appellant's claim to include the conditions of right shoulder AC sprain; left knee sprain and bone contusion and left knee retear of the medial meniscus.

In an October 8, 2009 report, Dr. Hasan described the history of appellant's November 1, 2006 shoulder injury and provided examination findings. He reiterated his diagnoses of AC joint arthritis and type-two superior labral tear of the right shoulder and recommended arthroscopic distal clavicle resection as well as arthroscopic superior labral repair versus debridement.

[2] In a report dated November 15, 2006, Dr. Larry Nguyen, a Board-certified orthopedic surgeon, reported that appellant had a previous history of a C3 pinched nerve since February 2006. On September 13, 2007 Dr. Robert Holladay, a Board-certified orthopedic surgeon, opined that appellant's carpal tunnel syndrome was not causally related to her accepted injury. On December 7, 2007 Dr. Nguyen agreed with Dr. Holladay's opinion that appellant's carpal tunnel syndrome was not causally related to her accepted injury. On August 28, 2009 Dr. John Wilson, a treating physician, found no evidence of back disease and opined that appellant's bladder and bowel conditions were not related to her work injury.

On October 6, 2009 Dr. Vander Schilden released appellant to return to work with no restrictions. In an outpatient note, he stated that she was totally asymptomatic, noting that range of motion in the left knee was 0 to 135 degrees and symmetric, and Lachman and pivot shift were zero.

By decision dated January 13, 2010, OWCP denied appellant's request to expand her claim to include neck and back conditions, right rotator cuff tear and subluxation, bowel and bladder conditions and carpal tunnel syndrome, finding that the medical evidence was insufficient to establish a causal relationship between those claimed conditions and the accepted injury.

On January 21, 2010 OWCP notified appellant of its intent to terminate her compensation for wage-loss benefits based on Dr. Vander Schilden's October 6, 2009 report, which represented the weight of the medical evidence and demonstrated that appellant no longer had any disability due to her accepted injury. It advised her that she had 30 days within which to provide additional evidence or argument if she disagreed with the proposed termination.

Appellant submitted a February 2, 2010 report from her newly authorized treating physician, Dr. Bernard Crowell, an orthopedic surgeon, who provided a history of the November 2006 injury, stating that appellant sustained injuries to her left knee and right shoulder when she fell from a ladder at work. On examination of the left knee, she had a mild effusion. There was some laxity of the ACL and a positive anterior and posterior drawer sign with tenderness to palpation around the medial and lateral joint line. Dr. Crowell stated that the description of appellant's injury correlated with the fall and she could have sustained a superior labral anteroposterior (SLAP) lesion of the right shoulder, along with a rotator cuff tear secondary to suspending herself on a box six feet off the ground falling and traumatizing her left knee. This compounded by appellant's weight would have injured her ACL requiring reconstruction of her left knee. Dr. Crowell recommended an MRI scan of the left knee.

In a letter dated February 20, 2010, and received by OWCP on February 24, 2010, appellant objected to the proposed termination, contending that Dr. Vander Schilden's October 6, 2009 report was insufficient to establish that she was no longer disabled due to the accepted injury. She noted that Dr. Vander Schilden's report addressed only her accepted knee condition, but failed to address her accepted shoulder condition. Appellant alleged that the physician failed to address her subjective complaints, the continued instability of the left leg or the fact that she continued to use a crutch periodically. She stated that she was attaching a copy of a February 12, 2010 MRI scan report, which provided new medical evidence of continued disability, and a report from her new physician, who was recommending surgery. Appellant requested an extension of time pending receipt by OWCP of her doctor's report.

Appellant submitted a February 12, 2010 report of an MRI scan of the left knee reflecting postoperative changes to the menisci with a superimposed tear to the posterior horn and body junction of the medial meniscus extending to the undersurface; osteoarthritic change; full-thickness cartilage defect of the patella; moderate to large-sized joint effusion with small loose

bodies and moderate prepatellar soft tissue swelling. She also submitted a February 16, 2010 letter from Dr. Crowell advising her that she had been scheduled for surgery on March 12, 2010.

By decision dated February 25, 2010, OWCP finalized its proposal to terminate appellant's compensation benefits effective March 14, 2010. The claims examiner stated that appellant had submitted three documents in response to its proposal to terminate, namely a February 2, 2010 treating note from Dr. Crowell, her request to change treating physicians to Dr. Crowell and a February 13, 2010 request for accounting of disclosures. He found that evidence sufficient to alter the recommendation to terminate appellant's compensation for wage loss had not been received.

In a letter dated February 26, 2010, OWCP informed appellant that it had not reviewed her February 20, 2010 letter, the February 12, 2010 MRI scan report or Dr. Crowell's February 16, 2010 report prior to issuing its February 25, 2010 termination decision because the documents were "not viewable at the time the decision was issued." The claims examiner stated that the medical documents received were not sufficient to support appellant's inability to return to work.

In a January 12, 2010 report, received by OWCP on March 2, 2010, Dr. Crowell stated that appellant injured her right shoulder and back in November 2006 and had been experiencing pain ever since. On examination of the right shoulder, range of motion with forward elevation and abduction were 160 degrees. Appellant was able to perform a subscapulary lift-off test without any difficulty. She had tenderness to palpation over the right AC joint and pain with abduction over the tip of the acromion. Strength in the upper extremity was 5/5. Sensation was intact. Speed test and drop arm test was negative. Appellant was able to perform an Apley's scratch test. A February 9, 2009 MRI scan revealed a Type II SLAP tear involving the posterior superior labrum. Also noted was a moderate AC joint arthrosis with subchondral cystic changes, as well as posterior subluxation of the humeral head, low-grade articular surface tear involving the anterior fibers of the supraspinatus, along with low-grade interstitial tear. Dr. Cromwell diagnosed a SLAP tear, along with supraspinatus and infraspinatus articular surface tears along with AC joint arthrosis. He recommended an AC joint or arthroscopic distal clavicle resection, as well as arthroscopic superior labrum repair versus debridement.

In a February 16, 2010 report, Dr. Crowell reviewed the results of the February 12, 2010 MRI scan, which reflected medial and lateral meniscal tears, along with several loose bodies ranging approximately 5.0 millimeters in size, as well as a large joint effusion. On examination of the left knee, appellant was positive for effusion. There was mild laxity with anterior and posterior drawer signs and a positive McMurray sign, both over the medial and lateral side of the knee. Range of motion was 0 to 120. The patella was not subluxable. Dr. Crowell recommended that appellant undergo an arthroscopic medial and lateral meniscectomy, along with removal of loose bodies.

On March 5, 2010 OWCP routed the case record to the district medical adviser (DMA) for review and an opinion as to whether the requested surgery was medically necessary. In a report dated March 10, 2010, the DMA opined that an additional surgery was not warranted because all other available treatment options, such as drainage and physical therapy, had not

been explored. He stated that Dr. Crowell had not properly correlated the tears that were evident on MRI scan with examination findings, such as catching in the knee.

On April 6, 2010 Dr. Crowell responded to the DMA's March 10, 2010 report, noting that locking and catching are subjective terms used by physicians when they ask patients what is causing their pain. The positive McMurray sign was an objective finding for patients who have meniscal tears. Dr. Cromwell stated that the DMA's recommendation for treatment options such as aspiration of fluid from the knee and injecting steroids, were inappropriate in appellant's case, because they are treatment modalities used only when patients have advanced osteoarthritis of the knees. He noted that appellant's position as an investigator included driving across the state and out of the state visiting court houses, hospitals, school institutions, and random facilities to obtain medical records, modern day congeniality, land records going back hundreds of years, going through vaults of storage rooms and warehouses. It also entailed climbing ladders, walking over debris, crawling under tables, and removing discarded office furniture and equipment. Dr. Crowell reiterated that the best treatment for appellant would be operative intervention. He restricted her from carrying greater than 5 to 10 pounds or from squatting, stooping or climbing ladders.

On April 22, 2010 appellant requested reconsideration of the February 25, 2010 termination decision. She contended that Dr. Vander Schilden's report was insufficient to establish that she was not disabled.

In an April 27, 2010 report, Dr. Crowell discussed the progression of appellant's right shoulder condition. He stated that prior to the MRI scan of 2007, there were hypertrophic changes and inflammation of the AC joint consistent with the low-grade AC joint trauma and joint arthropathy. In 2009 it had progressed to moderate AC joint arthrosis with subchondral cystic changes and edema of the distal clavicle with spinal fluid in the AC joint. Dr. Cromwell opined that her current shoulder condition was likely a progression of the trauma she suffered from her accepted injury.

OWCP found a conflict in medical opinion between the DMA and Dr. Crowell as to whether the recommended left knee surgery was medically necessary. Appellant was referred to Dr. Harold H. Chakales, a Board-certified orthopedic surgeon, in order to resolve the conflict.

In a May 4, 2010 report, Dr. Chakales provided a history of injury and treatment. Noting that appellant's ACL was intact, he stated that she was developing progressive osteoarthritis of the joint in her left knee and that because of her age, size and progression of the disease, he would not recommend arthroscopic surgery.

By decision dated July 26, 2010, OWCP denied modification of its February 25, 2010 termination decision, finding that the medical evidence submitted was insufficient to establish that she continued to be totally disabled from all work due to the accepted injury. The claims examiner found that the medical evidence from Dr. Crowell did not establish that Dr. Vander Schilden's opinion releasing appellant to the regular duties of her investigator date-of-injury position on October 6, 2009 was a medical error on his part. OWCP informed appellant that, if she had sufficient evidence to support a recurrence of disability beginning

April 6, 2010, the date Dr. Crowell recommended work restrictions, then she should pursue the issue by filing a notice of recurrence (Form CA-2a).

In a letter dated May 5, 2010, appellant stated that OWCP had issued its January 13, 2010 decision denying surgery for the right shoulder only one day after an authorized appointment with her new physician. She contended that her doctor was, therefore, not permitted to submit his report prior to OWCP's decision. Appellant alleged that she was deprived of procedural rights to present evidence in support of her claims.

In a letter dated June 10, 2010, the office of Congressman Vic Snyder inquired on behalf of appellant why OWCP had denied authorization for appellant's right shoulder surgery in spite of the recommendation of five Board-certified surgeons.

By decision dated August 10, 2010, OWCP denied authorization for left knee arthroscopic surgery based upon the opinion of the impartial medical examiner. The claims examiner found that Dr. Chakales' report, which represented the weight of the medical evidence, did not establish that the recommended surgery was warranted.

Appellant requested a review of the written record. In a decision dated December 5, 2010, an OWCP hearing representative set aside the August 10, 2010 decision. He found that OWCP had improperly found a conflict in medical opinion where none existed between the DMA and appellant's physician, noting that the DMA had merely opined that surgery should not be considered until all other options had been explored. The hearing representative found therefore that Dr. Chakales' report should not be awarded the special weight granted to a referee, but rather served to create a conflict with the opinion of Dr. Crowell. He remanded the case to OWCP with instruction to refer appellant to a new impartial medical specialist in order to resolve the conflict.

In a December 7, 2010 report, Dr. Crowell stated that appellant had a documented right shoulder injury. He provided examination findings and diagnosed a SLAP tear, along with inflammation with tears of the supraspinatus and infraspinatus tendons with AC joint arthrosis.[3]

In a letter dated January 12, 2011, appellant requested an extension of time to file a request for reconsideration of the January 13, 2010 decision. She stated that she had been unable to finalize her appeal due to the untimely death of her father on January 10, 2011. OWCP recorded appellant's letter as being received on January 19, 2011. The record does not contain a copy of the envelope in which the January 12, 2011 letter arrived.

In a letter dated January 21, 2011, OWCP informed appellant that her request for an extension of time to file her reconsideration request was denied.

[3] The record contains numerous follow-up reports relating to appellant's right shoulder condition from Dr. Crowell dated through December 7, 2010.

On remand, OWCP referred appellant, together with a statement of accepted facts and the medical record to Dr. Charles Varela, a Board-certified orthopedic surgeon, in order to resolve the conflict in medical opinion regarding the need for knee surgery. In a January 31, 2011 report, Dr. Varela provided a history of injury and examination findings. Examination of the left lower extremity revealed slight varus deformity of approximately five degrees, with slight effusion present. Appellant had full range of motion from 0 to 130 degrees and good medial and lateral stability. Anterior drawer did reveal a solid end point, which was slightly more lax than the opposite side. No medial or lateral joint pain was exhibited on palpation. X-rays of the left lower extremity revealed slight varus deformity, as was noted on physical examination, of approximately five degrees. There was decreased medial joint space compared to the opposite side. Two metallic screws were present, which were in satisfactory position. Dr. Varela reported that, although appellant complained of instability, he did not find any evidence of gross instability of left knee; rather, that there was only slight anterior laxity versus the opposite side, which he opined would be satisfactory stability for normal everyday activities. He stated that appellant's subjective complaints were not confirmed by objective findings.

After examining appellant and reviewing her medical records, Dr. Varela opined that further surgical intervention was not warranted. He stated that appellant had obvious chronic degenerative changes, which were present prior to her work injury and would explain the multiple findings on the MRI scan. Dr. Varela opined that the meniscal findings were likely artifact in nature (due to her multiple surgeries and obesity), as she had no symptoms or physical findings indicative of significant meniscal pathology.

On February 14, 2011 appellant submitted a 22-page document supporting a request for reconsideration of the January 13, 2010 decision denying expansion of her claim. She contended that her claim for rotator cuff tear was denied because she misidentified the injury on her Form CA-1. Appellant argued that OWCP should have considered Dr. Crowell's January 12, 2010 report in its January 13, 2010 decision.[4]

In support of her request, appellant submitted: a November 2, 2007 letter and March 13, 2007 clinic note from Dr. Lon Burba; a July 20, 2009 referral to a back specialist from a Dr. Barrow; A March 22, 2010 letter and a September 30, 2009 clinic note from Dr. Ronald J. Kuhn, a Board-certified urologist, regarding a bladder condition; an emergency room report dated July 26, 2009; clinic notes dated March 5, 2008 to January 5, 2011; an October 9, 2009 report from Cedars-Sinai; a December 31, 2009 report from Dr. Thomas P. Rooney, a Board-certified orthopedic surgeon; a March 19, 2010 report from Dr. Brad A. Thomas, a Board-certified neurological surgeon, regarding back, neck, right leg and right knee pain; e-mails dated November 16, 2008 to June 12, 2009 from Dr. Vander Schilden regarding injury to left knee in physical therapy and problems with aggravation to back problem; and medical records related to a 2004 motor vehicle accident.

In a February 17, 2011 decision, OWCP denied authorization of the left knee arthroscopic medial and lateral meniscectomy. It found that the weight of medical evidence,

[4] The Board notes that Dr. Crowell's January 12, 2010 report was not received by OWCP until March 2, 2010.

which was represented by Dr. Varela's well-rationalized report, did not support that the procedure would cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation, in accordance with the provisions of section 8103(a) of FECA.

By decision dated February 28, 2011, OWCP denied modification of its July 26, 2010 decision finding that the evidence submitted was not sufficient to establish that appellant continued to be totally disabled from all work because of the accepted work-related conditions. The claims examiner stated:

> "The evidence received since the prior decision does not contain a well rationalized medical opinion that is sufficient to overcome Dr. Vander Schilden's conclusion on October 6, 2009 you could perform the regular duties of your former date[-]of[-]injury position of investigator. Dr. Vander Schilden provided a well[-]rationalized opinion that at that time you were able to return to your date[-]of[-] injury position."

By decision dated March 3, 2011, OWCP denied appellant's request for reconsideration of the January 13, 2010 decision on the grounds that it was untimely and failed to establish clear evidence of error.

On March 19, 2011 appellant requested a review of the written record regarding the February 17, 2011 decision denying authorization for left knee surgery. She submitted follow-up reports from Dr. Crowell dated January 25 through March 29, 2011 reiterating his opinion that left knee arthroscopic surgery was appropriate.

By decision dated July 21, 2011, an OWCP hearing representative affirmed the February 17, 2011 decision denying authorization for left knee surgery on the grounds that it was not medically warranted. He found that the weight of the medical evidence was represented by the well-rationalized report of the impartial medical examiner, Dr. Valera, whose opinion was entitled to special weight.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[5] After it has determined that an employee has disability causally related to her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[6] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7]

[5] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[6] *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[7] *See I.R.*, Docket No. 09-1229 (issued February 24, 2010); *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

ANALYSIS -- ISSUE 1

OWCP initially accepted appellant's claim for left knee meniscus tear; left knee arthroscopy and ACL disruption and ACL reconstruction. It later expanded the accepted conditions to include right shoulder AC sprain; left knee sprain and bone contusion; left knee retear of the medial meniscus. By decision dated February 25, 2010, OWCP terminated appellant's compensation benefits effective March 14, 2010 based on Dr. Vander Schilden's October 6, 2009 report, which purportedly demonstrated that appellant no longer had any disability due to her accepted injury. In decisions dated July 26, 2010 and February 28, 2011, OWCP denied modification of its February 25, 2010 decision. The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective March 14, 2010.

In its February 28, 2011 decision, OWCP found that appellant had not met her burden to establish that she continued to be totally disabled from all work because of the accepted work-related conditions. As noted, however, once it accepts a claim and pays compensation, OWCP has the burden of justifying modification or termination of an employee's benefits.[8] After it has determined that an employee has disability causally related to her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[9] The Board finds that OWCP improperly placed the burden of proof on appellant in this case.

The decision to terminate appellant's compensation was based upon Dr. Vander Schilden's October 6, 2009 report, which the claims examiner found to be well rationalized and sufficient to establish that she was able to return to her date-of-injury position. The Board finds, however, that his report is insufficient to establish that appellant was no longer disabled. On October 6, 2009 Dr. Vander Schilden released appellant to return to work with no restrictions. He did not, however, discuss the duties of her date-of-injury job in the context of her accepted conditions. In a brief outpatient note, Dr. Vander Schilden stated that she was totally asymptomatic, noting that range of motion in the left knee was 0 to 135 degrees and symmetric, and Lachman and pivot shift were 0. He provided no medical rationale, however, to support his conclusory opinion. The Board has long held that a medical opinion without rationale is of limited probative value.[10] Moreover, Dr. Vander Schilden did not provide examination findings or an opinion on disability related to appellant's accepted right shoulder condition. For all of these reasons, the report is insufficient to establish that appellant was able to perform the duties of her date-of-injury job as an inspector.

[8] *Supra* note 5

[9] *Supra* note 6.

[10] *T.F.*, 58 ECAB 128 (2006); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006) (a medical report is of limited probative value on a given medical question if it is unsupported by medical rationale); *see also S.D.*, 58 ECAB 713 (2007).

The Board notes that OWCP did not address the issue of whether appellant had any continuing disability after March 14, 2010.[11] Rather, it reviewed the numerous medical reports submitted subsequent to October 6, 2009 to determine whether they established that Dr. Vander Schilden's opinion that appellant was able to return to her date-of-injury position at that time was erroneous. Although the termination was not effective until March 14, 2010, OWCP did not address Dr. Crowell's February 2, 2010 report reflecting objective symptoms related to the left knee and right shoulder conditions; the February 12, 2010 MRI scan of the left knee reflecting, among other things, a superimposed tear to the posterior horn and body junction of the medial meniscus; or Dr. Crowell's February 16, 2010 letter indicating that appellant had been scheduled for surgery on March 12, 2010. These documents were relevant to the issue of appellant's disability and were properly before OWCP prior to its February 25, 2010 decision. Therefore, OWCP was required to consider them.[12] Although OWCP's noted its failure to review these reports prior to the issuance of its February 25, 2010 decision, the contents of these reports were never addressed in any formal decision, including the February 28, 2011 decision.

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits effective March 14, 2010. Therefore, the February 28, 2011 decision must be reversed.

LEGAL PRECEDENT -- ISSUE 2

FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[13] OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[14] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.[15]

[11] OWCP advised appellant to file a notice of recurrence if she believed that she was disabled after March 14, 2010. As the issue of continuing disability was not addressed in the February 28, 2011 decision, the Board will not address it in this appeal.

[12] The Board notes that OWCP informed appellant by letter dated February 26, 2010 that the aforementioned documents were not available for viewing prior to its February 25, 2010 decision. Board precedent requires OWCP to review all evidence submitted by a claimant and received by OWCP prior to the issuance of its final decision, including evidence received on the date of the decision. *See Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, 41 ECAB 548 (1990) (OWCP did not consider new evidence received four days prior to the date of its decision); *see Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where OWCP did not consider a medical report received on the date of its decision). It makes no difference that the claims examiner may not have been directly in possession of the evidence. Indeed, Board precedent envisions evidence received by OWCP but not yet associated with the case record when the final decision is issued.

[13] 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.607(a).

[15] *Supra* note 13; *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[16] OWCP regulations and procedure 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(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.[17]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[18] The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.[19] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.[20] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[21] 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.[22] The Board makes an independent determination of whether a claimant 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.[23]

ANALYSIS -- ISSUE 2

In its March 3, 2011 decision, OWCP denied appellant's February 14, 2011 request for reconsideration of the January 13, 2010 decision, finding that it was not timely filed and failed to present clear evidence of error. The underlying issue in the January 13, 2010 decision was appellant's request to expand her claim. The Board finds that OWCP improperly determined that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

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[16] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[17] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). The term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows 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. *Id.* at Chapter 2.1602.3c.

[18] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[19] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[20] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[21] *See M.L.*, Docket No. 09-956 (issued April 15, 2010). *See Leona N. Travis*, *supra* note 19.

[22] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[23] *Pete F. Dorso*, 52 ECAB 424 (2001).

Appellant had until January 13, 2011 to make a timely request for reconsideration.[24] She submitted a 22-page document dated February 14, 2011, which OWCP determined to be her request for reconsideration. The Board finds, however, that appellant notified OWCP of her intent to seek reconsideration of the January 13, 2010 decision, and submitted evidence and argument in support of her request, within the required one-year time period.

In a letter dated January 12, 2011, appellant requested an extension of time to file a request for reconsideration of the January 13, 2010 decision, explaining that she had been unable to finalize her appeal due to the untimely death of her father on January 10, 2011.[25] The Board finds that appellant's January 12, 2011 letter placed OWCP on notice of her intent to request reconsideration of the January 13, 2010 decision. The record reflects that appellant's letter was received on January 19, 2011. The record, however, does not contain a copy of the envelope in which the January 12, 2011 letter arrived. The Board notes that OWCP's procedure manual provided at that time that timeliness for a reconsideration request is determined not by the date OWCP receives the request, but by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.[26] As the envelope was not retained, the date of receipt of the appellant's letter is the date of the letter itself. Therefore, OWCP received notice of appellant's intent to seek reconsideration of the January 13, 2010 decision within the required one-year period.

Subsequent to the January 13, 2010 decision denying her request to expand her claim, appellant submitted medical reports from Dr. Crowell reflecting the progression of her right shoulder condition. In a December 7, 2010 report, Dr. Crowell stated that appellant had a documented right shoulder injury and diagnosed a SLAP tear, along with inflammation with tears of the supraspinatus and infraspinatus tendons with AC joint arthrosis. On May 5, 2010 appellant argued that OWCP had issued its January 13, 2010 decision denying surgery for the right shoulder only one day after an authorized appointment with her new physician, contending that her doctor was not permitted to submit his report prior to the decision and that she was deprived of procedural rights to present evidence in support of her claims. She contacted her congressman, who in turn inquired on behalf of appellant why OWCP had denied authorization for right shoulder surgery in spite of the recommendation of five Board-certified surgeons. The Board finds that appellant's January 13, 2011 letter, together with the above-referenced submissions, constituted a timely request for reconsideration.

Appellant timely filed her request for reconsideration within one year of the January 13, 2010 decision. The Board finds that OWCP improperly denied her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since it erroneously reviewed the evidence submitted in support of appellant's

[24] The one-year time limitation for requesting reconsideration begins to run on the date of the original OWCP decision, 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008). A right to reconsideration within one year accompanies any merit decision on the issues. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (January 2004).

[25] As noted, OWCP denied her request for an extension of time.

[26] *Id.* at Chapter 2.1602.3(b)(1).

reconsideration request under the clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.[27]

LEGAL PRECEDENT -- ISSUE 3

Section 8103(a) of FECA provides for the furnishing of "services, appliances and supplies prescribed or recommended by a qualified physician" which OWCP, under authority delegated by the Secretary, "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation."[28] In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[29] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[30]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[31] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[32] Therefore, in order to prove that the surgical procedure is warranted appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[33]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[34]

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[27] *See Donna M. Campbell*, 55 ECAB 241 (2004).

[28] 5 U.S.C. § 8103(a).

[29] *Dale E. Jones*, 48 ECAB 648, 649 (1997).

[30] *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

[31] *See Debra S. King*, 44 ECAB 203, 209 (1992).

[32] *Id.*; *see also Bertha L. Arnold*, 38 ECAB 282 (1986).

[33] *See Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[34] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

ANALYSIS -- ISSUE 3

The Board finds that OWCP did not abuse its discretion when it denied appellant's request for right knee surgery in the July 21, 2011 decision. Although the requested procedure was deemed to be work related, appellant did not meet her burden of proof to establish that it was medically warranted.

OWCP found a conflict in medical opinion between appellant's treating physician, Dr. Crowell, who recommended that appellant undergo an arthroscopic medial and lateral meniscectomy of the left knee, and Dr. Chakales, a second opinion physician, who opined that surgery was not advisable due to appellant's age and the progression of the disease. It appropriately referred appellant, together with a statement of accepted facts and the medical record, to Dr. Varela in order to resolve the conflict.

In a January 31, 2011 report, Dr. Varela provided a history of injury and detailed examination findings. Appellant had full range of motion. Dr. Varela reported that, although appellant complained of instability, he did not find any evidence of gross instability of left knee; rather, that there was only slight anterior laxity versus the opposite side, which he opined would be satisfactory stability for normal everyday activities. He stated that appellant's subjective complaints were not confirmed by objective findings. After examining appellant and reviewing her medical records, Dr. Varela opined that further surgical intervention was not warranted. He stated that appellant had obvious chronic degenerative changes, which were present prior to her work injury and would explain the multiple findings on the MRI scan. Dr. Varela opined that the meniscal findings were likely artifact in nature (due to her multiple surgeries and obesity), as she had no symptoms or physical findings indicative of significant meniscal pathology. The Board finds that Dr. Varela's report, which was based on a proper history of injury and contained detailed physical findings, was sufficiently rationalized to constitute the special weight of the medical evidence.

The only limitation on OWCP's authority in approving, or disapproving, services under FECA is that of reasonableness.[35] In the instant case, after two prior authorized knee surgeries, appellant requested authorization of an arthroscopic left knee surgery. Based on the well-rationalized opinion of an impartial medical examiner, OWCP concluded that authorization for the requested surgery should be denied. The Board finds that OWCP's refusal to authorize the left knee surgery was reasonable and did not constitute an abuse of discretion.

On appeal, appellant contends that the July 21, 2011 decision was biased and that Dr. Chakales was improperly selected as a referee physician. The Board notes that Dr. Chakales was treated as a second opinion physician. The claims examiner relied on the well-rationalized opinion of Dr. Varela, who served as the impartial medical examiner in this case. The Board finds that appellant has presented no evidence of bias. For reasons stated, the Board finds that OWCP did not abuse its discretion in denying authorization for left knee surgery.

[35] *Daniel J. Perea, supra* note 30.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective March 14, 2010. The Board finds that appellant's request for reconsideration of OWCP's January 13, 2010 decision was timely filed. The Board further finds that OWCP did not abuse its discretion in denying authorization for left knee surgery.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2011 decision of the Office of Workers' Compensation Programs is affirmed. **IT IS FURTHER ORDERED THAT** the March 3, 2011 decision is set aside and remanded for action consistent with this decision. **IT IS FURTHER ORDERED THAT** the February 28, 2011 decision is reversed.

Issued: June 6, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board