United States Department of Labor
Employees' Compensation Appeals Board

W.J., Appellant	)	
and	)	**Docket No. 12-1746**
	)	**Issued: February 5, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Laguna Niguel, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 16, 2012 appellant filed a timely appeal from an August 3, 2012 nonmerit decision from the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as it was untimely filed and did not establish clear evidence of error. As the last merit decision was issued July 28, 2004, more than one year before the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.[2]

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not establish clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

[2] For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. *See* 20 C.F.R. § 501.3(d)(2). An appeal of a final adverse OWCP decision issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On January 29, 1999 appellant, then a 47-year-old letter carrier, filed an occupational disease claim alleging that he sustained a right lateral meniscal tear causally related to factors of his federal employment. OWCP accepted the claim for bilateral internal derangement of the knees.

By decision dated August 15, 2003, OWCP granted appellant a schedule award for a four percent permanent impairment of the left lower extremity. In a decision dated July 28, 2004, it denied his request for reconsideration of its August 15, 2003 decision after finding that he had not submitted evidence or raised argument sufficient to warrant reopening his case for further merit review.

On June 26, 2012 appellant requested that OWCP pay him any schedule award owed. He noted that he was refusing his physicians' recommendation for prostatic surgery. In a July 17, 2012 response, OWCP referred appellant to its August 15, 2003 schedule award decision.

On July 20, 2012 appellant requested reconsideration. He noted that it had been 10 years since the schedule award and that he had declined his physicians' recommendation that he receive bilateral knee implants. Appellant stated that he had retired and requested a lump-sum schedule award. He related that he earned less than he would have earned without his work injury.

In a decision dated August 3, 2012, OWCP denied appellant's request for reconsideration after finding that it was not timely filed and did not demonstrate clear evidence of error.

On appeal appellant contends that his physicians informed him that he needs knee replacement surgery. He maintains that his knees have deteriorated such that he experiences increased pain and decreased range of motion.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.[3] As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[4]

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical

[3] 5 U.S.C. § 8101 *et seq.*

[4] 20 C.F.R. § 10.607.

opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.[5] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.[6]

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.[7] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[8] As appellant's July 20, 2012 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.[9]

Appellant argued that he was entitled to an increased schedule award. He did not, however, allege any new exposure or submit any new medical evidence to establish that his condition had worsened since the August 15, 2003 decision granting a schedule award.[10] Instead, appellant requested reconsideration of the original schedule award decision. Consequently, the request for reconsideration was subject to the clear evidence of error standard of review.[11]

Appellant has not established clear evidence of error in OWCPs decision. He argued that his physicians recommended knee implants and noted that it had been 10 years since the prior decision. Appellant further alleged that he earned less than he would have had he not sustained his work injury.[12] His arguments, however, do not address the relevant issue of whether he is entitled to an increased schedule award. Appellant submitted no evidence and raised no argument showing any error with the prior schedule award determination. In order to establish clear evidence of error, the evidence submitted must raise a substantial question as to the

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

[6] *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[7] 20 C.F.R. § 10.607(a).

[8] *Robert F. Stone*, *supra* note 6.

[9] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[10] Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment. *See B.K.*, 59 ECAB 228 (2007); *Candace A. Karkoff*, 56 ECAB 622 (2005).

[11] *See Linda T. Brown*, 51 ECAB 115 (1999).

[12] A schedule award is made without regard to whether or not there is a loss of wage-earning capacity resulting from the injury and regardless of its effects upon employment or social opportunities. A schedule award is not intended to be compensation for wage loss or potential wage loss. *See Renee M. Straubinger*, 51 ECAB 667 (2000).

correctness of OWCP's decision.[13] Appellant has not submitted evidence or raised argument that meets this standard.

On appeal appellant maintains that his condition has worsened. He did not, however, support his reconsideration request with evidence or argument relevant to the underlying schedule award issue, and thus his request was insufficient on its face to warrant a reopening of his case for merit review. Appellant can request an increased schedule award based on evidence of new exposure or medical evidence showing the possible progression of an employment-related condition resulting in permanent impairment or increased impairment.[14]

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 3, 2012 is affirmed.

Issued: February 5, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[13] *See Veletta C. Coleman*, 48 ECAB 367 (1997).

[14] *See supra* note 10.