

FACTUAL HISTORY

This case has previously been before the Board. By decision dated March 9, 2007, the Board affirmed a February 24, 2006 decision by an OWCP hearing representative affirming an October 14, 2005 decision terminating appellant's compensation benefits.³ In affirming the February 24, 2006 OWCP decision, the Board found that the June 7, 2005 opinion of Dr. David G. Vanderweide, a second opinion Board-certified orthopedic surgeon, constituted the weight of the evidence and was sufficiently rationalized to support OWCP's decision terminating her compensation benefits. In affirming OWCP's June 2, 2006 decision denying reconsideration, the Board found that, while appellant advised in a May 4, 2006 letter that she was submitting a medical report, no report was received prior to OWCP's June 2, 2006 decision. The facts and circumstances surrounding the prior appeal are hereby incorporated by reference.⁴

On June 9, 2011 appellant's then counsel requested reconsideration and expansion of her claim to include left medial meniscus tear. On March 21 and April 15, 2013 OWCP again received the June 9, 2011 letter requesting reconsideration. Appellant's then counsel argued that the March 9, 2007 decision was based on erroneous information when it stated that OWCP had not approved a left knee partial meniscectomy on June 23, 2003. She argued that in view of the fact that OWCP had authorized this surgery, that it had accepted this condition, but failed to include it in the list of accepted conditions. In support of her request for reconsideration, appellant submitted medical and factual evidence including a June 23, 2003 hospital report.

By decision dated April 30, 2013, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error. It noted that the record contained no evidence that the June 23, 2003 surgery had been authorized by OWCP.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

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

³ Docket No. 06-1568 (issued March 9, 2007).

⁴ On November 17, 2002 appellant, then a 39-year-old clerk, filed a traumatic injury claim alleging that on that date she sustained a left knee and leg injury when a coworker hit her with an all-purpose container. OWCP accepted the claim for left knee strain/sprain, left thigh and left leg contusion. Subsequently, it accepted chondromalacia. Appellant stopped work on November 17, 2002, returned to work on March 10, 2004 and stopped on March 11, 2004. OWCP placed her on the periodic rolls for temporary total disability effective March 23, 2004. By decision dated September 4, 2008, OWCP's hearing representative granted appellant's request for waiver of recovery of an overpayment in the amount of \$1,992.48.

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ OWCP regulations and procedures provide that OWCP 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To show clear evidence of error, the evidence submitted 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴

OWCP procedures were changed effective August 29, 2011. Section 10.607 of the new regulations provide that the date of the reconsideration request for timeliness purposes was changed from the date the request was mailed to the date the request was received by OWCP.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. The last merit decision, dated March 9, 2007, affirmed an OWCP hearing representative's February 24, 2006 decision, which in turn affirmed an October 14, 2005

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011). OWCP procedures further provide that 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.*

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ 20 C.F.R. § 10.607.

OWCP decision terminating appellant's compensation benefits.¹⁶ OWCP received appellant's request for reconsideration on March 20, 2013; thus, the request was outside the one-year time limit.¹⁷ Consequently, appellant must demonstrate clear evidence of error by OWCP in terminating her compensation.¹⁸

The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of the termination decision or shift the weight of the evidence of record in her favor. OWCP terminated her wage-loss benefits effective October 30, 2005 based on the opinion of Dr. Vanderweide, a second opinion Board-certified orthopedic surgeon, who concluded that she no longer had any residuals or disability due to her accepted employment injuries. An OWCP hearing representative affirmed the termination of appellant's compensation on February 24, 2005, which the Board affirmed in a March 9, 2007 decision.

On reconsideration, appellant has presented insufficient evidence to establish that OWCP improperly terminated her compensation benefits. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁹ Appellant argues that OWCP erred in terminating her compensation as she continues to have residuals from her left medial meniscus tear. She claims that it accepted this condition as it authorized surgery for left knee partial meniscectomy on June 23, 2003. Contrary to appellant's contention, the record contains no evidence that OWCP authorized this surgery or paid for it. Even if the surgery had been paid for by OWCP, there is no evidence that it had accepted the condition of left knee meniscal tear as being caused by the accepted November 17, 2002 employment injury.²⁰ The evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of the last merit decision. Appellant has not established clear evidence of error.

On appeal, appellant contends that OWCP erred in denying her request for reconsideration as she continues to have residuals of her accepted employment injury and denied medical treatment. As discussed above, she failed to timely file a request for reconsideration and failed to establish clear evidence of error. Appellant submitted no evidence raising a substantial question as to the correctness of OWCP's termination of her compensation benefits effective October 30, 2005.

¹⁶ The record also contains a September 4, 2008 OWCP hearing representative's decision granting waiver on recovery of an overpayment.

¹⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(e)(6) (August 2011). For decisions issued on or after August 29, 2011, there is still a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision and the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.

¹⁸ 20 C.F.R. § 10.607(a); see *D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

¹⁹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

²⁰ The Board has held that payment for medical expenses does not, in and of itself, constitute acceptance of a particular condition or disability in the absence of evidence indicating that a particular condition or disability has been accepted as work related. *Gary L. Whitmore*, 43 ECAB 441 (1992); see also *M.C.*, Docket No. 12-64 (issued May 10, 2012).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the grounds as it was not timely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 30, 2013 is affirmed.

Issued: March 10, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board