

ISSUE

The issue is whether OWCP properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On April 15, 2002 OWCP accepted that appellant, a flat sorting machine operator, sustained effusion of bilateral lower leg joint, right chondromalacia patellae, tear of left medial meniscus of knee, psychogenic pain, and bilateral multiple and unspecified open wound of leg without complications as a result of her federal employment. Appellant underwent several authorized arthroscopic procedures to both knees.

Dr. David Anderson, a Board-certified orthopedic surgeon, acting as an OWCP district medical adviser, reviewed the record on January 11, 2003 and related that appellant had 23 percent permanent bilateral lower extremity impairments. He explained that pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition, she had 12 percent bilateral lower extremity permanent impairment for weakness of knee extension, and another 12 percent bilateral impairment for loss of knee flexion.⁴ Using the Combined Values Chart of the A.M.A., *Guides*,⁵ Dr. Anderson explained that appellant had 23 percent bilateral permanent impairment of the lower extremities.

By decision dated May 12, 2003, OWCP granted appellant 23 percent permanent impairment of the right lower extremity and 23 percent permanent impairment of the left lower extremity.

Appellant requested an increased schedule award on March 18, 2005. OWCP denied her request for an increased schedule award on June 7, 2005. On June 30, 2005 appellant requested a hearing before the Branch of Hearings and Review. By decision dated February 8, 2006, an OWCP hearing representative set aside OWCP's June 7, 2005 decision which had denied an increased award for impairment of appellant's bilateral lower extremities as the medical impairment evaluation lacked probative value. By decision dated June 15, 2006, OWCP denied appellant's claim for an increased schedule award.

On January 22 and February 22, 2007 appellant again requested schedule awards.

A district medical adviser, Dr. Benjamin P. Crane, a Board-certified orthopedic surgeon, reviewed the case record on March 11, 2007 and related that appellant had a 20 percent bilateral lower extremity impairment for two millimeters cartilage interval of the knee,⁶ as well as a 10 percent permanent impairment for two millimeters cartilage interval of the patellofemoral joint bilaterally. He then stated that she had another 10 percent permanent bilateral lower extremity

⁴ A.M.A., *Guides* 532, Table 17-8.

⁵ *Id.* at 604.

⁶ *Id.* at 544, Table 17-31.

impairment for partial medial and lateral meniscectomies,⁷ and another 1 percent permanent bilateral impairment for pain.⁸ Dr. Crane concluded that using the Combined Values Chart⁹ appellant had 36 percent bilateral lower extremity impairments.

By decision dated June 15, 2007, OWCP granted an additional 13 percent schedule award for impairment to the right lower extremity and an additional 13 percent for impairment to the left lower extremity. By decision dated August 29, 2008, it affirmed the June 15, 2007 decision.

Appellant thereafter underwent a left total knee replacement on February 24, 2009 and a right total knee replacement on August 18, 2009.

On March 9, 2011 appellant requested an additional schedule award.

A district medical adviser, Dr. Neil Ghodadra, an orthopedic surgeon, reviewed the case record on June 9, 2011. He related that the record substantiated that appellant had good results after total knee replacement. Dr. Ghodadra concluded that her total knee arthroplasties would be rated as 23 percent bilateral permanent lower extremity impairments. Appellant was therefore not entitled to an additional schedule award.

By decision dated June 23, 2011, OWCP denied appellant's claim for an increased schedule award over the previously paid awards for 36 percent bilateral lower extremity impairments.

On March 28, 2014 OWCP received a request for reconsideration of the June 23, 2011 decision. The request was postmarked March 25, 2014. In support of her request, appellant submitted a March 24, 2014 letter indicating that she had seven surgeries on her knees, two of which were total knee replacements. She stated that the fibromyalgia makes life almost unbearable along with the new diagnosis of tendinitis in both knees. Appellant stated that the plantar fasciitis required her to have orthotics for her shoes. She argued that reconsideration of her schedule award should be considered for both knees as she had undergone total knee replacements. Appellant submitted duplicative evidence already of record and a new medical report.

In an April 24, 2014 report, Dr. Eugene Lopez, a Board-certified orthopedic surgeon, noted appellant's symptoms have worsened since the last visit. Appellant has severe sharp pains in her left knee near the front of her knee cap and has swelling by the end of the day. Her right knee was also painful, with the left knee worse. Examination findings were provided. These findings included slight patellar tendon tenderness, full range of motion but pain with resisted knee flexion. Full strength and intact neurovascular. An impression of bilateral patellar tendinitis status post bilateral total knee replacement was provided.

⁷ *Id.* at 546, Table 17-33.

⁸ *Id.* at 482, Table 16-10; 552, Table 17-37.

⁹ *Supra* note 5.

By decision dated June 27, 2014, OWCP denied her reconsideration request, finding that it was untimely filed and did not present clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.¹⁰ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹¹

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.¹² This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.¹⁴ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁵ 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 evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁹ A determination of whether the claimant has

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.605.

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ 20 C.F.R. § 10.607.

¹⁶ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁹ *Id.*

established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.²⁰

ANALYSIS

When the underlying compensation claim is for a schedule award, an initial question is whether the claimant has submitted an application for reconsideration or has requested an increased schedule award. Even if appellant has requested reconsideration, if there is new and relevant evidence with respect to an increased permanent impairment, then a claimant may be entitled to a merit decision on the issue.²¹ When a claimant does not submit any relevant evidence with respect to an increased schedule award, then OWCP may properly determine that appellant has filed an application for reconsideration of a schedule award decision.²² In this case, appellant did not submit any relevant evidence with respect to an increased permanent impairment. Therefore, the Board finds that OWCP properly considered appellant's submission as an application for reconsideration.

The last OWCP decision on the merits of the schedule award issue was dated June 23, 2011. Effective August 29, 2011, OWCP amended its procedures to reflect that an application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought²³ as opposed to the use of the postmark to determine timeliness.²⁴ As OWCP's June 23, 2011 decision was issued before OWCP amended its procedures to determine timeliness, the use of the postmark is appropriate. In this case, appellant's reconsideration request was postmarked March 25, 2014. As this is more than one year after the June 23, 2011 merit decision, it is an untimely reconsideration request.

As an untimely application for reconsideration, appellant must establish clear evidence of error by OWCP to require her claim to be reopened for merit review. In this case, she did not establish clear evidence of error. Appellant did not present any argument with respect to error by OWCP. The evidence submitted with the application for reconsideration did not address the degree of permanent impairment with respect to any scheduled member of the body as of June 23, 2011.²⁵ While Dr. Lopez noted a worsening of appellant's symptoms and patellar tendon tenderness, he did not discuss a permanent impairment with regard to her knees.²⁶ The

²⁰ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

²¹ See *Linda T. Brown*, 51 ECAB 115 (1999).

²² See *W.J.*, Docket No. 12-1746 (issued February 5, 2013), *E.M.*, Docket No. 13-1255 (issued December 3, 2013).

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(e) (August 29, 2011).

²⁴ Prior to August 29, 2011, OWCP regulations provided in pertinent part: An application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the employing establishment within the time period allowed. *Id.* at Chapter 2.1602.3(b)(1) (January 2004).

²⁵ *E.M.*, *supra* note 22.

²⁶ *Cf.*, *J.M.*, Docket No. 12-1341 (issued December 12, 2012); *T.M.*, Docket No. 11-1989 (issued January 12, 2012).

remaining medical reports submitted were duplicative of reports previously of record and do not show error with respect to the June 23, 2011 decision.

As noted above, the clear evidence of error standard requires that the evidence raise a substantial question as to the correctness of OWCP's decision and shift the weight in favor of appellant. Appellant did not meet that standard in this case and OWCP properly denied merit review.

On appeal, appellant stated that she underwent several knee surgeries and requires medication for the pain. She contends the evidence supports additional impairment. The Board notes that appellant may, as noted above, claim an increased schedule award based on relevant evidence which supports an additional impairment that is not duplicative of a previous impairment. For the reasons stated, appellant did not establish clear evidence of error and OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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