



## **FACTUAL HISTORY**

On December 17, 2012 appellant, then a 59-year-old electronic integrated systems mechanic, filed an occupational disease claim alleging that he sustained a left knee condition in the performance of duty. He indicated that his work was physical and was comprised of walking, twisting, kneeling, and using stairs and ladders. Appellant noted that his home life was “sedentary in comparison.” He did not stop work.

In a November 23, 2012 attending physician’s report, Dr. Rachel Kaufman, a family practitioner, noted a history of degenerative joint disease (DJD) on x-ray, and checked the box “yes” in response to whether she believed the condition was caused or aggravated by an employment activity. She indicated that appellant’s condition was caused by repetitive motions of kneeling, climbing, and crawling. Dr. Kaufman diagnosed DJD of the left knee and recommended a return to work. November 23 and December 14, 2012 duty status reports were also provided.

By decision dated February 13, 2013, OWCP denied appellant’s claim for compensation as the medical evidence did not demonstrate that the claimed condition was related to established work-related events.

OWCP subsequently received another copy of the November 23, 2012 reports of Dr. Kaufman. In a new December 10, 2012 medical report, Dr. Garrett W. Duckworth, an occupational medicine physician, noted that appellant reported a history of recurring left knee pain. He diagnosed sciatica and found that appellant could return to work without limitations. OWCP also received a supervisor’s report/dispensary permit dated December 10, 2012.

On June 19, 2014 appellant requested reconsideration. Dr. Michael S. McManus, Board-certified in occupational medicine, provided several reports dating from April 23 to June 17, 2014. In his April 23, 2014 reports, he noted appellant’s history of injury and treatment. Dr. McManus related that appellant described his duties at work to include: prolonged ambulation on hard uneven surfaces, repetitive work in confined spaces requiring prolonged kneeling; stooping and crawling, often while carrying or moving equipment, repetitive climbing of vertical ladders, and scaffolding, often while carrying equipment; and walking up and down dry dock steps. He diagnosed post-traumatic osteoarthritis of the left knee, “partially due to work and partially due to prior history of septic joint.” In a May 8, 2014 report, Dr. McManus diagnosed contusion of left knee, left knee strain, left knee osteoarthritis, and tear of the lateral meniscus of the left knee. He also provided duty status reports for April 23 and May 8, 2014.

In a June 17, 2014 report, Dr. McManus explained that appellant worked for the employing establishment as a mechanic for 36 years. He related appellant’s repetitive work duties and noted that his symptoms were “recurrently reagravated by work activities and would improve with time away from work.” Dr. McManus diagnosed secondary osteoarthritis of the left knee aggravated by work activities. He indicated that appellant had a history of septic left knee joint while in the service; however, he was only recently more symptomatic due to his activities. Dr. McManus opined that appellant’s present diagnosis was a “permanent aggravation of left knee osteoarthritis due to his work activities and his work activities have resulted in repetitive stress to his left knee joint resulting in progressive secondary osteoarthritis.”

In a September 29, 2014 decision, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>2</sup>

OWCP's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).<sup>3</sup> This section does not mandate that it review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.<sup>4</sup>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish 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.<sup>6</sup> To show clear

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> *Id.* at § 10.607(b).

<sup>6</sup> *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>7</sup>

### ANALYSIS

In its September 29, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on February 13, 2013. Appellant's June 19, 2014 request for reconsideration was submitted more than one year after the February 13, 2013 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether OWCP on February 13, 2013, properly denied his claim for an occupational disease. The issue underlying appellant's claim was causal relationship, thus, the issue at hand is primarily medical in nature.

Appellant submitted new medical evidence from Dr. McManus dating from April 23 to June 17, 2014. In his April 23, 2014 reports, Dr. McManus noted appellant's history and described appellant's duties at work. He diagnosed post-traumatic osteoarthritis of the left knee, "partially due to work and partially due to prior history of septic joint." In his May 8, 2014 report, Dr. McManus diagnosed contusion of left knee, left knee strain, left knee osteoarthritis, and tear of the lateral meniscus of the left knee. On June 17, 2014 he explained that appellant worked for the employing establishment as a mechanic for 36 years. Dr. McManus repeated appellant's repetitive work duties and noted that his symptoms were "recurrently reaggravated by work activities and would improve with time away from work." He diagnosed secondary osteoarthritis of the left knee aggravated by work activities. Dr. McManus related that appellant had a history of septic left knee joint while in the service; however, he was only recently more symptomatic due to his activities. He opined that appellant's present diagnosis was a "permanent aggravation of left knee osteoarthritis due to his work activities and his work activities have resulted in repetitive stress to his left knee joint resulting in progressive secondary osteoarthritis." While supportive of causal relationship, these reports are insufficient to establish clear evidence of error. The Board notes that clear evidence of error is intended to represent a

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<sup>7</sup> *Id.*

difficult standard. Evidence such as a detailed, well-rationalized report which, if submitted prior to OWCP's merit decision might require additional development of the claim, is insufficient to establish clear evidence of error.<sup>8</sup>

OWCP also received a December 10, 2012 report from Dr. Duckworth who noted a history of recurring left knee pain and diagnosed sciatica. This report merely contains a diagnosis and fails to establish clear evidence of error in the last merit decision. OWCP also received a copy of a November 23, 2012 report from Dr. Kaufman. This report was previously of record and does not provide positive, precise or explicit evidence that manifests on its face that OWCP committed an error in its prior decision.

To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that OWCP committed an error.<sup>9</sup> Appellant did not submit such evidence. Consequently, OWCP properly denied appellant's reconsideration request as it does not establish clear evidence of error.

On appeal, appellant argued that his permanent aggravation of left knee osteoarthritis was a direct result of his employment duties over the course of 36 years. As explained, the Board does not have jurisdiction over the merits of the claim. Furthermore, as found above, appellant has failed to establish clear evidence of error by OWCP.

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

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<sup>8</sup> See *E.R.*, Docket No. 09-599 (issued June 3, 2009).

<sup>9</sup> *Robert F. Stone*, 57 ECAB 292 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 29, 2014 decision of Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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