

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**W.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Norfolk, VA, Employer**

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**Docket No. 15-0860  
Issued: September 22, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 9, 2015 appellant timely appealed the February 25, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of February 11, 1991 to the filing of the current appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's December 5, 2014 request for reconsideration because it was untimely and he failed to establish clear evidence of error.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193 (2006).

## **FACTUAL HISTORY**

This case has been before the Board on several prior occasions. Appellant, a 50-year-old distribution clerk, has an accepted claim for aggravation of left knee sprain.<sup>2</sup> He claimed wage-loss compensation beginning October 21, 1989, which OWCP denied by decision dated July 12, 1990. On appeal, by decision dated February 11, 1991, the Board affirmed OWCP's July 12, 1990 decision.<sup>3</sup> In its decision, the Board found that appellant had failed to establish that disability beginning October 21, 1989 was causally related to the accepted aggravation of his left knee condition. The Board also found the evidence insufficient to establish a causal relationship between appellant's accepted condition and his November 3, 1989 left knee arthroscopic surgery.<sup>4</sup>

On October 28, 2002 appellant requested reconsideration. In a January 22, 2003 decision, OWCP denied reconsideration because his October 28, 2002 request was untimely and failed to present clear evidence of error. The Board affirmed OWCP's denial of reconsideration by decision dated September 15, 2003.<sup>5</sup>

In addition to the above-noted Board decisions, appellant filed two additional appeals which the Board dismissed for lack of jurisdiction.<sup>6</sup> The February 11, 1991 decision by the Board represents the latest merit review of record.

On November 1, 2014 appellant requested reconsideration before OWCP. He referenced Docket No. 03-0864, which was the Board's September 15, 2003 nonmerit decision. Along with his request, appellant submitted a September 19, 2013 compensation and pension (C&P) examination report from the Department of Veterans Affairs (DVA). Dr. Carolyn L. H'Doubler, a Board-certified internist and DVA staff physician, diagnosed moderately severe left knee degenerative joint disease and moderate dislocation/subluxation, status post trauma, and meniscectomy. She noted that appellant was currently service-connected for a left knee condition and had previously undergone a meniscectomy in 1985 and debridement in 1989. Dr. H'Doubler opined that appellant's left knee condition prevented him from securing gainful employment that was physically demanding in nature. However, his ability to perform sedentary labor was not impacted.

By letter dated November 21, 2014, OWCP explained that the Board's September 15, 2003 nonmerit decision was not subject to reconsideration. Additionally, it asked appellant to clarify whether he was actually seeking review of the February 11, 1991 merit decision.

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<sup>2</sup> Appellant initially injured his left knee playing flag football in September 1985. He was in the military at the time.

<sup>3</sup> Docket No. 90-1758 (issued February 11, 1991).

<sup>4</sup> *Id.*

<sup>5</sup> Docket No. 03-0864 (issued September 15, 2003).

<sup>6</sup> Docket No. 02-0002 (issued April 18, 2002) and Docket No. 07-1438 (issued October 11, 2007).

Appellant responded on December 5, 2014 that he was seeking reconsideration of the February 11, 1991 merit decision. He argued that the September 19, 2013 DVA medical report showed that his left knee condition had worsened. OWCP received appellant's latest correspondence on December 9, 2014.

By decision dated February 25, 2015, OWCP denied appellant's request for reconsideration because it was untimely and failed to demonstrate clear evidence of error on the part of OWCP.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>7</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>8</sup> One such limitation is that the application for reconsideration must be received within one year of the date of the decision for which review is sought.<sup>9</sup> When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.<sup>10</sup>

### **ANALYSIS**

OWCP had accepted appellant's occupational disease claim for aggravation of left knee sprain. In July 1990, it denied wage-loss compensation beginning October 21, 1989. In a February 11, 1991 decision, the Board affirmed OWCP's July 12, 1990 decision denying compensation benefits. Appellant failed to establish that his disability commencing October 21, 1989 was causally related to the accepted aggravation of his left knee condition. He also failed to establish that his November 3, 1989 left knee arthroscopy was employment related. The Board's February 11, 1991 decision is the latest merit decision of record.

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<sup>7</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607.

<sup>9</sup> *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of its decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

<sup>10</sup> *Id.* at § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

On December 5, 2014 appellant requested reconsideration of the February 11, 1991 merit decision. In support of his request, he submitted Dr. H'Doubler's September 19, 2013 C&P report. As noted, OWCP received appellant's request more than 23 years after the last merit decision dated February 11, 1991. Because more than one year elapsed since the last merit decision, appellant's request for reconsideration was untimely.<sup>11</sup> As such, he must demonstrate clear evidence of error on the part of OWCP in denying his claim for wage-loss compensation beginning October 21, 1989.<sup>12</sup>

Appellant argued that Dr. H'Doubler's report demonstrated that his left knee condition had worsened. Dr. H'Doubler diagnosed moderately severe left knee degenerative joint disease and moderate dislocation/subluxation status post trauma and meniscectomy. She noted that appellant had served in the U.S. Army and was service-connected for a left knee condition, which had progressively worsened since his last C&P evaluation in 2011. Dr. H'Doubler also reported that appellant had undergone two left knee surgeries; a 1985 meniscectomy and a 1989 debridement. Additionally, she reported that his left knee buckled three to four weeks ago. Appellant fell forward, bruising his forehead. Dr. H'Doubler noted that the bruise was still visible, but fading. She also indicated that due to his left knee condition, appellant was unable to secure and maintain gainful employment which was physically demanding in nature. However, sedentary labor was not impacted.

OWCP accepted the claim for aggravation of left knee sprain, and appellant has not submitted any evidence or argument relevant to the issue that this accepted condition clearly caused disability as of October 21, 1989, or that it resulted in the November 3, 1989 left knee arthroscopic surgery. Although Dr. H'Doubler opined that appellant's left knee condition had worsened, she did not specifically implicate his prior duties as a distribution clerk, or his accepted left knee condition. Dr. H'Doubler reported that appellant's left knee condition was service connected. She did not diagnose left knee sprain, and OWCP has not accepted left knee degenerative joint disease or dislocation/subluxation. Accordingly, the Board finds that appellant failed to establish clear evidence of error on the part of OWCP in denying wage-loss compensation beginning October 21, 1989, and appellant's left knee arthroscopic surgery. Therefore, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's December 5, 2014 request for reconsideration because it was untimely and he failed to establish clear evidence of error.

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<sup>11</sup> See *supra* note 9. Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (October 2011).

<sup>12</sup> 20 C.F.R. § 10.607(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 25, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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