

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

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**Y.G., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Washington, DC, Employer**

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**Docket No. 10-2190  
Issued: July 12, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 16, 2010 appellant filed a timely appeal of the July 22, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. Because more than one year has elapsed between the most recent merit decision dated June 19, 2009 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

**ISSUE**

The issue is whether the Office properly denied appellant's July 15, 2010 request for reconsideration as untimely filed and lacking clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On January 12, 2009 appellant, then a 59-year-old letter carrier, filed a traumatic injury claim alleging that on January 7, 2009 she was climbing the stairs at work when her knee snapped and she felt a sharp pain. She stopped work on January 13, 2009. The employing establishment controverted appellant's claim alleging that her knee pain was a result of degenerative arthritis, not a specific incident.

In a supplemental statement dated February 2, 2009, appellant explained that on January 7, 2009 at approximately 1:30 p.m. she was walking up stairs to deliver mail when she heard a snap and felt a sharp pain in her left knee. Her knee buckled, but she maintained her balance. Although appellant was able to finish her route and go to work on January 8 and 12, 2009 her knee was swollen. When the pain and swelling continued while climbing stairs, she decided to see a doctor.

In a January 14, 2009 radiology report, Dr. Louis Napoli, a Board-certified radiologist, stated that appellant contracted an overall degenerative disease in her left knee that was mild but somewhat more prominent in her medial compartment. He also noted spurring from the patella, but did not find any evidence of fracture or dislocation.

In a January 23, 2009 medical report, Dr. Philip B. Bovell, an orthopedic surgeon, stated that on January 9, 2009 appellant was seen in his office for complaints of left knee pain and recalled that she slipped on steps at work a few days ago. Appellant explained that she felt a clicking sensation and a mass subsequently developed over the back of her knee. Upon examination, Dr. Bovell observed pain over appellant's lateral collateral ligaments and a posterior mass over the back of her knee that was parable. He further observed some para patella puffiness present to palpation with some discomfort. Dr. Bovell diagnosed appellant with left knee lateral collateral ligament strain and sprain and Baker's cyst of the left knee.

By decision dated March 4, 2009, the Office denied appellant's traumatic injury claim on the grounds that the medical evidence failed to establish that she sustained any knee condition that was causally related to the accepted January 7, 2009 employment incident.

On April 2, 2009 appellant requested a review of the written record.

In a January 13, 2009 hospital record, it was noted that appellant was treated in the emergency room on January 13, 2009 by Dr. Sassan Taghizadeh, a Board-certified internist, for complaints of pain and swelling in her left knee. Appellant stated that her knee had been painful since January 7, 2009 from walking up stairs, but she denied any specific trauma. She underwent an x-ray examination and was diagnosed with degenerative arthritis and joint knee pain.

Appellant provided additional medical reports by Dr. Bovell. In a March 31, 2009 medical report, Dr. Bovell stated that appellant was again treated in his office for a left knee injury sustained while at work. X-ray and magnetic resonance imaging (MRI) scan examinations revealed that appellant sustained a left knee injury, chondromalacia, medial collateral ligaments strain and sprain, and patella subluxation or dislocation in her left knee. Dr. Bovell explained

that, based on recent history and clinical examination, the pain and swelling in appellant's medical collateral ligaments areas were consistent with the history of injury described. He also stated that because appellant was asymptomatic before the injury her knee condition was a result of the injury and that the snap and clicking sound was the subluxation or dislocation of the patella out of its regular groove. Dr. Bovell noted that the employment incident merely aggravated appellant's chondromalacia and degenerative joint disease. He summarized that appellant's symptoms, injury, and complaints were definitely related to the January 7, 2009 work incident.

In a decision dated June 19, 2009, the Office hearing representative affirmed the Office's March 4, 2009 denial decision claiming that appellant did not meet her burden of proof to establish that her knee condition was causally related to the January 7, 2009 employment incident. It specifically found that although Dr. Bovell's report supported causal relationship his opinion was based upon an inaccurate description of the accepted work event, and thus, was not considered probative medical opinion.

Appellant provided additional reports by Dr. Bovell. In a June 12, 2009 report, Dr. Bovell stated that he reevaluated appellant for her left knee injury. He prescribed different medication and also completed a duty status report advising that she be off four hours for about two weeks. In a July 24, 2009 medical report, Dr. Bovell stated that within a reasonable degree of medical certainty a causal relationship existed between appellant's knee problems and the January 7, 2009 work event. He recalled that appellant's knee popped as she was walking up the stairs and explained that the popping sound was the subluxation of her patella. Dr. Bovell stated that appellant developed a mass at the back of her knee, which surfaced from the fluid or effusion that was built up from her injury, and that the MRI scan examination revealed edema swelling and a bursitis type of symptom. He noted that appellant experienced pain over the medial collateral ligament and the medial joint line area, which demonstrated that this area took the brunt of the injury. Dr. Bovell also stated that there were other coincidental findings of aggravation, particularly that appellant's chondromalacia and degenerative joint disease played a small part in appellant's pain. In an August 14, 2009 medical report, he stated that appellant continued to experience pain from bending, walking and prolonged standing.

On July 15, 2010 appellant submitted a request for reconsideration. In a July 22, 2010 decision, the Office denied appellant's request for further review of the merits on the grounds that appellant failed to submit her request without one year of the last decision and to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Act does not entitle a claimant to review of an Office decision as a matter of right.<sup>2</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>3</sup> One such limitation provides that an application for reconsideration must be submitted within one year of the date of the Office

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<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> *Annette Louise*, 54 ECAB 783, 789-90 (2003).

decision for which review is sought.<sup>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>5</sup>

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>8</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup> This entails a limited review by the Office 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 the Office.<sup>11</sup>

To establish 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 the Office decision.<sup>12</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>13</sup>

### ANALYSIS

The Office found that appellant did not file a timely request for further review of the merits of the claim. The most recent merit decision was the Office's June 29, 2009 decision.

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<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> See *F.R.*, Docket No. 09-575 (issued January 4, 2010); *Jesus D. Sanchez*, *supra* note 2.

<sup>6</sup> *Id.* at § 10.607(b).

<sup>7</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

<sup>8</sup> *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>9</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>11</sup> *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>12</sup> *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>13</sup> *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

Appellant's request for reconsideration was dated July 15, 2010, which is more than one year after the June 29, 2009 decision. Therefore, the Board finds that her request was not timely filed.

The Office has accepted that appellant, a letter carrier, did walk up stairs while delivering her route on January 7, 2009, but denied the claim because appellant did not meet her burden of proof to establish that her left knee condition was causally related to this incident. The Board finds that appellant's July 15, 2010 request for reconsideration does not establish that the Office's June 29, 2009 decision denying her claim was clearly erroneous.

The June 29, 2009 merit decision found that Dr. Bovell's opinions regarding causal relationship were based upon an inaccurate history of injury. Dr. Bovell premised his opinion on a history that appellant fell on January 7, 2009.

In support of her untimely request for reconsideration, appellant submitted several additional medical reports from Dr. Bovell. The only report from this submission which addressed causal relationship was the July 24, 2009 report in which Dr. Bovell stated that appellant's knee popped as she was walking up stairs on January 7, 2009, resulting in a subluxation of her patella. He further stated that appellant had pain over the medial collateral ligament and medial joint line area, because this area took the blunt of the injury. While this report did provide an accurate history of injury, it is not sufficient to establish manifest error in the prior denials of appellant's claim. Dr. Bovell had offered the same opinion, that appellant sustained a subluxation of her patella, in his earlier reports wherein he stated this specific injury occurred due to a fall on stairs. As he did not explain why walking up stairs would have caused exactly the same injury, and he did not explain why he initially related the injury to a fall, his new report does not establish manifest error in the Office's prior decisions. The additional medical reports describe a work injury but do not raise a substantial question as to the correctness of the Office's decision.<sup>14</sup> The term clear evidence of error is intended to represent a difficult standard.

As appellant as not provided any argument or evidence sufficient to show clear evidence of error on the part of the Office, it properly denied her request for further review of the merits.

### **CONCLUSION**

The Board finds that appellant's July 15, 2010 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.<sup>15</sup>

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<sup>14</sup> See *J.H.*, Docket No.10-1312 (issued February 24, 2011).

<sup>15</sup> The Board notes that appellant submitted additional evidence following the July 22, 2010 nonmerit decision. Since the Board's jurisdiction is limited to evidence that was before the Office at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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