

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

A.S., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION NORTH ISLAND, San Diego, CA,
Employer**

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**Docket No. 11-356
Issued: September 16, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 21, 2010 appellant filed a timely appeal from a July 14, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as it was untimely filed and did not establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only over the nonmerit issue in this case. Because more than one year has elapsed between the most recent merit decision dated July 24, 2006 to the filing of this appeal on September 21, 2010 the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse OWCP's decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly denied appellant's June 10, 2010 request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On June 12, 2006 appellant, then a 52-year-old sheet metal worker, filed an occupational disease claim alleging that in May 2004 she sustained a left knee condition when she fell in the ladies bathroom. She explained that she had pain in her knees and the physician thought it was arthritis. Appellant first realized her condition was related to her employment on May 30, 2006. She stopped work on May 30, 2006 and returned on June 12, 2006. No additional evidence was received.

In a May 31, 2006 medical report, Dr. James Fait, a Board-certified orthopedic surgeon, noted that on May 30, 2006 appellant began to experience pain in her knees while she was walking around at work. He noted a history of left knee osteoarthritis and that she was previously seen in orthopedics after a fall at work. Dr. Fait diagnosed mild to moderate bilateral knee degenerative joint disease.

In a June 19, 2006 attending physician's report, Dr. Benjamin Corpuz Orejudos, a Board-certified diagnostic radiologist, noted that on May 30, 2006 appellant complained of left knee pain. He diagnosed mild degenerative narrowing medial right and left knee joint spaces.

In a July 24, 2006 decision, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that the work activities or that she sustained an injury in the performance of duty.

On October 2, 2006 appellant requested a review of the written record. She stated that she sustained a meniscus tear when she fell in the ladies bathroom two years ago. Appellant resubmitted Dr. Orejudos' June 19, 2006 report and Dr. Fait's medical chart records dated May 30 and 31, 2006. She also submitted handwritten progress notes by an unknown provider dated July 23 to November 22, 2004, which indicated that she twisted her knee and fell down in the bathroom several months prior.

In a July 23, 2004 magnetic resonance imaging (MRI) scan report of appellant's knees, Dr. Nehal Patel, a Board-certified diagnostic radiologist, diagnosed mild bilateral degenerative joint disease of her knees.

In a June 13, 2006 report, Dr. Steven R. Schelkun, a Board-certified orthopedic surgeon, noted appellant's complaints of acute anterior knee pain for the past two weeks and stated that she experienced similar problems two years prior, but it resolved. He provided handwritten chart notes dated from June 15 to July 11, 2006.

By decision dated October 25, 2006, OWCP denied appellant's request for reconsideration. It noted that the medical evidence indicated that she fell down in the bathroom, but the evidence did not establish whether she fell in the bathroom at work in May 2004. The

medical evidence was found irrelevant to the issue of whether the May 2004 employment incident occurred at the time, place and in the manner alleged and therefore did not warrant further merit review of her claim. OWCP also pointed out that the medical evidence failed to establish that appellant's left knee condition resulted from the alleged May 2004 employment incident.

On June 10, 2010 appellant submitted a request for reconsideration and contended that its untimeliness be waived because OWCP did not properly advise her of her rights. She addressed the medical evidence submitted and alleged that the record established that she fell in the bathroom at work, resulting in her left knee condition. Appellant also provided the names of two witnesses, but did not include any statements.

In a July 29, 2004 handwritten medical note from her occupational health unit, a registered nurse stated that appellant complained of a knee injury after falling in a restroom about two months prior.

In a September 19, 2006 consultation report, Dr. Michael Moreno, Board-certified in occupational medicine, noted appellant's history of left knee pain dating back two years. Appellant stated that the pain began when she fell in a bathroom in 2004 and injured her left knee. Her left knee pain increased around May 2006, particularly in the medial side of the knee. Dr. Moreno reviewed appellant's medical history, which included an August 27, 2006 MRI scan that showed a degenerative posterior horn medial meniscus tear and degenerative changes involving the medial compartment. Upon examination, he observed well-localized medial joint line tenderness, patellofemoral crepitus and medial-sided knee pain. Dr. Moreno did not observe any effusion or varus or valgus laxity and the Lachman test was negative. X-rays also revealed degenerative changes involving the medial compartment.

Appellant resubmitted Dr. Patel's MRI scan reports, Dr. Fait's May 31, 2006 medical report and July 23, 2004 and June 15, 2006 handwritten chart notes by an unknown provider.

In a decision dated July 14, 2010, OWCP denied appellant's request for reconsideration finding it was untimely and that the evidence failed to establish clear evidence of error. It noted that the issue in her case was whether she fell in the bathroom at work on May 2004 as alleged, but she did not submit sufficient evidence to establish that the employment incident occurred at the time, place and in the manner alleged. OWCP stated that although appellant contended that she had two witnesses she did not submit their statements and the medical evidence did not contain records dated from May to June 2004 to corroborate her claimed injury.

LEGAL PRECEDENT

OWCP regulations provide that, in order to be entitled to merit review of OWCP's decision, a claimant must file her application for review within one year of the date of that decision.³ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of

³ 20 C.F.R. § 10.607(a).

FECA.⁴ OWCP regulations provide 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.⁵ 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.⁶

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

OWCP's procedures note 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.¹² 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.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration as more than one year had passed from the date of the last OWCP decision on October 25, 2006 and her request for reconsideration dated June 10, 2010. While

⁴ See 5 U.S.C. § 8128(a); *F.R.*, Docket No. 09-575 (issued January 4, 2010).

⁵ 20 C.F.R. § 10.607(b).

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

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

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹² *James R. Mirra*, 56 ECAB 738 (2005).

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

appellant alleged that OWCP failed to advise her of her rights, the Board notes that the 2006 decisions clearly apprised her of the deficiencies in the evidence she submitted and of her appellate rights, should she seek further review. Accordingly, she must demonstrate clear evidence of error by OWCP in denying her occupational disease claim.¹⁴

The Board finds that appellant's June 10, 2010 request for reconsideration failed to establish clear evidence of error. As noted, to establish clear evidence of error a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹⁵ In this case, OWCP denied appellant's claim because she failed to submit sufficient evidence demonstrating that the May 2004 employment incident occurred at the time, place and in the manner alleged. The only additional factual evidence appellant submitted was an undated, typed statement which addressed the medical evidence of record and alleged that the record established that she injured her left knee when she fell in the bathroom at work. Although appellant provided the names of two witnesses, she did not provide any witness statements. This additional evidence is not positive, precise and explicit and does not manifest on its face that OWCP's decision was in error.¹⁶ In addition, the medical evidence submitted does not address the issue of whether the March 2004 employment incident occurred as alleged. Although the medical reports note that appellant injured her knee when she fell in a bathroom, none of the reports provided a precise date or indicated whether the bathroom was at her employing establishment. As none of the evidence raises a substantial question concerning the correctness of the OWCP's decision, she has failed to establish clear evidence of error on the part of OWCP in denying further merit review.

CONCLUSION

The Board finds that appellant's June 10, 2010 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.¹⁷

¹⁴ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ *Marcano*, *supra* note 7.

¹⁶ *Perez*, *supra* note 8; *see also A.F.*, Docket No. 09-1556 (issued February 23, 2010).

¹⁷ The Board notes that appellant submitted additional evidence following the July 14, 2010 nonmerit decision. Since the Board's jurisdiction is limited to evidence that was before OWCP 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 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2011
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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