

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

L.C., Appellant)	
)	
and)	Docket No. 12-504
)	Issued: August 6, 2012
)	
DEPARTMENT OF THE NAVY, MARINE CORPS, Barstow, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2012 appellant, through counsel, filed a timely appeal of a December 5, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for reconsideration without conducting a merit review. Because more than one year has elapsed between OWCP's most recent merit decision dated September 3, 2008, and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(f)(2).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

¹ For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(f)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously on appeal before the Board. In a decision dated October 20, 2010, the Board found that OWCP properly denied appellant's request for reconsideration of his claim pursuant to 5 U.S.C. § 8128(a).³ The Board found that his reconsideration request did not demonstrate that OWCP erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by OWCP. It further found that appellant did not provide relevant and pertinent new evidence not previously considered. The facts of the case, as set forth in the prior decision, are incorporated by reference.

In a letter dated September 21, 2011, appellant's representative requested reconsideration and submitted additional medical evidence. OWCP received a copy of the August 30, 2007 report from Dr. Paul Stanton, a Board-certified orthopedic surgeon, who noted that appellant had an injury while operating a man lift when he twisted his right knee. Dr. Stanton presented examination findings and diagnosed a torn right knee medial meniscus.

In an October 16, 2008 report, Dr. Ted Gregorius, a Board-certified orthopedic surgeon, noted that appellant presented with right knee pain which originated on or about June 2007. He noted that the event was traumatic in nature and that appellant was operating some heavy machinery when he felt a pop in his knee, accompanied with pain and swelling. Dr. Gregorius noted that appellant had medial compartment changes. He advised that his symptoms were characterized as a sharp severe and constant pain that occurred when he walked or climbed. Dr. Gregorius also noted that appellant related that he had prior surgery on this same knee in December 1992. He advised that he discussed the risks and benefits of knee surgery with appellant. In a November 13, 2008 report, Dr. Gregorius examined appellant, provided findings and noted that appellant wished to proceed with arthroscopic removal of medial meniscus with chondroplasty instead of partial knee or total knee replacement. In a December 3, 2008 operative report, he performed a right knee arthroscopic microfracture drilling of medial femoral condyle and tibial plateau of the medial compartments and a right knee arthroscopic patellofemoral chondroplasty.

OWCP also received a copy of an October 21, 2008 magnetic resonance imaging (MRI) scan read by Dr. John H. Naheedy, a Board-certified diagnostic radiologist, which revealed a horizontal tear in the right medial meniscus. It also received part of a report dated February 26, 2008; however, the report is incomplete and there is no indication of who prepared the report.

In a December 5, 2011 decision, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

³ Docket No. 10-742 (issued October 20, 2010).

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.”⁴

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).⁵ This section does not mandate that OWCP 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 decision for which review is sought.⁶

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.⁷

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.⁸ To show clear 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

⁴ 5 U.S.C. § 8128(a).

⁵ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

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.⁹

ANALYSIS

In its December 5, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on September 3, 2008. Appellant's September 21, 2011 letter requesting reconsideration was submitted more than one year after the September 3, 2008 merit decision and was, therefore, untimely.¹⁰

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 September 3, 2008, properly denied appellant's claim for a traumatic injury on June 13, 2007. The issue underlying appellant's claim was causal relationship, thus, the issue at hand is primarily medical in nature.

On reconsideration, appellant's representative alleged that he was submitting new medical evidence. The new medical evidence included reports dated October 16, November 13 and December 3, 2008 from Dr. Gregorius. However, these reports are insufficient to establish clear evidence of error. None of these reports address how the June 13, 2007 work incident caused a right knee strain in such a way as 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. The Board notes that clear evidence of error is intended to represent a 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.¹¹

Regarding the reports of August 30, 2007 and October 21, 2008, these reports were previously of record and do not provide an opinion on causal relationship and do not provide positive, precise or explicit evidence that manifests on its face that OWCP committed an error.

⁹ *Id.*

¹⁰ A reconsideration request is also considered timely if it is filed within one year of a merit decision of the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011). However, the Board notes that its October 20, 2010 decision, *supra* note 3, was not a merit decision.

¹¹ *See E.R.*, Docket No. 09-599 (issued June 3, 2009).

The record also contains an incomplete report from an unknown individual and this would not be sufficient to prove that OWCP committed an error.

Appellant did not submit any new medical evidence or legal arguments sufficient to raise a substantial question as to the correctness of OWCP's 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.¹² Appellant did not submit such evidence. Consequently, OWCP properly denied appellant's reconsideration request as it does not establish clear evidence of error.

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.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹² *Robert F. Stone*, 57 ECAB 292 (2005).