

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

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W.S., Appellant)	
)	
and)	Docket No. 11-1828
)	Issued: March 22, 2012
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Mount Hope, WV, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 2, 2011 appellant filed a timely appeal from a February 3, 2011 decision of the Office of Workers’ Compensation Programs (OWCP), which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days has elapsed since the most recent merit decision dated November 26, 2008 and the filing of this appeal on August 2, 2011, the Board lacks jurisdiction to review the merits of his case pursuant to the Federal Employees’ Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ 5 U.S.C. §§ 8101-8193.

² For final adverse OWCP 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(d)(2) (2008). For final adverse decisions issued on or after November 19, 2008 a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

ISSUE

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

On appeal, appellant contends that OWCP did not review all of the evidence submitted before issuing its February 3, 2011 decision.

FACTUAL HISTORY

On October 10, 2008 appellant, then a 60-year-old coal mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that he sustained a right knee injury due to factors of his federal employment. He indicated that his injury was originally reported on June 4, 1997 and placed on file by OWCP.³ Appellant was notified that the file was destroyed and that he needed to file a new claim for an additional period of exposure rather than a recurrence claim.

By letter dated October 21, 2008, OWCP notified appellant of the deficiencies of his claim and allotted 30 days for the submission of additional evidence.

Subsequently, appellant submitted a traumatic injury claim form dated June 4, 1997 and two narrative statements dated November 3, 2008 indicating that his job requirements included walking long distances on uneven, slippery and muddy terrain, upgrades and down steep slopes, crawling and carrying approximately 30 pounds of weight on his mining belt. He reported that his knee was first injured on June 4, 1997 assigned to OWCP File No. xxxxxx570 and medical treatment was received on June 9, 1997. Appellant claimed that over the years his knee deteriorated causing constant pain and at times made it difficult to walk, especially up and down grades. He noted that the physician who provided the treatment on June 9, 1997 retired from medical practice.

By decision dated November 26, 2008, OWCP denied appellant's claim on the basis that he submitted no medical evidence providing a diagnosis causally related to factors of his federal employment.

Appellant submitted a June 9, 1997 report by Dr. David A. Santrock, a Board-certified orthopedic surgeon, who indicated that appellant sustained a twisting injury to the right knee on June 4, 1997 while at work bearing the full weight on his right knee trying to protect his left. Dr. Santrock diagnosed right knee effusion and advised appellant to remain off work until June 16, 1997. On June 17, 1997 he reported that the effusion had not reoccurred and that appellant's knee range-of-motion had returned to normal with slight peripatellar tenderness and no instability. Dr. Santrock stated that appellant would be able to return to work on June 23 1997.

³ By decision dated February 3, 2011, OWCP noted that appellant's June 4, 1997 traumatic injury claim was a short form closure case, not formally adjudicated by OWCP.

Appellant also submitted a position description, a report of exposure hours, physical requirements of his job and physical therapy notes dated September 21, 2009 to January 25, 2010.

A March 4, 2010 narrative statement indicated that appellant had a total knee replacement performed by Dr. Ali Oliashirazi, a Board-certified orthopedic surgeon, on November 10, 2009. He requested that OWCP review his claim and grant compensation.

In an April 20, 2010 letter, OWCP acknowledged receipt of the evidence appellant submitted after issuance of its November 26, 2008 decision and notified him that if he wished to dispute that decision he would have to follow the appeal rights, which accompanied it in order for OWCP to take action. It informed him that it could take no action at that time; however, it would place the evidence in his case file so that it would be available if and when he appealed the November 26, 2008 decision.

On December 20, 2010 appellant filed a claim for a schedule award. He submitted a December 16, 2010 attending physician's report by Dr. Oliashirazi, who diagnosed degenerative joint disease of the right knee and indicated that he performed a total right knee arthroplasty. Dr. Oliashirazi wrote a question mark next to the area indicating whether the condition found was caused or aggravated by factors of appellant's federal employment and did not mark either box with a check mark.

By letter dated December 27, 2010, OWCP notified appellant that it could not process his request for a schedule award as his claim for a right knee condition was denied by decision dated November 26, 2008.

On January 7, 2011 appellant requested reconsideration and resubmitted the June 4, 1997 traumatic injury claim form and his March 4, 2010 narrative statement.

By decision dated February 3, 2011, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which

⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

review is sought.⁶ 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 5 U.S.C. § 8128(a).⁷

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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³

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 OWCP's decision.¹⁴ 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.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The Board's procedures provide that the one-year time limitation

⁶ 20 C.F.R. § 10.607(a).

⁷ See *F.R.*, Docket No. 09-575 (issued January 4, 2010); *Jesus D. Sanchez*, *supra* note 4.

⁸ 20 C.F.R. § 10.607(b).

⁹ See *Nancy Marciano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

¹⁰ See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

period for requesting reconsideration begins on the date of the original OWCP decision.¹⁶ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷ The most recent merit decision was OWCP's November 26, 2008 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since he did not file his request until January 7, 2011, it was filed outside the one-year time period. As appellant's January 7, 2011 request for reconsideration was submitted more than one year after the November 26, 2008 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.¹⁸

OWCP denied appellant's occupational disease claim because there was insufficient medical evidence to establish a diagnosis causally related to factors of his federal employment. The Board finds that the medical evidence submitted by appellant is not sufficient to establish clear error by OWCP in denying his claim.¹⁹

In a December 16, 2010 attending physician's report, Dr. Oliashirazi diagnosed degenerative joint disease of the right knee and indicated that he performed a total right knee arthroplasty. He wrote a question mark next to the area indicating whether the condition found was caused or aggravated by factors of appellant's federal employment and did not mark either box with a check mark. Dr. Oliashirazi's report does not establish clear evidence of error as it does not show that OWCP committed an error in denying appellant's claim.

On June 9, 1997 Dr. Santrock indicated that appellant sustained a twisting injury to the right knee on June 4, 1997 while at work and diagnosed right knee effusion. On June 17, 1997 he reported that the effusion had not reoccurred and that appellant's knee range-of-motion had returned to normal with slight peripatellar tenderness and no instability. Although Dr. Santrock opined that appellant was injured at work, he failed to provide a rationalized medical explanation as to how factors of his federal employment, such as walking long distances on uneven, slippery and muddy terrain, upgrades and down steep slopes, crawling and carrying approximately 30 pounds of weight on his mining belt, caused or aggravated his right knee effusion. The reports of Dr. Santrock do not establish clear evidence of error as they do not show that OWCP committed an error in denying appellant's claim nor do they raise a substantial question as to the correctness of OWCP's decision.

The physical therapy notes dated September 21, 2009 to January 25, 2010, do not constitute medical evidence as they were not prepared by a physician.²⁰ As the question is of

¹⁶ See *Veletta C. Coleman*, *supra* note 14; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (March 2011). See also *supra* note 6; *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁷ See *D.G.*, 59 ECAB 734 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

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

¹⁹ See *J.R.*, Docket No. 10-2137 (issued July 12, 2011).

²⁰ Physical therapists are not physicians under FECA. See 5 U.S.C. § 8101(2).

causal relationship is medical in nature, they do not establish clear evidence of error as they are not relevant to the issue decided by OWCP.²¹

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, appellant contends that OWCP did not review all of the evidence submitted before issuing its February 3, 2011 decision. OWCP reviewed the evidence submitted but, for the reasons stated above, the Board finds that his argument is not substantiated.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was not timely filed and failed to establish clear evidence of error.

²¹ See *F.R.*, *supra* note 7 (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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