

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 11-1848
Issued: March 19, 2012**

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 2, 2011 appellant, through her attorney, filed a timely appeal from a May 12, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as it was untimely and did not establish clear evidence of error. Because more than 180 days has elapsed since the most recent merit decision dated January 14, 2010 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim 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 *et seq.*

² For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's January 11, 2011 request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case was previously before the Board. By decision dated January 14, 2010, the Board affirmed an April 3, 2009 decision denying appellant's traumatic injury claim on the grounds of insufficient medical evidence establishing that she sustained a diagnosed condition as a result of the accepted July 24, 2008 employment incident.³ In this decision, the Board reviewed medical reports appellant submitted in support of her claim from Drs. Akhtar, Apostolos Tambakis, a Board-certified orthopedic surgeon, Boginsky, Ferriter, Singson, Harwin and Tice. The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

Appellant thereafter resubmitted medical reports previously of record. She also submitted additional medical reports from Dr. Tambakis,⁴ who noted appellant's complaints of left knee pain due to arthritis and recent right knee pain. Dr. Tambakis provided an accurate history of injury that when appellant was a teenager she injured her left knee and underwent surgery to repair a fractured patella. Appellant developed arthritis in her left knee over the years but was able to work at the employing establishment. On July 24, 2008 she twisted her left knee when she walked fast in the parking lot at work. Dr. Tambakis noted that this accident changed the condition of appellant's left knee. Examination of the left knee revealed limited flexion, soreness, crepitation and fluid. Swelling and effusion were mild. Dr. Tambakis diagnosed knee arthritis and derangement. In a February 17, 2011 report, he opined that the July 24, 2008 accident did not produce the arthritis but aggravated her arthritic condition.

In a January 11, 2010 x-ray report, Dr. Marina Perlov, a Board-certified diagnostic radiologist, observed early osteoarthritic changes with smooth spur formations in the patellofemoral and medial joint compartments. No joint effusion was noted. Dr. Perlov diagnosed mild osteoarthritis.

On February 11, 2011 appellant, through counsel, requested reconsideration. He acknowledged that the request was made more than one year from the last merit decision but contended that the enclosed medical report from Dr. Lyubov Moysik, a family practitioner, demonstrated clear evidence of error.

In a January 17, 2011 report, Dr. Moysik stated that he had treated appellant since July 2008 for a work-related accident when she slipped on wet pavement and twisted her left knee at work. Appellant complained of persistent moderate pain in her left knee, which severely

³ Docket No. 09-1370 (issued January 14, 2010).

⁴ The reports were dated January 11, April 1, May 13, June 10, August 19, October 21 and December 16, 2010 and February 17, 2011.

limited her daily life activities. Dr. Moysik related that appellant had left knee cartilage removal surgery 22 years ago and did not have any problems until the work-related accident. He opined that she was still unable to work and must continue to be on disability.

By decision dated May 12, 2011, OWCP denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.⁸ It must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value 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.⁹

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹² The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

⁸ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998); *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*; *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Thankamma Mathews*, 44 ECAB 765 (1993).

¹³ *Pete F. Dorso*, 52 ECAB 424 (2001); *Cresenciano Martinez*, 51 ECAB 322 (2000).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ As appellant's January 11, 2011 request for reconsideration was submitted more than one year after the last merit decision of record, issued by the Board on January 14, 2010, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.

The Board finds that appellant failed to establish clear evidence of error on the part of OWCP. In support of her request for reconsideration, appellant resubmitted previous medical reports of record. She also submitted various medical reports from Drs. Tambakis, Perlov and Moysik. These physicians provided an accurate history of injury regarding the July 24, 2008 work event and noted appellant's left knee pain and arthritis. In a February 17, 2011 report, Dr. Tambakis opined that the accepted work incident aggravated her arthritic condition. This evidence, however, is insufficient to establish that OWCP erred in denying appellant's claim as it does not raise a substantial question as to the correctness of OWCP's decisions.¹⁶ None of the new medical reports submitted with the untimely request for reconsideration provided detailed medical rationale explaining how appellant's July 24, 2008 work event caused her alleged injury. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report which, if submitted before the merit denial was issued, might require additional development of the claim, is insufficient to establish clear evidence of error.¹⁷

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

CONCLUSION

The Board finds that appellant's January 11, 2011 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *D.O.*, Docket No. 11-398 (issued August 19, 2011); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁶ *See M.N.*, Docket No. 11-1317 (issued January 20, 2012); *Y.G.*, Docket No. 10-2190 (issued July 12, 2011); *D.G.*, 59 ECAB 455 (2008).

¹⁷ *R.A.*, Docket No. 11-1062 (issued November 2, 2011); *James R. Mirra*, 56 ECAB 738 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2012
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