



## **FACTUAL HISTORY**

On November 11, 2009 appellant, then a 51-year-old mail handler, filed a recurrence claim alleging that she sustained left knee symptoms while sitting at work on November 2, 2009.<sup>2</sup> A November 2, 2009 attending physician's report from Dr. John P. Gouts, an internist, related that she injured her left knee in 1998 and thereafter experienced chronic pain. In a November 2, 2009 duty status report, Dr. Gouts placed appellant on modified assignment effective November 3, 2009.<sup>3</sup>

OWCP informed appellant in a December 14, 2009 letter that her claim would be developed as one for a new traumatic injury because she did not experience a spontaneous worsening of an employment-related condition without new injury or exposure to work factors.<sup>4</sup> It gave her 30 days to submit a medical report from a physician explaining how an employment incident on November 2, 2009 caused or contributed to a left knee condition.

In a November 4, 2009 report, Dr. Kio mars Moosazadeh, a Board-certified physiatrist, stated that appellant stopped work due to a swollen left knee. Appellant previously underwent two prior surgeries and was diagnosed with post-traumatic knee osteoarthritis. On examination, Dr. Moosazadeh observed patellofemoral joint tenderness and minor effusion. In a December 8, 2009 attending physician's report, he diagnosed left knee derangement and anterior cruciate ligament insufficiency. Dr. Moosazadeh checked the "yes" box indicating that appellant's condition resulted from her federal employment, specifying that she was involved in a work-related accident on September 21, 1998 and was symptomatic on November 2, 2009. He placed her on total disability status effective November 4, 2009.

In a November 13, 2009 report, Dr. Charles A. DeMarco, a Board-certified orthopedic surgeon, examined appellant and observed antalgic gait, medial and lateral patellar facet and joint line tenderness and a positive Lachman test. He diagnosed left knee degenerative arthritis and anterior cruciate ligament deficiency and opined that she remained totally disabled.<sup>5</sup>

By decision dated January 14, 2010, OWCP denied appellant's claim, finding the medical evidence insufficient to demonstrate that the accepted November 2, 2009 employment incident caused or contributed to a left knee condition.

Appellant requested reconsideration on August 12, 2010 and submitted new evidence. A July 28, 2010 left knee magnetic resonance imaging (MRI) scan obtained by John M. Athas, a Board-certified diagnostic radiologist, exhibited blunting of the posterior horn of the medial

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<sup>2</sup> Appellant identified OWCP File No. xxxxxx418 as the prior claim and September 21, 1998 as the date of original injury.

<sup>3</sup> The case record also contains an illegible November 2, 2009 progress note.

<sup>4</sup> OWCP assigned File No. xxxxxx408 to this claim.

<sup>5</sup> Dr. DeMarco mentioned that appellant experienced left knee pain while walking down a flight of stairs on September 21, 2008.

meniscus with underlying subchondral bone marrow edema in the peripheral medial tibial plateau.<sup>6</sup>

On November 15, 2010 OWCP denied modification of the January 14, 2010 decision.

Appellant requested reconsideration on January 20, 2012, asserting that she did not file a timely application due to illness in her family. She also maintained that OWCP should have consolidated three of her workers' compensation claims, namely File Nos. xxxxxx426, xxxxxx418 and xxxxxx408.<sup>7</sup>

By decision dated February 1, 2012, OWCP denied appellant's request for reconsideration, finding that it was not filed within one year of the November 15, 2010 decision and did not otherwise establish clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>8</sup> This discretionary authority, however, is subject to certain restrictions. Title 20 Code of Federal Regulations section 10.607(a) provides that a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.<sup>9</sup> The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>10</sup>

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>12</sup> is positive, precise and explicit and manifests on its face that OWCP committed an error.<sup>13</sup> The evidence must not only be of sufficient probative value to

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<sup>6</sup> Appellant also submitted Dr. Moosazadeh's January 4, 2010 attending physician's report, which essentially duplicated the content of his December 8, 2009 report.

<sup>7</sup> Appellant furnished a copy of OWCP's October 25, 2010 decision accepting a past traumatic injury claim for post-traumatic left knee degenerative arthritis sustained on June 1, 2009. File No. xxxxxx426.

<sup>8</sup> See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>9</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

<sup>10</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) ("The term 'clear evidence of error' is intended to represent a difficult standard").

<sup>12</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question 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. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>14</sup>

### ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The last merit decision in this case was issued on November 15, 2010. Appellant filed an application to reopen this decision for further merit review on January 20, 2012. Because more than one year passed between November 15, 2010 and January 20, 2012, OWCP properly determined that the reconsideration request was not timely filed.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. In its January 14 and November 15, 2010 merit decisions, OWCP denied her traumatic injury claim on the basis that the medical evidence did not sufficiently establish that the accepted November 2, 2009 employment incident caused or contributed to a left knee condition. Appellant presented two arguments with her January 20, 2012 reconsideration request. First, she asserted that she was unable to file a timely request due to illness in her family. The Board has held that the regulatory language unequivocally sets a one-year time limit for filing reconsideration requests and does not indicate that a late filing may be excused by extenuating circumstances.<sup>15</sup>

Second, appellant contended that OWCP should have combined three of her workers' compensation claims, namely File Nos. xxxxxx426, xxxxxx418 and xxxxxx408.<sup>16</sup> As noted, evidence must not only be of sufficient probative value to establish a clear procedural error, but must also shift the weight of the evidence in favor of the employee and raise a substantial question as to the correctness of OWCP's decision for which reconsideration is sought. While appellant appeared to suggest that doubling would produce a contrary conclusion, this argument was not of sufficient probative value to *prima facie* shift the weight of the evidence in her favor and did not raise a substantial question as to the correctness of the November 15, 2010 decision in view of the earlier, deficient case record. Therefore, OWCP properly determined that the untimely request failed to establish clear evidence of error.

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<sup>14</sup> See *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>15</sup> *B.F.*, Docket No. 11-1181 (issued December 8, 2011). See also 20 C.F.R. § 10.607.

<sup>16</sup> See FECA Procedure Manual, *supra* note 11, *File Maintenance & Management*, Chapter 2.400.8(c) (February 2000) ("Cases meeting one of the following tests must be doubled: (1) A new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same body part ....") See also *M.R.*, Docket No. 06-198 (issued August 28, 2006) ("[OWCP] has the discretion to determine when and if cases should be doubled...."). Appellant raises the same argument on appeal.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 1, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2012  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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