

FACTUAL HISTORY

In the prior appeal,² the Board found that appellant, a mail carrier, did not meet her burden to establish that she sustained a right knee injury in the performance of duty on June 16, 2007. The Board offered two grounds. First, appellant did not establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The history of injury she described on her December 5, 2007 claim form differed materially from the history she provided her physician on June 18, 2007, only two days after the alleged injury. Dr. Barry S. Ziring, the attending internist and an assistant professor of medicine, did not mention a popping in appellant's knee. He reported that appellant was walking when she suddenly felt pain behind her right calf. Dr. Ziring's findings included some tenderness on the lateral aspect of the knee but no swelling or edema. He diagnosed a partial tear of the right calf muscle and released appellant to return as needed.

OWCP accepted appellant's claim for partial tear of the right gastrocnemius muscle, resolved.

Second, the Board found that the medical opinion evidence was not sufficiently rationalized to support the claimed right knee injury. The Board found that Dr. Ziring failed to reconcile his opinion that appellant tore her right medial meniscus and fractured her medial femoral condyle on June 16, 2007 with his initial treatment notes. The Board affirmed OWCP's December 10, 2009 decision denying appellant's right knee claim. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On February 9, 2012 OWCP received a January 13, 2012 report from Dr. Ziring to appellant's representative. Dr. Ziring indicated that he disagreed with the Board's decision "stating that her knee injury was not related to the popping sound that she heard or to an injury sustained at work." He stated that he lacked the expertise to interpret whether x-ray findings supported a traumatic *versus* a degenerative origin of her injury.

On May 8, 2012 appellant's representative requested reconsideration. He argued that, as OWCP had received Dr. Ziring's January 13, 2012 report within one year of the Board's decision, it was obligated to review the merits of her case.

In a June 8, 2012 decision, OWCP denied appellant's reconsideration request. It found that her request was untimely and failed to present clear evidence of error.

Appellant's representative argues on appeal that OWCP abused its discretion in failing to review Dr. Ziring's January 13, 2012 report, which constituted new medical evidence that appellant did suffer a knee injury on June 16, 2007.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

² Docket No. 10-1299 (issued February 8, 2011).

“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.”³

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

The term “clear evidence of error” is intended to represent a difficult standard.⁵ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁶

ANALYSIS

The Board’s February 8, 2011 decision affirming the denial of appellant’s right knee claim was the most recent merit decision in this case. Appellant had one-calendar year, or until February 8, 2012, to deliver a reconsideration request to OWCP.⁷ Her May 8, 2012 request was therefore untimely by 13 weeks.

The question for determination is whether appellant’s untimely request shows clear evidence of error in OWCP’s denial of her right knee claim. Appellant argued that OWCP was obligated to review Dr. Ziring’s January 13, 2012 report, which OWCP received on February 9, 2012. But Dr. Ziring simply indicated that he disagreed with the Board’s decision. He did not reconcile his history of a knee popping with the history he reported on June 18, 2007, nor did he reconcile his opinion that appellant sustained a right knee injury with his findings and diagnosis on June 18, 2007. The Board finds, therefore, that this evidence does not, on its face, show clear error in the denial of appellant’s right knee claim.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

⁶ *Id.*, Chapter 2.1602.5.b.

⁷ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include prerecoupment hearing decisions. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004). (Emphasis deleted.)

Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request. The Board will affirm OWCP's June 8, 2012 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's reconsideration request as untimely filed and failing to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board