

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

H.C., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
HOSPITAL, Pensacola, FL, Employer**

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**Docket No. 12-1650
Issued: January 2, 2013**

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 29, 2012 appellant, through her attorney, filed a timely appeal from a February 1, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely filed.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

¹ The last merit decision in this case was the September 13, 2010 decision granting appellant a schedule award for three percent permanent impairment of the left lower extremity. For final adverse OWCP decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days has elapsed between the most recent merit decision dated September 13, 2010 to the filing of this appeal on July 29, 2012, the Board lacks jurisdiction to review the merits of this case.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On March 21, 2008 appellant, then a 63-year-old budget technician, injured her left knee in the performance of duty when she was ascending the stairs to the fourth floor. OWCP accepted her claim for lateral meniscus tear of the left knee. Appellant stopped work and returned on April 2, 2008. On July 21, 2008 she underwent a left knee arthroscopy and partial lateral meniscectomy.

In a July 23, 2009 progress note, Dr. Dale T. Zorn, a Board-certified orthopedic surgeon, related that appellant sustained a work-related injury on March 21, 2008 and complained of pain in the medial compartment of the knee. He reviewed her history and noted that postoperative x-rays revealed that she only had about one millimeter of articular cartilage in the medial compartment of her left knee. Dr. Zorn reported that he had previously given appellant a maximum medical improvement date of October 7, 2008. Examination of the lower extremity revealed an effusion in the left knee and crepitance with range of motion. Dr. Zorn diagnosed progressive symptoms of osteoarthritis of the left knee. He opined that according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* appellant's overall impairment of the left lower extremity was approximately 20 to 30 percent based on the findings of rather severe loss of articular cartilage and chondromalacia with one millimeter of remaining articular cartilage. Dr. Zorn reported that the 20 to 30 percent extremity impairment would convert to 8 to 12 percent whole person impairment.

In a May 20, 2010 letter, Dr. Zorn stated that appellant was placed at maximum medical improvement on October 7, 2008. He reported that she had 20 to 30 percent permanent impairment of the extremity or 8 to 12 percent permanent impairment of her whole body.

On June 1 and 22, 2010 appellant filed a claim for a schedule award.

In a June 8, 2010 report, the medical adviser noted appellant's accepted condition of left knee lateral meniscus tear. He stated that appellant's treating physician provided a detailed explanation of her left knee joint osteoarthritis and opined that she had a permanent impairment of 20 to 30 percent of the left lower extremity and 8 to 12 percent impairment of her whole body. The medical adviser noted, however, that appellant's case was only accepted for tear of the lateral meniscus and not for arthritis of the knee. According to the sixth edition of the A.M.A., *Guides*³ at Chapter 16, Table 16-3 on page 509, he opined that appellant had three percent permanent impairment of the left lower extremity. The medical adviser determined that appellant had class 1 impairment with a default value of two percent.⁴ He found that she had

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.* at 509.

grade modifiers of 2 for Functional History (GMFH) and Physical Examination (GMPE), which resulted in a net adjustment of +2.⁵ Thus, the medical adviser concluded that appellant had three percent permanent impairment of the left lower extremity.

On September 13, 2010 OWCP granted a schedule award for three percent permanent impairment of the left leg. The award ran from October 7 to December 6, 2008 for 8.64 weeks.

In a September 14, 2010 report, Dr. Zorn reviewed the district medical adviser's June 8, 2012 report and disagreed with his rating. He explained that the district medical adviser only addressed appellant's lateral meniscus injury and did not consider her July 21, 2008 left knee arthroscopy, which resulted from persistent pain following her March 21, 2008 work-related injury. Dr. Zorn opined that appellant's March 21, 2008 injury directly contributed to and led to progressive arthritic changes that necessitated a total knee arthroplasty and reported that her permanent impairment should be based on her ultimate surgical requirement. He restated that appellant had 20 to 30 percent impairment of the left lower extremity due to her total knee arthroplasty and 8 to 12 percent impairment of the whole body.

In reports dated October 19, 2010 to December 13, 2011, Dr. Zorn related that appellant sustained a March 21, 2008 work-related injury and continued to experience pain in her left knee associated with effusion. X-rays revealed progressive varus changes in the left knee and significant degenerative arthritis and varus changes. Examination revealed an effusion in the left knee, crepitus with range of motion, early genu varum and trade edema. Dr. Zorn recommended that she undergo a total knee arthroplasty.

On November 10, 2011 OWCP expanded appellant's claim to include left knee synovitis, left knee chondromalacia patellae, and contusion of medial femoral condyle and tibial acetabular.

In a letter dated January 2, 2011 and received on January 6, 2012, appellant, through counsel, requested reconsideration of the September 13, 2010 schedule award decision. He stated that the rating was based on the accepted condition of left lateral meniscus tear but that the claim had been expanded to accept Dr. Zorn's previous diagnoses.

OWCP referred appellant's case to the district medical adviser to determine whether the record supported greater impairment. In a January 30, 2011 report, the district medical adviser noted that on July 21, 2008 a left knee arthroscopic surgery was performed, which included a partial lateral meniscectomy. Upon examination, there was chronic pain and limited activity due to varus knee and total loss of articular cartilage of the medial compartment. The medical adviser recommended accepting her claim for primary osteoarthritis of the left knee. He did not know whether appellant had reached maximum medical improvement.

By decision dated February 1, 2012, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to present clear evidence of error.

⁵ The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). A.M.A., *Guides* 494-531.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.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 reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁸

OWCP may still reopen a claimant's case for merit review, even if the claimant's applications was not filed within the one-year time limitation, if claimant's application demonstrates 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 decided by OWCP.⁹ The evidence must be positive, precise, and explicit, and it must 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 The evidence submitted 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.¹³ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.¹⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹⁶

⁶ 20 C.F.R. § 10.607(a).

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

⁸ *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁹ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁴ *Id.*

¹⁵ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

ANALYSIS

The Board finds that OWCP applied an erroneous standard to appellant's schedule award claim.

OWCP accepted appellant's claim for left knee lateral meniscus tear. By decision dated September 13, 2010, it granted her a schedule award for three percent impairment of the left lower extremity. On January 6, 2012 OWCP received appellant's request for reconsideration. In a decision dated February 1, 2012, it denied her request for reconsideration as untimely filed and failing to establish clear evidence of error.

The Board notes that in schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of the existing schedule award. When a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration. A claim for an additional schedule award may be based on new exposure to employment factors or on the progression of an employment-related condition, without new exposure, resulting in greater permanent impairment.¹⁷ Following the original schedule award, OWCP accepted left knee synovitis, left knee chondromalacia patellae, and contusion of the medial femoral condyle and tibial acetabular. In her request for reconsideration, appellant's counsel requested an additional schedule award based on the accepted conditions and submitted medical evidence to support her request. The Board has held that a claimant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment, at any time.¹⁸ Appellant submitted new evidence for an additional schedule award based on a progression of her employment-related condition rather than on the basis that the original schedule award was in error. OWCP erroneously issued a denial of appellant's request for reconsideration under the clear evidence of error standard. On remand, it should review and develop the medical evidence and issue an appropriate decision regarding her request for an increased schedule award.

CONCLUSION

The Board finds that OWCP erroneously refused to reopen appellant's case for further merit review.

¹⁷ *R.L.*, Docket No. 09-1948 (issued June 29, 2010); *B.K.*, 59 ECAB 228 (2007); *Candace A. Karkoff*, 56 ECAB 622 (2005).

¹⁸ See *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: January 2, 2013
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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