

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

L.A., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer

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**Docket No. 13-619
Issued: May 15, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2013 appellant, through her attorney, filed a timely appeal from a September 13, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as it was untimely filed and did not establish clear evidence of error. As the last merit decision, dated August 19, 2010, was issued more than 180 days prior to the filing of the appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On January 29, 2010 appellant, then a 34-year-old laborer/custodian, filed a traumatic injury claim alleging that on June 25, 2006 she sustained an injury to her knee when she fell at

¹ 5 U.S.C. § 8101 *et seq.*

work. Her supervisor controverted the claim as it was reported more than three years from the date of injury.²

In a decision dated March 18, 2010, OWCP denied appellant's claim as it was not timely filed under 5 U.S.C. § 8122. It determined that she did not file her claim within three years of the date of injury and there was no evidence that her supervisor had actual knowledge of the injury within 30 days.

On April 5, 2010 appellant requested a review of the written record. In a decision dated July 7, 2010, an OWCP hearing representative remanded the case for OWCP to ask the employing establishment whether she had provided written or verbal notification of injury and to determine whether she had filed a claim for the alleged traumatic injury prior to January 29, 2010.³

In a decision dated August 19, 2010, OWCP denied appellant's claim as it was untimely filed under 5 U.S.C. § 8122. It found that she had not provided evidence showing that she timely notified the employing establishment of her injury or filed a claim within three years of the date of injury. OWCP noted that the employing establishment had not responded to its request for additional information. It further determined that appellant had not submitted medical evidence showing that she received treatment for a June 25, 2006 injury.

By letter dated June 6, 2012, appellant related that she had hurt her knee twice at work but her initial injury was not accepted. She asserted that her physician determined that her injury was employment related. Appellant maintained that she had advised her supervisor of her injury and filed a claim form but did not receive "any paperwork." She attributed her left knee injury to a change in gait as a result of a back injury.

By decision dated September 13, 2012, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁴ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP 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.⁵

The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example,

² Appellant's supervisor also noted that she had a prior work injury and was on the periodic rolls.

³ On August 5, 2010 OWCP denied appellant's request for an oral hearing as she had previously received a review of the written record.

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ 20 C.F.R. § 10.607.

proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.⁶ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.⁷

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP.⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ As appellant's June 6, 2012 request for reconsideration was submitted more than one year after the last merit decision of record issued August 19, 2010, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁰

On reconsideration appellant argued that she sustained an injury to her left knee that her physician found work related. The underlying issue, however, is whether she timely filed a claim for her alleged June 25, 2006 employment injury. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹

Appellant further contended that she notified her supervisor of her injury and filed a claim form. The issue, however, is whether she submitted written notice of injury to the employer within 30 days, filed a claim within three years of the date of injury or provided her immediate supervisor with actual knowledge of the alleged injury within 30 days.¹² Appellant has not submitted any evidence establishing one of the above-listed criteria; consequently, she has not established clear evidence of error.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

⁷ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Robert F. Stone*, *supra* note 7.

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

¹¹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹² Section 8122 of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. In cases involving a traumatic injury, the time limitation begins to run on the date of the incident even though the employee may not be aware of the seriousness or ultimate consequences of the injury or the nature of the injury is not diagnosed until sometime later. *See Paul S. Devlin*, 39 ECAB 715 (1988). Even if a claim is not timely filed within the required three-year period, it is still regarded as timely under section 8122(a)(1) if the claimant's immediate superior had actual knowledge of the alleged employment-related injury within 30 days. Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119. *See* 5 U.S.C. § 8122(a)(1) and (a)(2).

As the evidence submitted by appellant is insufficient to raise a substantial question as to the correctness of OWCP's last merit decision, she has not established clear evidence of error.¹³

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2013
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

¹³ See *Veletta C. Coleman*, 48 ECAB 367 (1997).