

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

C.M., Appellant)	
)	
and)	Docket Nos. 14-1134 & 14-1216
)	
U.S. POSTAL SERVICE, COLORADO- WYOMING PERFORMANCE CLUSTER, Denver, CO, Employer)	Issued: August 18, 2014
)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 18, 2014 appellant, through counsel, filed a timely appeal from the November 22, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) and, on April 18, 2014, she filed a timely appeal from a November 25, 2013 nonmerit decision of OWCP. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she had work-related disability for the period April 12, 2005 to August 15, 2008; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that her September 6, 2013 reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 10, 2006 appellant then a 50-year-old casual carrier, filed an occupational disease claim alleging that she sustained internal derangement of her right knee and bilateral sciatica due to the repetitive duties of her job. She first became aware of her claimed conditions on March 1, 2005. Appellant stopped work on April 12, 2005 and was terminated from the employing establishment effective April 14, 2005.²

In a March 1, 2006 report, Dr. Christopher B. Ryan, an attending Board-certified physiatrist, provided a description of his first examination of appellant. He noted that her complaints began in late March 2005 or early April 2005 due to her new duties of carrying mail. Dr. Ryan described the reported April 12, 2005 incident³ and detailed appellant's employment duties at K-Mart, which were performed after she stopped working at the employing establishment on April 12, 2005. He reviewed medical records from 2005 and found that they showed slight swelling and minimal effusion of the right knee. Dr. Ryan provided a diagnosis of substantial permanent aggravation of right knee osteoarthritis which was related to the employment duties appellant described in her Form CA-2.

In an April 3, 2007 report, Dr. Ryan reiterated some of the historical information and noted that he had reviewed an October 24, 2003 magnetic resonance imaging (MRI) scan study. It showed significant degenerative changes, bursitis and chondromalacia. Dr. Ryan again reviewed the 2005 medical records and described the results of a right knee MRI scan study dated February 15, 2007, which showed moderate osteoarthritis, very significant patellofemoral joint space loss and chondromalacia.

In an April 3, 2008 report, Dr. Ryan noted that appellant's walking in the snow at work in early April 2005 contributed to the aggravation of her right knee condition. He termed the reported April 12, 2005 incident as the "straw that broke the camels back," but indicated that her exposure was over the course of more than one day and therefore was properly classified as an occupational illness. Dr. Ryan noted that appellant's physical examination was difficult and provided little, if any, evidence of the aggravation, but noted that the diagnostic testing from October 2003 demonstrated convincing objective findings. He stated that osteoarthritis does not generally resolve and that appellant's performance of work duties in March and April 2005, including actions involved in the April 12, 2005 incident, contributed to her degenerative arthritis.

OWCP found in a July 23, 2008 decision that appellant's case should be accepted for the occupational condition of temporary aggravation of right knee osteoarthritis. It later accepted

² After April 12, 2005 appellant worked for private employers, including K-Mart, where she worked as a sales clerk.

³ On April 25, 2005 appellant filed a Form CA-1, traumatic injury claim, stating that on April 12, 2005, at 11:00 a.m., her knee tore when going up and down stairs at work. She described the nature of her injury as torn ligament fibers to the right knee. OWCP denied this traumatic injury claim in decisions dated June 22, 2005, January 19 and December 11, 2007 and July 23, 2008. It acknowledged that appellant sustained an occupational disease due to her repetitive work duties prior to April 12, 2005 and the issue of whether she sustained a traumatic work injury on April 12, 2005 is not currently before the Board.

that she sustained a work-related permanent aggravation of right knee osteoarthritis due to her repetitive job duties, including engaging in extensive walking, prior to stopping work on April 12, 2005.

By submission of a Form CA-7 dated August 24, 2008, appellant requested compensation for the period April 12, 2005 through August 15, 2008.

In an October 9, 2008 report, Dr. Ryan indicated that recent x-rays revealed significant osteophytes and a loss of substantial cartilage that showed a permanent aggravation. He noted that appellant had been able to work and use her legs vigorously before the occupational exposure, but indicated that she was now relegated to a sedentary state.

Appellant submitted excerpts from the testimony Dr. Ryan provided at Equal Employment Opportunity Commission (EEOC) hearings held on April 16 and 17, 2007. Dr. Ryan testified that, before April 12, 2005, she sustained a permanent aggravation of her right knee osteoarthritis. He stated that appellant required various work restrictions, including limiting the amount of carrying, stair climbing, squatting and kneeling she could perform.

In an August 17, 2009 report, Dr. Ryan stated that diagnostic testing revealed end-stage osteoarthritis, that the effects of the injury had not ceased and that appellant would need a total knee arthroplasty which would only be considered after significant weight loss. He stated that her tolerance for walking, standing, kneeling, stooping, squatting and crawling was greatly limited. Dr. Ryan noted that appellant could walk about a block and that she could not perform the job she held when she was injured. He anticipated a return to modified work after the surgery and stated that she could not drive while at work and needed transportation to and from any work activities.

By decision dated August 16, 2010, OWCP denied appellant's claim for compensation for the period April 12, 2005 through August 15, 2008. It noted that she had held several jobs after being terminated by the employing establishment. Further, the medical evidence which was contemporaneous with the beginning dates of her claimed disability cited no objective findings that her work-related condition caused disability for any specific period.

In a February 2, 2011 decision, an OWCP hearing representative affirmed the August 16, 2010 decision. He found that the reports of Dr. Ryan discussed the permanent aggravation of appellant's right knee condition, but did not provide a rationalized opinion on specific periods of work-related disability between April 12, 2005 and August 15, 2008.

In a July 13, 2012 decision,⁴ the Board affirmed OWCP's February 2, 2011 decision, finding that appellant did not meet her burden of proof to establish that she had work-related disability for the period April 12, 2005 to August 15, 2008. It noted that the medical evidence from the period immediately following April 12, 2005 was sparse and did not provide objective evidence or medical reasoning for the claimed period of disability. The Board noted that Dr. Ryan began serving as appellant's physician on March 1, 2006 and discussed his reports dated March 2006 to August 2009. Although Dr. Ryan noted that appellant sustained a permanent occupational injury prior to April 12, 2005, he did not provide a clear, rationalized

⁴ Docket No. 11-1747 (issued July 13, 2012).

opinion that she sustained disability due to her employment duties for specific periods between April 12, 2005 and August 15, 2008.

In a letter dated February 1, 2013, appellant, through counsel, requested reconsideration of OWCP's February 2, 2011 decision denying her claim for work-related disability for the period April 12, 2005 to August 15, 2008.

In an August 29, 2011 report, Dr. Ryan provided a description of his treatment of appellant's right knee condition. He noted that appellant worked as a casual carrier up until April 12, 2005 and then began working for K-Mart on May 11, 2005. Dr. Ryan discussed an October 24, 2003 MRI scan study of appellant's right knee which showed bursitis of the tibial collateral region, advanced chondromalacia of the medial femoral condyle near full thickness, degenerative changes to the anterior cruciate ligament, mild patellar chondromalacia and moderate-sized joint effusion. A February 15, 2007 MRI scan study of appellant's right knee revealed moderate osteoarthritis, very significant patellofemoral joint space loss and chondromalacia, proximal medial collateral ligament tear and degenerative changes to the anterior cruciate ligament. Dr. Ryan stated, "In other words, while significant osteoarthritis was present in 2003, it had advanced, particularly at the patellofemoral articulation, on the scan of 2007." He indicated that appellant sustained work-related aggravation of her osteoarthritis prior to April 12, 2005 and stated:

"Regarding disability, she appears to have been totally disabled between April 12, 2005 and May 11, 2005. Subsequently, she has been partially disabled since that time. This is based on objective findings noted above. However, with regard to partial or total disability up to February 28, 2006 related to duties before April 12, 2005, her work permanently accelerated and aggravated her condition before April 12, 2005, as the degenerative changes demonstrated in 2003 were permanent. This most probably was caused by the walking, standing, and squatting that she described in her narratives regarding work duties.

"Regarding the issue of whether [appellant] would have suffered the April 12, 2005 flare-up if she did not already have work-related degenerative arthritis, most probably she would not have. It seems most likely that the degenerative arthritis demonstrated on the MRI scan in 2003 made her knee far more vulnerable to injury than if her knee had been normal.

"Again, with regard to the objective findings which substantiate the claim that she suffered a worsening of her condition, there was a substantial worsening of the osteoarthritis that occurred between the scan of 2003 and the scan of 2007. Correlating this with her clinical course, this aggravation occurred due to work activity before and on April 12, 2005, to a reasonable degree of medical certainty.

"Regarding the objective findings, they restrict standing and walking insofar as the joint space has narrowed, and it is far easier to inflame a damaged joint surface than a healthy one. Chondromalacia involves softening of the cartilage, and weighting such a joint with softened cartilage more easily breaks down the cartilage, irritates the underlying tissue (bone), and causes an inflammatory

reaction. This inflammatory reaction results in fluid accumulation within the knee capsule, causing further pain in the joint capsule, and restricting range of motion by causing a tense effusion in the knee capsule. Standing for long periods of time puts further pressure on this inflamed joint surface, and causes deep visceral pain in the knee, as is the case with osteoarthritis.”⁵

Appellant also submitted reports of Dr. Ryan dated March 29, 2011 to May 30, 2013; an April 20, 2012 report of Dr. Chris E. Wilkinson, an attending Board-certified orthopedic surgeon; and an October 1, 2013 report of Dr. Rajesh Bazaz, an attending Board-certified orthopedic surgeon. Although the reports discussed appellant’s right knee condition, none of the reports provided an opinion regarding whether appellant had work-related disability for the period April 12, 2005 to August 15, 2008.⁶

In a May 1, 2013 decision, OWCP denied appellant’s September 29, 2011 reconsideration request noting that “the request was not valid because the case was already under review for the same issue” by the Board.⁷

In an August 29, 2013 letter received on September 6, 2013, appellant, through counsel, requested reconsideration of OWCP’s May 1, 2013 nonmerit decision denying her reconsideration request. Counsel argued that appellant’s February 1, 2013 reconsideration request was improperly denied as untimely. He contended that appellant’s reconsideration request actually was timely because it was filed within one year of the Board’s July 13, 2012 merit decision.⁸

In a November 22, 2013 merit decision, OWCP affirmed its prior decisions finding that appellant did not meet her burden of proof to establish that she had work-related disability for the period April 12, 2005 to August 15, 2008. It found that Dr. Ryan did not provide adequate medical rationale with respect to his opinion on appellant’s disability for this period.

In a November 25, 2013 decision, OWCP refused to reopen appellant’s case for further review of the merits of her claim on the grounds that her September 6, 2013 reconsideration request was untimely filed and failed to demonstrate clear evidence of error. It found that

⁵ Dr. Ryan indicated that he did not believe that appellant further aggravated her right knee condition after stopping work for the employing establishment.

⁶ The record reflects that appellant underwent OWCP authorized right total knee arthroplasty on October 9, 2013.

⁷ Appellant filed her appeal with the Board on July 26, 2011 and her reconsideration request was made on September 26, 2011, while the case was still under review by the Board. *See* 20 C.F.R. § 501.2 providing that the Board and OWCP may not exercise simultaneous jurisdiction over the same issue in a case on appeal. *See also Douglas E. Billings*, 41 ECAB 880 (1990).

⁸ The Board notes that OWCP’s May 1, 2013 nonmerit decision actually addressed appellant’s September 29, 2011 reconsideration request. The May 1, 2013 decision did not deny this reconsideration request on the grounds that it was untimely, but rather denied it on the grounds that the Board and OWCP may not exercise simultaneous jurisdiction over the same issue in a case on appeal.

appellant's September 6, 2013 reconsideration request was untimely because it was filed more than a year after the Board's July 13, 2012 decision.⁹

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹⁰ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹

Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues, which must be proved by a preponderance of reliable, probative and substantial medical evidence.¹²

ANALYSIS -- ISSUE 1

OWCP accepted that appellant suffered a work-related permanent aggravation of right knee osteoarthritis due to her repetitive job duties, including engaging in extensive walking, prior to stopping work on April 14, 2005. She stopped work on April 12, 2005 and was terminated from the employing establishment effective April 14, 2005. By submission of a Form CA-7 dated August 24, 2008, appellant requested compensation for the period April 12, 2005 through August 15, 2008. In August 16, 2010 and February 2, 2011 decisions, OWCP denied her claim on the grounds that she did not submit sufficient medical evidence to establish that she had work-related disability for the period April 12, 2005 to August 15, 2008.

In a July 13, 2012 decision, the Board affirmed OWCP's February 2, 2011 decision finding that appellant did not meet her burden of proof to establish that she had work-related disability for the period April 12, 2005 to August 15, 2008. The Board indicated that Dr. Ryan, a Board-certified physiatrist, began serving as appellant's physician on March 1, 2006 and discussed his reports dated between March 2006 and August 2009. The Board found that Dr. Ryan did not provide a clear, rationalized opinion that appellant sustained disability due to her employment duties for specific periods between April 12, 2005 and August 15, 2008.

⁹ OWCP noted that, in connection with appellant's timely February 1, 2013 reconsideration request, it had reopened her claim and issued a November 22, 2013 decision on the merits.

¹⁰ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

¹¹ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹² *W.D.*, Docket No. 09-658 (issued October 22, 2009).

After the Board's July 13, 2012 decision, appellant submitted additional medical evidence in support of her claim. The Board finds that this additional evidence does not establish that appellant was totally disabled from April 12, 2005 to August 15, 2008. The reports do not provide sufficient medical opinion.

In an August 29, 2011 report, Dr. Ryan discussed an October 24, 2003 MRI scan study of appellant's right knee and a February 15, 2007 MRI scan study of his right knee and noted the differences in the two reports. He stated, "[W]hile significant osteoarthritis was present in 2003, it had advanced, particularly at the patellofemoral articulation, on the scan of 2007." Dr. Ryan indicated that appellant sustained work-related aggravation of her osteoarthritis prior to April 12, 2005 and stated, "Regarding disability, she appears to have been totally disabled between April 12 and May 11, 2005. Subsequently, [appellant] has been partially disabled since that time. This is based on objective findings noted above. However, with regard to partial or total disability up to February 28, 2006 related to duties before April 12, 2005, [appellant's] work permanently accelerated and aggravated her condition before April 12, 2005, as the degenerative changes demonstrated in 2003 were permanent." He further noted that the permanent aggravation of her right knee made her more vulnerable to further injury.

While Dr. Ryan identified a period of disability beginning April 12, 2005, he did not provide sufficient medical rationale addressing why appellant was totally disabled during the period April 12, 2005 to August 15, 2008. The mere fact that OWCP accepted a permanent aggravation of a preexisting condition does not necessarily confer entitlement to disability compensation as requested. Dr. Ryan suggested that the fact that there were changes in appellant's diagnostic testing between 2003 and 2007 showed that her claimed period of disability was work related. The diagnostic testing does not raise an inference of causal relationship between a claimed period of disability and employment factors. Dr. Ryan did not explain why appellant's right knee condition beginning April 12, 2005 disabled her from all work, nor did he explain why her condition beginning May 11, 2005 only partially disabled her from work. He did not provide any notable discussion of physical examination findings that supported his stated conclusion that appellant had work-related disability beginning April 12, 2005. In addition, Dr. Ryan did not explain why her ostensible right knee problems beginning and continuing after April 12, 2005 would not have been solely due to some nonwork-related problem, such as the natural progression of her underlying degenerative right knee condition.

The additional reports of Dr. Ryan and the April 20, 2012 report of Dr. Wilkinson, an attending Board-certified orthopedic surgeon; and an October 1, 2013 report of Dr. Bazaz, an attending Board-certified orthopedic surgeon, do not provide an opinion regarding whether appellant had work-related disability for the period April 12, 2005 to August 15, 2008. Therefore, these reports do not establish appellant's disability claim for this period.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.¹³ 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.¹⁴ OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”¹⁵ Its regulations and procedures provide that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of OWCP.¹⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.²¹

OWCP procedures provide that a “decision denying an application for reconsideration cannot be the subject of another application for reconsideration.” The only review for this type

¹³ 20 C.F.R. § 10.607(a). According to OWCP procedure, the one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (October 2011).

¹⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁶ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedure further provides, “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 a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error.”

¹⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁸ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

²⁰ See *Leona N. Travis*, *supra* note 18.

²¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

of nonmerit decision is an appeal to the Board and OWCP will not entertain a reconsideration request or a hearing on this decision denying reconsideration.²²

ANALYSIS -- ISSUE 2

In its November 25, 2013 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on September 6, 2013, more than one year after the Board's July 13, 2012 decision which had affirmed OWCP's February 2, 2011 decision finding that appellant did not meet her burden of proof to establish that she had work-related disability for the period April 12, 2005 to August 15, 2008.²³ Therefore, appellant must demonstrate clear evidence of error on the part of OWCP in issuing its February 2, 2011 decision.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its February 2, 2011 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error. In her untimely reconsideration request, appellant did not argue the merits of her claim, but rather alleged that OWCP improperly denied her reconsideration request in a May 1, 2013 nonmerit decision. Such argument regarding a nonmerit matter would not provide any support that OWCP committed error with respect to the merit issue of the present case, *i.e.*, whether the medical evidence shows that appellant had work-related disability for the period April 12, 2005 to August 15, 2008.²⁴ For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's February 2, 2011 regarding her disability claim for the period April 12, 2005 to August 15, 2008 and OWCP properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she had work-related disability for the period April 12, 2005 to August 15, 2008. The Board further finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her September 6, 2013 reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

²² 20 C.F.R. § 10.608(b).

²³ *See supra* note 13.

²⁴ Moreover, it should be noted that, under OWCP regulations, a decision denying an application for reconsideration cannot be the subject of another application for reconsideration. *See supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the November 25 and 22, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 18, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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