

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

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D.C., Appellant )

and )

**DEPARTMENT OF LABOR, OCCUPATIONAL  
SAFETY & HEALTH ADMINISTRATION,  
Boston, MA, Employer** )

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**Docket No. 14-663  
Issued: June 26, 2014**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 2, 2014 appellant filed a timely appeal from a September 6, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely filed and insufficient to establish clear evidence of error. The most recent merit decision was issued on November 10, 2010 more than 180 days from the filing of this appeal. The Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 establish clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated November 10, 2010, the Board affirmed the October 1 and November 20, 2009 OWCP decisions denying appellant's traumatic injury claim.<sup>2</sup> The Board found that she did not submit rationalized medical evidence to establish that kneeling on April 3, 2008 caused a new injury or an aggravation of a preexisting condition. In an order dated October 26, 2011, the Board set aside a February 16, 2011 nonmerit decision of OWCP denying appellant's request for reconsideration as untimely and insufficient to establish clear evidence of error.<sup>3</sup> The Board found that she had timely requested reconsideration within one year of the Board's November 10, 2010 decision and remanded the case for OWCP to consider the request under the appropriate standard for timely reconsideration requests. In a decision dated October 3, 2012, the Board affirmed a November 9, 2011 nonmerit decision denying appellant's request to reopen her case for further review of the merits under section 8128.<sup>4</sup> The facts and circumstances as set forth in the prior decisions and order are hereby incorporated by reference.

In a treatment report dated March 19, 2013, Dr. Nina Shervin, an orthopedic surgeon, evaluated appellant for pain in both knees and the right hip. She discussed appellant's history of a 1995 employment injury to her right lower extremity and an April 2008 injury when she "fell directly onto her knees on the cement floor at work." Dr. Shervin noted that appellant subsequently underwent a total knee replacement on the left side. She stated, "[Appellant] experienced a work[-]related injury back in 1995 and again in 2008 that appears to have exacerbated her arthritis." Dr. Shervin recommended joint replacement of the right hip.

Appellant resubmitted an April 17, 2008 authorization for examination and/or treatment (Form CA-16), in which a physician noted that she was status post one year knee surgery and that she had sustained an injury two weeks prior kneeling at work. She resubmitted a June 17, 2008 form report from Dr. Robert G. Davis, a Board-certified orthopedic surgeon, who diagnosed post-traumatic osteoarthritis from a direct injury to the knees and checked "yes" that the condition was caused or aggravated by the identified work activity. Dr. Davis found that appellant was partially disabled.

On May 22, 2013 appellant requested reconsideration of the November 9, 2011 nonmerit decision. She related that her injury occurred when her knees hit the floor when she reached for a magnifying glass. Appellant asserted that she originally described her injury as occurring when her knees hit the floor but was told that her account of the incident would not fit on the

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<sup>2</sup> Docket No. 10-567 (issued November 10, 2010) On April 16, 2008 appellant, then a 51-year-old program assistant, filed a traumatic injury claim alleging that she injured her knees on April 3, 2008 while kneeling on the floor looking for a cable outlet. The Board noted that she subsequently alleged that she fell onto her knees while on the balls of her feet bending over. The Board determined that the evidence was insufficient to establish that appellant fell onto her knees but did establish that she knelt onto her knees looking for an outlet.

<sup>3</sup> *Order Remanding Case*, Docket No. 11-920 (issued October 26, 2011).

<sup>4</sup> Docket No. 12-1038 (issued October 3, 2012). On March 26, 2013 the Board denied appellant's petition for reconsideration of its October 3, 2012 decision. *Order Denying Petition for Reconsideration*, Docket No. 12-1038 (issued March 26, 2013).

form, so she instead indicated that she “knelt on knee or something to that matter...” Dr. Davis told her that an office worker on maternity leave put the history of injury on one attending physician’s form report.

By decision dated September 6, 2013, OWCP denied appellant’s request for reconsideration finding that it was untimely filed and did not demonstrate clear evidence of error.

On appeal, appellant related that numerous documents were removed from her record, including an April 14, 2008 Form CA-16, e-mails and witness statements. Management told her to use a Form CA-20 rather than a Form CA-16 and her original description of injury was not included. Appellant related that she did not have any knee or hip problems prior to an injury on August 9, 1995. She stated that her injury occurred when she fell on her knees onto the floor while bending over at the waist with the top of her shoes on the floor. Appellant told her supervisor that she knelt on her knees because she did not want her to be upset.

### **LEGAL PRECEDENT**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>5</sup> As one such limitation, 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.<sup>6</sup>

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, 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.<sup>7</sup> 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.<sup>8</sup>

### **ANALYSIS**

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP’s procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>9</sup> A right to

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<sup>5</sup> *Supra* note 1.

<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

<sup>8</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>9</sup> 20 C.F.R. § 10.607(a).

reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>10</sup> Appellant's request for reconsideration was received on June 4, 2013, more than one year after the merit decision by the Board of November 10, 2010. Therefore, it was untimely. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.<sup>11</sup>

The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of OWCP's denial of her claim. The issue is whether she has shown clear evidence of error in OWCP's denial of her claim that she sustained a bilateral knee injury on April 3, 2008 while kneeling on the floor.

Appellant submitted medical reports already of record. In an April 17, 2008 Form CA 16, a physician indicated that she had sustained an injury two weeks prior to kneeling at work. In a form report dated June 17, 2008, Dr. Davis diagnosed post-traumatic osteoarthritis due to a knee injury and checked "yes" that the condition was caused or aggravated by the identified work activity. These reports, which were previously considered by OWCP, are insufficient to establish clear evidence of error as they are not positive, precise and explicit evidence manifesting on their face that OWCP committed an error.<sup>12</sup>

Dr. Shervin's March 19, 2013 report noted that appellant injured her knees in April 2008 when she fell onto a cement floor. She found that the 2008 incident appeared to have exacerbated arthritis. Dr. Shervin's report is speculative in nature and thus of little probative value.<sup>13</sup> Further, the term "clear evidence of error" is intended to represent a difficult standard. The submission of 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 sufficient to establish clear evidence of error.<sup>14</sup>

On reconsideration, appellant alleged that her knees struck the concrete floor when she reached over to get a magnifying glass. She maintained that she originally provided this description of her injury but was told it was too long so she changed it to an injury when she knelt on her knees. Appellant indicated that Dr. Davis told her that an office worker placed the history of injury on one of his forms. The Board, however, in its November 10, 2010 decision, found that the evidence was insufficient to establish that she fell onto her knees while bending over on the balls of her feet. Absent further review of this issue by OWCP, the matter is *res judicata* and not subject to further consideration by the Board.<sup>15</sup>

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<sup>10</sup> *Robert F. Stone, supra* note 8.

<sup>11</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>12</sup> *See D.D.*, 58 ECAB 206 (2006).

<sup>13</sup> *Rickey S. Storms*, 52 ECAB 349 (2001) (the opinion of a physician supporting causal relationship need not be one of absolute medical certainty but must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

<sup>14</sup> *See Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>15</sup> *See Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998); *Hugo A. Mentink*, 9 ECAB 628 (1958).

On appeal, appellant maintains that documents were removed from the record and that management failed to submit her original description of her injury. She describes her injury as occurring when she fell onto her knees while bending over at the waist. Appellant told her supervisor that she knelt on the floor because she did not want to make her angry. She did not, however, submit any evidence supporting her contentions. As noted, the issue of whether appellant fell onto her knees instead of kneeling on the floor on April 2, 2008 is *res judicata* absent further review.<sup>16</sup>

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not provided evidence of sufficient probative value or to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

### **CONCLUSION**

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

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<sup>16</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 6, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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