

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

J.L., Appellant)	
)	
and)	Docket No. 15-1142
)	Issued: August 19, 2015
U.S. POSTAL SERVICE, POST OFFICE,)	
Columbus, OH, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 24, 2015 appellant filed a timely appeal from a January 22, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of June 10, 2013 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

ISSUE

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

FACTUAL HISTORY

On April 17, 2013 appellant, then a 62-year-old mail handler, filed an occupational disease claim alleging that he developed arthritis in his right knee as a result of his employment.

¹ 5 U.S.C. § 8101 *et seq.*

He first became aware of his condition on September 15, 2011 and realized it resulted from his employment on March 31, 2013. Appellant stopped work and returned to light duty on April 5, 2013.

In a handwritten statement, appellant explained that in March he began to feel a considerable amount of discomfort on his right knee and walked with a definite limp. On March 31, 2013 he was walking to his job on the loading dock when his right knee suddenly buckled and he fell down. Appellant did not return to work his next shift and sought medical treatment.

By letter dated April 22, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual evidence regarding what employment factors he believed contributed to his condition and additional medical evidence to establish that he sustained a diagnosed condition causally related to his employment.

On April 4, 2013 appellant was examined in the emergency room by Dr. Marvin McCreary, Board-certified in emergency medicine. In April 4, 2013 discharge instructions, Dr. McCreary noted appellant's complaints of right knee pain after it suddenly "gave out." Appellant reported that he had some mild right knee pain for the last two weeks. Dr. McCreary noted that appellant worked for the employing establishment and did a lot of standing and walking. He reviewed appellant's history and provided examination findings. Dr. McCreary diagnosed right knee pain.

Appellant submitted an April 5, 2013 state workers' claim form which indicated that on March 31, 2013 his right knee gave out at work.

In an April 5, 2013 x-ray of the right knee, Dr. Ethan C. Hansen, a Board-certified diagnostic radiologist, observed moderate-to-severe osteoarthritis.

In a decision dated June 10, 2013, OWCP denied appellant's occupational disease claim because it found that appellant failed to provide a statement describing the work factors he believed caused or contributed to his right knee pain and failed to provide medical evidence which established a diagnosed condition causally related to factors of his employment.

On June 10, 2014 OWCP received appellant's request for reconsideration. Appellant stated that since February 2011 he experienced right knee pain and had to undergo cortisone shots because of walking on concrete floors. He alleged that walking on concrete floors damaged and aggravated his right knee. Appellant claimed that he had two physician's opinions that would establish that walking on concrete floors would destroy your knee. He stated that over the years he also did a lot of kneeling, bending, and climbing on ladders.

Appellant submitted a witness statement dated April 4, 2013 from Kim Harrington, a coworker. He stated that she observed him walking down the dock when his knee gave out.

In a June 9, 2013 report, Dr. Joel R. Politi, a Board-certified orthopedic surgeon, noted that appellant complained of severe and worsening right knee pain for the past three weeks. He reviewed appellant's history and conducted an examination. Dr. Politi observed mild swelling and tenderness over the right medial joint line of the right knee. Examination of the left knee revealed it to be normal to inspection and palpation and no swelling. Dr. Politi reported that

x-rays revealed severe degenerative joint disease of both knees. He diagnosed osteoarthritis of the lower leg. Dr. Politi recommended that appellant remain on light duty and continue with injections until he decided whether to undergo surgery. He provided a light-duty restriction form.

By decision dated January 22, 2015, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to establish clear evidence of error. It noted that his June 10, 2014 reconsideration request was not made within one year of the last OWCP merit decision on June 10, 2013.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.² 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.³ 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.⁴

ANALYSIS

The Board has reviewed the record on appeal and remands the case to OWCP for application of the correct standard of review because appellant's request for reconsideration was timely submitted.

An application for reconsideration must be received by OWCP within one year of the date of a merit review of the claim, including any merit review by the Board.⁵ The last merit decision of the record was OWCP's June 10, 2013 decision denying appellant's occupational disease claim. Because appellant's reconsideration request dated June 9, 2014 and received on June 10, 2014 was made within one year of OWCP's merit decision dated June 10, 2013, the Board concludes that the request was timely.⁶

The Board notes that OWCP's January 22, 2015 decision erroneously noted that appellant had until June 9, 2014 to file a timely request for reconsideration of the June 10, 2013 decision. However, appellant had one year from the actual date of the June 10, 2013 decision rather than the day before. In its January 22, 2015 decision denying appellant's reconsideration

² 20 C.F.R. § 10.607.

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

⁴ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁵ *Supra* note 2.

⁶ *C.V.*, Docket No. 14-1293 (issued February 23, 2015); *J.N.*, Docket No. 12-1543 (issued February 12, 2013).

request, OWCP applied the clear evidence of error legal standard. This standard is the appropriate standard only for cases in which a reconsideration request is untimely filed.⁷ Since OWCP erroneously reviewed the evidence submitted by appellant in support of his reconsideration request under the clear evidence of error standard, the Board will remand the case to OWCP for application of the standard for reviewing a timely request for reconsideration as set forth at 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: August 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

⁷ See *Donna M. Campbell*, 55 ECAB 241 (2004).