

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE
Albany, NY, Employer**

**Docket No. 14-1612
Issued: January 23, 2015**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 14, 2014 appellant filed a timely appeal of a June 12, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 and because more than 180 days elapsed from May 16, 2013, the date of the most recent OWCP merit decision, to July 14, 2014, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 27, 2013 appellant, then a 37-year-old city letter carrier, filed a traumatic injury claim alleging that on February 22, 2013 she sustained pain in her left knee while in the performance of duty. She stopped work on February 23, 2013.

In a February 22, 2013 report, Dr. Carsten Stracke, Board-certified in family medicine, noted that the history of injury included: “no known injury, acute onset of left knee pain.” He responded “yes” with regard to whether there was any history of evidence of concurrent or preexisting injury or disease or physical impairment. Dr. Stracke indicated that appellant had a left labral tear of the hip one year ago. He provided findings of tenderness over the left medial knee. Dr. Stracke stated that x-rays were not indicated. He diagnosed pain in the joint and lower leg and advised that appellant had a possible medial meniscus tear. Dr. Stracke responded “yes” with regard to whether he believed that the condition was caused or aggravated by an employment activity and filled in “walking.” He placed appellant on total disability for the period February 22 to 25, 2013.

On March 19, 2013 appellant filed a notice of recurrence. She alleged that her recurrence began on March 12, 2013. Appellant indicated that she returned to work for two days on March 11 and 12, 2013 and by the end of the second day she had the same problem with her left knee.

In a letter dated April 16, 2013, OWCP noted that appellant’s claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and her claim was administratively approved but the merits of the claim had not been formally considered. It explained that her claim was now being reopened because she had filed a claim for a recurrence. OWCP informed appellant of the type of factual and medical evidence needed to support her claim and requested that she submit such evidence within 30 days.

By decision dated May 16, 2013, OWCP denied appellant’s claim for compensation as the evidence was not sufficient to establish that the claimed event occurred as alleged. It further found that the medical evidence did not establish that the February 22, 2013 employment incident caused an injury.²

On May 21, 2014 appellant requested reconsideration. She noted that, on February 22, 2013, she was performing her duties as a mail carrier on her assigned route in Albany, New York. Appellant’s duties included walking from house to house delivering the mail, climbing stairs, and carrying parcels to people’s homes. She indicated that, toward the late morning to afternoon, she started to feel pain in her left knee, and as the day progressed, her pain worsened and her knee began to swell. Appellant advised that she called her supervisor and informed him that she was in a lot of pain and could not continue her deliveries. She explained that she never had an injury or pain prior to the incident and that it was actually an occupational disease, as described by her physician. Appellant noted that she had worked as a full-time mail carrier for 8 to 10 hours a day, five days a week for 12 years. She indicated that she always walked many

² On that same date, OWCP advised appellant that no further action would be taken regarding her claim for a recurrence as her claim was denied.

miles up and down stairs, through the snow, and on uneven terrain. Appellant denied engaging in any other outside activities, sports or otherwise, with the exception of caring for her two children.

In support of her claim, appellant submitted additional medial evidence. OWCP received reports dated March 27 and April 1, 2013 from Dr. James Alfandre, a Board-certified orthopedic surgeon. In the duty status report dated March 27, 2013, Dr. Alfandre described the injury as occurring by indicating that appellant felt pain in her left knee an hour into her route and it worsened throughout the day. In the March 1, 2013 report, he noted that she walked at work and over used her knee. Dr. Alfandre's findings included: edema and pain on flexion to 120 degrees. He diagnosed chondromalacia of the patella. Dr. Alfandre checked "yes" with regard to whether he believed that the condition was caused or aggravated by an employment activity and filled in "prolong walking." He advised that appellant was disabled from March 11 to April 8, 2013. Dr. Alfandre provided restrictions to limit walking two hours per day.

Also submitted was a copy of the February 22, 2013 report from Dr. Stracke. Additionally, OWCP also received: physical therapy notes from March 15 to April 15, 2013; notes from physician's assistants; discharge instructions dated February 22, 2013; a letter from the employing establishment to appellant; and a May 24, 2013 letter from Travelers Insurance to appellant related to its refusal to make a payment with regard to an "unwitnessed fall."

In a June 12, 2014 decision, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."³

OWCP's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁴ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations

³ 5 U.S.C. § 8128(a).

⁴ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

provide that an application for reconsideration must be received within one year of the date of OWCP decision for which review is sought.⁵

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.⁸

ANALYSIS

In its June 12, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on May 16, 2013. Appellant's May 21, 2014 letter requesting reconsideration was submitted more than one year after the May 16, 2013 merit decision and was, therefore, untimely.

OWCP properly performed a limited review to determine whether appellant's untimely reconsideration request showed clear evidence of error. It reviewed the additional evidence submitted by her in support of her reconsideration request, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether OWCP on May 16, 2013 properly denied her claim for a traumatic injury on February 27, 2013.

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁸ *Id.*

The issue underlying appellant's claim is whether the February 22, 2013 employment incident occurred at the time, place and in the manner alleged. This is factual in nature.

On reconsideration, appellant provided a statement describing how she believed her injury occurred. She explained that, on February 22, 2013, she was performing her duties as a mail carrier on her assigned route in Albany, New York. Appellant described her duties which included: walking from house to house delivering the mail, climbing stairs, and carrying parcels to people's homes. She also explained that, toward the late morning to afternoon, she started to feel pain in her left knee, and as the day progressed, her pain worsened and her knee started to swell. Appellant advised that she called her supervisor and informed him that she was in a lot of pain and could not continue her deliveries. She explained that she never had an injury or pain prior to the incident and she believed that it was actually an occupational disease, as described by her physician.⁹

The Board notes that this statement does not provide positive, precise or explicit evidence that manifests on its face that OWCP committed an error. The Board notes that clear evidence of error is intended to represent a difficult standard,¹⁰ and as noted, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.

The Board also notes that the medical evidence submitted by appellant is not relevant to the pertinent issue of whether she has established the occurrence of the February 22, 2013 employment incident. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ Appellant submitted medical reports from Drs. Alfandre and Strack. The submission of medical evidence is insufficient to resolve the factual question of whether the February 22, 2013 employment incident occurred at the time, place, and in the manner alleged.¹²

Other documentation provided by appellant does not provide positive, precise or explicit evidence that manifests on its face that OWCP committed an error.

Appellant did not submit any evidence or legal arguments sufficient to raise a substantial question as to the correctness of OWCP's decision. To establish clear evidence of error, the evidence submitted must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹³ Appellant did not submit such evidence. Consequently, OWCP properly denied her reconsideration request as it does not establish clear evidence of error.

On appeal, appellant asserts that causal relationship was at issue in her case and that she had submitted medical evidence supporting that she sustained a work-related injury. However,

⁹ The Board notes that, if appellant is alleging that she sustained an occupational disease, she may wish to file a separate claim for an occupational disease.

¹⁰ See *E.R.*, Docket No. 09-599 (issued June 3, 2009).

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

¹² *Andrew Fullman*, 57 ECAB 574 (2006).

¹³ *Robert F. Stone*, 57 ECAB 292 (2005).

as explained, the Board does not have jurisdiction over the merits of the claim. The Board may only consider whether the reconsideration request was timely and, if not, whether appellant presented clear evidence of error in OWCP's May 16, 2013 decision.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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