



## **FACTUAL HISTORY**

On September 20, 2011 appellant, then a 44-year-old clerk, slipped on a wet step as she entered the employing establishment. She alleged that she injured her right knee, right wrist, mid-way of her arm, and right shoulder in the performance of duty. On April 24, 2012 appellant underwent a revision of a right total knee arthroplasty.

In a June 25, 2012 decision, OWCP denied appellant's claim. It found that the medical evidence did not demonstrate that the claimed medical condition was causally related to the accepted injury as appellant failed to submit, as requested, a detailed narrative report from her physician which rationally explains how the accepted work event brought about the diagnosis.

On July 13, 2012 appellant requested reconsideration and submitted additional medical evidence. In an October 19, 2012 decision, OWCP denied modification of the prior decision.

On March 10, 2013 appellant requested reconsideration. In a December 18, 2012 report, Dr. Robert E. Booth, a Board-certified orthopedic surgeon, noted that he was treating appellant for persistent pain in her right knee following a slip and fall on steps at her workplace on September 20, 2011. He noted her April 24, 2012 right total knee revisional arthroplasty. Dr. Booth opined that "I feel the need for revisional knee surgery was precipitated by the slip and fall that occurred on September 20, 2011."

In an April 15, 2013 report, Dr. Kevin Hanley, a Board-certified orthopedic surgeon and second opinion physician, noted appellant's history of injury and treatment and examined appellant. He advised that the September 20, 2011 fall aggravated her underlying condition, a total knee replacement. However, Dr. Hanley opined that it did not lead to a loosening of the prosthesis. He explained that she had loss of bone in the sub-prosthetic area, which argued against a temporary traumatic worsening. Dr. Hanley noted that the work-related aggravation was temporary and had long since resolved. He explained that the revision surgery was necessary because of the natural history of the knee replacement and because she was overweight.

By decision dated May 20, 2013, OWCP vacated the October 19, 2012 decision. It accepted the claim for complications due to internal orthopedic device, implant and graft, temporary, now resolved. In a separate May 20, 2013 decision, OWCP denied authorization for revision of right total knee replacement. It found that the work injury did not lead to the need for the April 24, 2012 total right knee replacement revision surgery. OWCP found that the weight of the medical opinion rested with the second opinion physician, Dr. Hanley.<sup>3</sup>

On July 18, 2014 appellant requested reconsideration of the denial of authorization for surgery. In an April 22, 2014 report, Dr. Carver Hills, an internist, noted that appellant was

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<sup>3</sup> On June 8, 2013 appellant claimed intermittent wage-loss compensation from November 8, 2011 to April 13, 2012. The employing establishment indicated that the claim was for leave buyback. Accompanying this claim was another copy of Dr. Booth's April 16, 2012 report as well as disability and treatment notes. On April 8, 2014 OWCP advised her and the employing establishment that it could not process the claim for leave buyback at that time and advised appellant and the employing establishment of the information needed to take further action on the request. On April 17, 2014 it informed appellant that it could not authorize leave buyback associated with a surgery that was not approved by OWCP.

under his care since September 2012 for multiple medical conditions including osteoarthritis of multiple joints and lumbar disc disease. He advised that in October 2013 appellant sustained a fall resulting in increased pain of her bilateral knees and right shoulder. Dr. Hills explained that her examination revealed laxity of both knees and pain with movement and gait imbalance requiring the use of a cane. He opined that appellant was totally disabled from the time of the recurrence of her injury. Appellant also submitted October 31, 2011 right knee x-rays.

In an August 14, 2014 decision, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>4</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>6</sup>

OWCP may not deny a reconsideration request solely on the ground that it was not timely filed. When a claimant's application for review is not timely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>8</sup> is positive, precise, and explicit, and manifests on its face that OWCP committed an error.<sup>9</sup> The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question 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. A determination of whether the claimant has established clear evidence of error entails a limited

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<sup>4</sup> See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>5</sup> 20 C.F.R. § 10.607(a). See also *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

<sup>6</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011) ("the term 'clear evidence of error' is intended to represent a difficult standard").

<sup>8</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>10</sup>

### **ANALYSIS**

In its August 14, 2014 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on May 20, 2013. Appellant's July 18, 2014 request for reconsideration was submitted more than one year after the May 20, 2013 merit decision and was, therefore, untimely.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. In its last merit decision dated May 20, 2013, OWCP accepted that her September 20, 2011 fall at work aggravated her underlying condition, a previous total right knee replacement, but found that this aggravation had resolved and that it did not necessitate the April 24, 2012 revision of right total knee replacement. On reconsideration, appellant did not make any arguments. She did submit medical evidence around the time of her request. In an April 22, 2014 report, Dr. Hills advised that in October 2013 appellant sustained a fall resulting in increased pain of her bilateral knees and right shoulder. He opined that she was totally disabled from the time of the recurrence of her injury. The Board notes that 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 report, which if submitted prior to OWCP's 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 a case.<sup>11</sup> Dr. Hills' report does not establish clear evidence of error. Appellant also submitted right knee x-rays dated October 31, 2011 right knee x-rays but these were not accompanied by a physician's report and she did not otherwise explain how these established clear evidence of error. She also resubmitted Dr. Booth's April 16, 2012 report but she did not indicate how resubmission of this report showed clear evidence of error.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's May 20, 2013 decision. Consequently, OWCP properly denied her reconsideration request as her request does not establish clear evidence of error.

### **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.

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<sup>10</sup> See *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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