

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

K.P., Appellant)	
)	
and)	Docket No. 16-1447
)	Issued: December 7, 2016
U.S. POSTAL SERVICE, POST OFFICE,)	
Canton, OH, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 30, 2016 appellant, through counsel, filed a timely appeal of a May 17, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated July 1, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 14, 2014 appellant, then a 47-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 8, 2014 she injured her left knee while descending steps when delivering mail in the performance of duty.

The employing establishment provided appellant with an authorization for examination (Form CA-16) on April 8, 2014.

Appellant provided a statement indicating that she began experiencing knee pain on April 7, 2014. She purchased a knee brace and worked on April 8, 2014 with some pain. While delivering mail on April 8, 2014, appellant walked down steps holding onto the handrail and when she stepped on the last step with her left foot she felt and heard a “pop” in the back of her knee. She felt excruciating pain immediately and reported her condition to the employing establishment. Appellant’s supervisor transported her to the emergency room.

Dr. Simas V. Laniauskas, an emergency room physician, examined appellant on April 8, 2014. He noted her history of stepping off of a stair and hearing a pop in her left knee with instant pain. Dr. Laniauskas diagnosed knee sprain and found that appellant’s x-ray was unremarkable.

Dr. Steven Coss, a Board-certified orthopedic surgeon, examined appellant on April 11, 2014 and found that her x-rays demonstrated mild-to-moderate preexisting arthritis under her knee cap and not the medial aspect of her knee. He diagnosed chondromalacia patella, osteoarthritis in the lower leg, knee, and a grade 1 medial collateral ligament sprain with a possible torn medial meniscus. Dr. Coss reported that appellant’s injury occurred on April 8, 2014 during work-related travel. He released appellant to return to modified duty. Dr. Coss examined appellant on May 7, 2014. He noted that appellant had not returned to work.

In a letter dated May 19, 2014, OWCP noted that when appellant’s claim was initially received, it appeared to be a minor injury and payment of a limited amount of medical expenses was administratively approved. It reopened appellant’s claim for consideration because she had not returned to full-time work. OWCP requested that appellant provide additional factual and medical evidence in support of her claim.

Dr. Coss examined appellant on June 4, 2014. He repeated his diagnoses of sprain medial collateral ligament of the left knee, chondromalacia patella, and osteoarthritis of the lower leg knee. Dr. Coss recommended a magnetic resonance imaging (MRI) scan.

In a narrative report dated June 6, 2014, Dr. Coss described appellant’s employment incident as descending stairs, feeling her left knee pop, and then experiencing a sharp pain in her left knee. He opined that this was a work-related injury sustained on April 11, 2014. Dr. Coss again diagnosed sprained medial collateral ligament of the left knee, chondromalacia of the patella, osteoarthritis of the left knee, and a possible medial meniscal tear of the left knee. He recommended a left knee MRI scan to confirm these diagnoses. Dr. Coss opined that appellant’s left knee conditions were a direct result of the April 8, 2014 injury. He again noted that appellant experienced a pop in the left knee at the time of injury which was consistent with a meniscal-type injury.

By decision dated July 1, 2014, OWCP denied appellant's traumatic injury claim, finding that she had not submitted sufficient evidence to establish that the employment event occurred as alleged. It noted that appellant had not provided any witnesses statements, nor had she responded to its request for information regarding any prior symptoms. OWCP further noted that appellant had submitted reports from Dr. Coss dated April 11, May 7, and June 4 and 6, 2014.

Appellant, through counsel, submitted a document entitled "Motion for Rescission" of the July 1, 2014 decision, received by OWCP on February 22, 2016. Counsel cited to the regulations governing requests for reconsideration. He alleged that OWCP failed to consider Dr. Coss' June 6, 2014 report which contained a history of injury. Counsel noted that OWCP specifically mentioned reports from Dr. Coss dated April 11, May 7, and June 4 and 5, 2014, but not the June 6, 2014 report. He asserted that OWCP's claims examiner overlooked a crucial piece of evidence as the June 6, 2014 report from Dr. Coss provided a complete history of injury.

By decision dated May 17, 2016, OWCP denied appellant's request for reconsideration, as it was received on February 22, 2016, more than one year after the July 1, 2014 merit decision. It further found that appellant had not demonstrated clear evidence of error in support of her request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitled a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ OWCP, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that it will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request which is the "received date" in the Integrated Federal Employee's Compensation System (iFECS).⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where requests for reconsideration are not timely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ OWCP's procedures state that it will

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011). *G.F.*, Docket No. 15-1053 (September 11, 2015).

⁷ *Supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

⁸ *Supra* note 4 at 770.

reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in its regulations, if the claimant's request for reconsideration demonstrates "clear evidence of error."⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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.¹⁵ The Board must make an independent determination of whether a claimant has demonstrated 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.¹⁶

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

Counsel requested reconsideration of the July 1, 2014 merit decision, through an undated document entitled "Motion for Rescission" of the July 1, 2014 decision which was received by OWCP on February 22, 2016. As this request for reconsideration was received by OWCP more than one year after the latest merit decision, OWCP properly determined that it was untimely filed and properly applied the clear evidence of error standard.

In support of the February 22, 2016 request for reconsideration, counsel argued that OWCP failed to consider Dr. Coss' June 6, 2014 report as establishing the factual basis for appellant's claim. The Board finds that this argument does not demonstrate clear evidence of error on the part of OWCP. Counsel incorrectly asserted that OWCP did not specifically

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

¹⁰ *Supra* note 4.

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5 at 968.

¹³ *Supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁶ *Nancy Marciano*, 50 ECAB 110 (1998).

mention the June 6, 2014 report in its July 1, 2014 decision. In fact, OWCP listed this report among the medical evidence reviewed. Furthermore, while Dr. Coss' report was supportive of appellant's version of the events of April 8, 2014, was not responsive to OWCP's queries regarding appellant's previous left knee symptoms or any prior diagnosed conditions. Clear evidence of error is intended to be a difficult standard. As noted above, evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ The Board finds that the argument submitted by counsel does not demonstrate clear evidence of error on the part of OWCP.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, as it was untimely filed and failed to demonstrate clear evidence of error by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁷ *Jesus D. Sanchez*, *supra* note 5 at 968.

¹⁸ *Supra* note 11.