

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

D.M. Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 15-1748
Issued: February 18, 2016**

Appearances:
Lenin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 18, 2015 appellant, through her representative, filed a timely appeal of a July 20, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from May 21, 2014, the date of the most recent OWCP merit decision, to the filing of the current appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 14, 2013 appellant, then a 53-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that getting in and out of her vehicle, climbing on steps, and walking on uneven ground while delivering mail caused a complex right medial meniscus tear with osteoarthritis of the bilateral knees in the performance of duty.² She indicated that she became aware of the disease on August 3, 2010. Appellant stopped work on March 14, 2013. OWCP accepted the claim for aggravation of derangement of posterior horn of medial meniscus, right aggravation of localized primary osteoarthritis, lower leg, bilateral. Appellant accepted a modified limited-duty position on May 17, 2013. However, she stopped work on June 17, 2013.³

Appellant received treatment from Dr. Grant Garlick a Board-certified orthopedic surgeon. In a June 14, 2013 report, Dr. Garlick noted her history of injury and treatment. He opined that he did not relate appellant's condition to her work injury, but rather he determined that her condition was a "degenerative process and would develop regardless [of] her job as a letter carrier." Dr. Garlick explained that the meniscus tear was a degenerative tear and did not appear to be traumatic. He noted that appellant "became very angry in the office and [stated that] this was a waste of [appellant's] day and did storm out of the office prior to me discussing the entire plan with her." Dr. Garlick opined that she might need some type of arthroplasty in the future, he did not believe that it would be of much benefit. He recommended that appellant follow up with him as needed.

OWCP referred appellant for a second opinion examination with Dr. William Dinenberg, a Board-certified orthopedic surgeon. In an August 8, 2013 report, Dr. Dinenberg noted her history of injury and treatment and performed his examination. He diagnosed degenerative joint disease of bilateral knees, right greater than left and determined that appellant no longer had residuals or disability due to her injury. In particular, Dr. Dinenberg explained that her current physical examination findings, which included lateral and joint line tenderness, antalgic gait, and effusion, were related to her preexisting medial meniscus tear and bilateral osteoarthritis. He also indicated that appellant stopped work on June 29, 2013 and explained her aggravation would have ceased approximately four weeks after discontinuing work, and thus the aggravation would have ceased by August 1, 2013.

On August 29, 2013 OWCP proposed to terminate appellant's compensation. It found that she no longer had residuals or disability due to her injury. OWCP referred to the reports of appellant's treating physician, Dr. Garlick and the second opinion physician, Dr. Dinenberg, who attributed her current disability to her preexisting conditions and found no residuals from the accepted August 3, 2010 work injury.

² The record reflects that appellant has preexisting or concurrent conditions to include right knee osteoarthritis medial compartment, osteophytes in the bilateral knees, and degenerative joint disease.

³ Appellant has another claim for a back injury on June 16, 2004, accepted for lumbosacral strain. She returned to full duty on August 2, 2004. This claim is not before the Board on the present appeal.

On October 3, 2013 OWCP terminated appellant's compensation effective October 2, 2013. It found that she no longer had any residuals related to the work-related condition or continued disability from work as a result of the employment injury.

On October 9, 2013 appellant requested a hearing, which was held on April 2, 2014.

In a May 21, 2014 decision, an OWCP hearing representative affirmed the October 3, 2013 decision.

On June 24, 2015 appellant's representative requested reconsideration. He argued that he was submitting copies of a motion to reconsider along with a medical report pertaining to the motion which was filed on March 23, 2015 for which counsel argued that they had never received a response. A copy of a March 23, 2015 motion to reconsider was included. These documents were received by OWCP on June 25, 2015. In the March 23, 2015 motion, counsel argued that the September 11, 2014 report from Dr. Michael Buscemi, Jr., a Board-certified orthopedic surgeon and osteopath, supported causal relationship. He argued that the reports from Dr. Sami F. Bishai, Board-certified in emergency medicine, also supported causal relationship as everyone was in agreement that the "conditions of her work environment as such (uneven surfaces, many transfer's climbing, *etc.*) there is definitely a causal relationship to her knee injuries, if not the cause of those injuries."

In a September 11, 2014 report, Dr. Buscemi noted appellant's history of injury and treatment. He indicated that he had reviewed her statement of her job activities and noted that "the repetitiveness that went into a day's work is very extraordinary, physically demanding and somewhat problematic. With all the transferring in and out of the postal vehicle, in itself over 400 times a day, and then waiting on uneven terrain, coupled with the amount step climbing in a day's work for over 16 years, I would have to agree" that they would "definitely exasperate [sic] an underlying condition of the knees. However, I would not rule out the possibility of all the grinding, twisting and turning of the knee joint as the onset of her condition." Dr. Buscemi opined that it was clear that everyone was in agreement that there was definitely a causal relationship to appellant's knee injuries, if not the cause of her injuries. He further explained that, although the knee replacement was a success, the work that it entailed continued to aggravate her condition for some degree on a permanent basis.⁴

OWCP received several reports from Dr. Bishai. They included a July 29, 2014 report in which Dr. Bishai noted appellant's history of injury and treatment. He explained that she was recovering from total right knee replacement surgery in the last several months. Dr. Bishai examined appellant and provided findings. He diagnosed internal derangement of the right knee joint, torn meniscus of the right knee joint, severe degenerative arthritis of the right knee joint, status postoperative right total knee replacement; internal derangement of the left knee joint, and degenerative arthritis of the left knee joint. Dr. Bishai explained that appellant was recovering reasonably well from a total knee replacement performed on her right knee joint. He recommended that she continue working and encouraged her to continue getting physical therapy treatments on a twice per week basis.

⁴ The record does not indicate that OWCP authorized the knee surgery.

In an August 28, 2014 report, Dr. Bishai again noted appellant's history of injury, treatment, and diagnoses. He explained that the causal relationship between her symptoms in her knee joints and her activities over the past several years was "quite clear and not in doubt." Dr. Bishai indicated that appellant's problems with her knee joints were due to the repetitive exiting and entering of her work vehicle, walking on uneven and unlevel surface, and terrain during the delivery of mail and climbing up and down stairs very repetitively every single day of her job as a letter carrier. He opined that it was his opinion "within a reasonable degree of medical certainty," that if she did not have the right total knee replacement on November 6, 2013 she would not be able to return to work to perform her work duties. Dr. Bishai explained that the aggravation of appellant's conditions was definitely a permanent aggravation and the causal relationship between her symptoms and the permanent aggravation of her conditions was linked and established.

In a March 19, 2015 report, Dr. Bishai noted appellant's history and explained that she presented with complaints of pain and discomfort in the right knee joint. He determined that she had a reasonable result from the surgery and was able to return to work on a controlled route. Dr. Bishai advised that appellant had some residual right knee pain, but she was improved following the surgery. He also advised that she had left knee joint pain due to degenerative arthritic changes in that knee joint. Dr. Bishai examined appellant's right knee found slight swelling of the knee joint due to the presence of a little bit of effusion. He noted findings that included a healed surgical scar procedure on the anterior aspect of the right knee joint as well as knee ranges of motion. Dr. Bishai diagnosed internal derangement of the right knee joint, torn meniscus of the right knee joint, severe degenerative arthritis of the right knee joint, status postoperative right total knee replacement, internal derangement of the left knee joint, and degenerative arthritis of the left knee joint. He indicated that appellant continued to recover from her right total knee replacement. Dr. Bishai indicated that she was able to return to work as a letter carrier because she had a special route that was less troublesome than the previous one. He explained that there were some restrictions in how much walking appellant did and how many times she was getting in and out of her vehicle. Dr. Bishai noted that she had some residual symptoms in her right knee joint, including limited range of motion, but that was expected. He recommended an orthopedic evaluation in six to eight weeks.

In July 20, 2015 decision, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate 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.⁵ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of

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

OWCP's decision for which review is sought.⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁸

To demonstrate 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.⁹ 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.¹⁰

ANALYSIS

In its July 20, 2015 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on May 21, 2014. The reconsideration request of appellant's counsel was received on June 25, 2015 more than one year after the May 21, 2014 merit decision and was, therefore, untimely.¹¹

The Board also finds that appellant's untimely request fails to demonstrate clear evidence of error. In its May 21, 2014 decision, OWCP affirmed the termination of her wage-loss and

⁶ 20 C.F.R. § 10.607(a).

⁷ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *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 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

⁹ *Steven J. Gunderson*, 53 ECAB 252, 254-55 (2001).

¹⁰ *Id.*

¹¹ Although appellant's representative asserted that he earlier submitted a March 23, 2015 reconsideration request to OWCP, the record before the Board does not contain any reconsideration request that was received by OWCP before June 25, 2015. The record does not contain evidence of an earlier or timely submission.

medical benefits based on the weight of the medical evidence. Thereafter, appellant submitted additional factual and medical evidence. The Board finds that the evidence submitted by her fails to raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error.

On reconsideration, appellant's representative submitted new medical evidence and argued that the report from Dr. Buscemi and the reports from Dr. Bishai supported causal relationship between her diagnosed conditions and the accepted conditions. In his September 11, 2014 report, Dr. Buscemi noted that "the repetitiveness that went into a day's work is very extraordinary, physically demanding, and somewhat problematic" and that, "with all the transferring in and out of the postal vehicle ... over 400 times a day, and then waiting on uneven terrain, coupled with the amount step climbing in a day's work for over 16 years, I would have to agree" that they would "definitely" aggravate her underlying knee conditions. He also indicated that grinding, twisting, and turning of the knee while working may have caused appellant's conditions. Dr. Buscemi further explained that, although the knee replacement was a success, the work that she engaged in continued to aggravate her condition to some degree on a permanent basis.

The Board finds that Dr. Buscemi's opinion does not establish clear evidence of error. The Board has held 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.¹²

Likewise, OWCP received several reports from Dr. Bishai. On July 29, 2014 Dr. Bishai explained that appellant was recovering from a total right knee replacement. He diagnosed internal derangement of the right knee joint, torn meniscus of the right knee joint, severe degenerative arthritis of the right knee joint, status postoperative right total knee replacement; internal derangement of the left knee joint, and degenerative arthritis of the left knee joint. Dr. Bishai recommended that appellant continue working. On August 28, 2014 he explained that the causal relationship between her symptoms in her knee joints and her activities over the past several years was "quite clear and not in doubt." Dr. Bishai indicated that appellant's problems with her knees were due to the repetitive exiting and entering of her work vehicle, walking on uneven and unlevel surfaces, and terrain, as well as climbing up and down stairs during mail delivery. He opined "within a reasonable degree of medical certainty," that if she did not have the right total knee replacement on November 6, 2013 she would not be able to return to work to perform her work duties. Dr. Bishai explained that the aggravation of appellant's conditions was a permanent aggravation and the causal relationship between her symptoms and the permanent aggravation of her conditions was linked and established. His March 19, 2015 report noted her recovery from her surgery and addressed her work status. Although Dr. Bishai gives some support for causal relationship, his reports do not demonstrate clear evidence of error. As noted,

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

clear evidence of error is intended to represent a difficult standard.¹³ Even if these reports offered reasoned support for causal relationship of the claimed conditions and disability, they would be insufficient to demonstrate clear evidence of error.

Consequently, appellant has not met her burden to demonstrate clear evidence of error on the part of OWCP such that OWCP erred in denying merit review. The Board, therefore, finds that, in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of her argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied her untimely request for a merit reconsideration on that basis.¹⁴

On appeal, appellant's representative asserts that OWCP improperly terminated benefits. However, as explained, the Board does not have jurisdiction over the merits of the claim. It only has jurisdiction to address whether appellant's reconsideration request was untimely filed and whether it established clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits as her request was untimely filed and failed to demonstrate clear evidence of error.

¹³ *See id.*

¹⁴ *Nancy Marcano*, 50 ECAB 110 (1998).

ORDER

IT IS HEREBY ORDERED THAT the July 20, 1015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2016
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