

ISSUE

The issue is whether OWCP properly determined that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 8, 2011 appellant, then a 41-year-old transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that on April 7, 2011 a cart hit the podium where she was working causing the podium to strike her lower extremities. OWCP accepted her claim for bilateral knee contusions. Appellant received continuation of pay benefits from April 8 to May 19, 2011. On May 19, 2011 she returned to her date-of-injury position in a full-duty capacity.

On September 12, 2013 appellant filed a recurrence claim (Form CA-2a) alleging a recurrence of disability as of September 10, 2013 due to the April 7, 2011 accepted injury. She was seen on September 10, 2013 by Dr. Jerry Withrow, Board-certified in family medicine, for knee pain. Dr. Withrow excused appellant from work on September 10 and 11, 2013.

In a September 18, 2013 letter, OWCP notified appellant of the additional factual and medical evidence necessary to establish her recurrence claim and afforded her 30 days within which to submit the requested evidence. Appellant did not respond to this request.

By decision dated October 21, 2013, OWCP denied the recurrence claim. On October 30, 2013 it received appellant's request for a telephonic hearing before a hearing representative with the Branch of Hearings and Review. A hearing was held on May 12, 2014. OWCP received a May 9, 2014 medical report and work status form from Dr. Scott Burbank, an orthopedic surgeon. Dr. Burbank related that radiographs from a prior evaluation showed no significant bony abnormalities, and reasonably well-maintained joint spaces, but the May 5, 2014 magnetic resonance imaging (MRI) scan showed a small effusion, posterior cruciate ligament cyst, with lateral patellar tilt and mild subluxation consistent with potential patellar tendon lateral femoral condyle flexion syndrome. He related that he had discussed surgery with appellant. Dr. Burbank related that appellant's current condition was related to her "fall" because she had no prior knee pain.³

By decision dated July 25, 2014, an OWCP hearing representative affirmed the October 21, 2013 decision. He found the medical evidence of record failed to establish an objective change in the nature and extent of appellant's injury-related bilateral knee contusions that would cause disability or require medical treatment on or after September 10, 2013.

On August 21, 2015 OWCP received appellant's request for reconsideration. Appellant contended that her current knee condition was related to the April 17, 2011 work injury. She requested that OWCP review the October 9, 2014 medical note from OrthoCarolina Medical Center as Dr. Burbank had related her current MRI scan findings to her 2011 work injury.

³ Dr. Burbank's report appears to recite an incorrect history of injury.

In an October 9, 2014 report, Dr. Burbank advised that he had previously discussed with appellant during her May 9, 2014 evaluation that her knee symptoms and MRI scan findings were caused by her April 7, 2011 injury or at least aggravated by this injury. He noted that she had tried appropriate nonsurgical measures for the last three and a half years and surgical options were discussed. Dr. Burbank noted that appellant had no significant pain prior to this injury and he opined that this injury was to blame for her persistent symptoms. He noted that in 2011 she had findings of a smaller PCL cyst, some lateral patellar subluxation, but her MRI scan showed worsening findings.

In a July 30, 2015 report, a Tony Connot noted a history of appellant's right knee injury and that changes were seen on her 2014 MRI scan. Examination findings of the right knee were provided.

On July 28, 2015 Richard Richardson, physician assistant, reported appellant's complaints of right low back, buttock, and leg pain with an onset date of July 24, 2015 and diagnosed lumbar sprain and strain of thoracic spine.

Appellant also resubmitted physical therapy notes previously of record.

By decision dated December 2, 2015, OWCP denied appellant's request for reconsideration because it was untimely filed and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.⁴ 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.⁵

OWCP regulations state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of OWCP regulations, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁶ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (October 2011).

⁶ *Id.* at § 10.607(b) (2011); *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁷ *See Alberta Dukes*, 56 ECAB 247 (2005).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which 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 demonstrate clear evidence of error. It is not enough to merely 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. To demonstrate clear evidence of error, the evidence submitted 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.⁸

OWCP procedures note 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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent OWCP merit decision in this case was issued on July 25, 2014. Appellant's request for reconsideration was received by OWCP on August 21, 2015, more than a year after the July 25, 2014 merit decision. Therefore, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her request for a merit review of her claim.

The Board finds that appellant has failed to demonstrate clear evidence of error. In the July 25, 2014 decision, an OWCP hearing representative affirmed the October 21, 2013 denial of appellant's recurrence claim. He found the medical evidence of record did not establish that there was an objective change in the nature and extent of appellant's injury-related bilateral knee contusions on or about September 10, 2013 that necessitated her stopping work or receiving medical treatment. Furthermore, the medical record was devoid of a rationalized medical opinion from a physician, who on the basis of a complete and accurate factual and medical history, provided an explanation of how and why the accepted conditions due to the April 7, 2011 workplace injury worsened such that appellant became disabled for work on September 10, 2013. In her untimely reconsideration request, appellant expressed her belief that her current right knee condition was related to the April 7, 2011 work injury.

⁸ *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹⁰ *Nancy Marciano*, 50 ECAB 110 (1998).

With respect to the medical evidence submitted with the application for reconsideration, appellant has failed to demonstrate clear evidence of error. In his October 9, 2014 report, Dr. Burbank noted that he previously discussed during appellant's May 9, 2014 evaluation that her knee symptoms and MRI scan findings were consistent with her April 7, 2011 employment injury. He also indicated that prior to this injury, appellant had no significant pain and this injury was to blame for her persistent symptoms. Dr. Burbank related that in 2011 she had findings of a smaller PCL cyst, some lateral patellar subluxation but her MRI scan showed worsening findings. His October 9, 2014 report was substantially similar to his prior report of May 9, 2014, which was previously reviewed. Neither report addressed the accepted condition of bilateral knee contusions, both reports noted diagnoses which were not accepted as causally related to the accepted injury. To demonstrate clear evidence of error, the evidence submitted 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.¹¹ A detailed, well-rationalized medical report which would have required further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.¹² To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹³

Appellant also submitted a July 30, 2015 report from Mr. Connot and a July 28, 2015 report from Richard Richardson, a physician assistant. These individuals however are not considered physicians under FECA.¹⁴ Thus, this evidence is therefore of no probative value and does not demonstrate clear evidence of error or raise a substantial question as to the correctness of OWCP's decision.

None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's recurrence claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's merit decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

On appeal, counsel argues that the decision is contrary to fact and law. However, for the reasons set forth above, appellant did not meet her burden of proof to establish that her untimely reconsideration request demonstrated clear evidence of error in OWCP's July 25, 2014 merit decision. The Board affirms OWCP's December 2, 2015 decision.

¹¹ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² See *G.B.*, Docket No. 16-319 (issued April 16, 2016).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011); see *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

¹⁴ 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law). See *George H. Clark*, 56 ECAB 162 (2004); a physician assistant is not a physician as defined by FECA at 5 U.S.C. § 8101(2) and any report from such individual does not constitute competent medical evidence.

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.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board