

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

A.B., Appellant)	
)	
and)	Docket No. 16-0864
)	Issued: November 16, 2016
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Seattle, WA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 22, 2016 appellant filed a timely appeal of an October 9, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was rendered by the Board, on September 2, 2014, which became final after 30 days of issuance and is not subject to further review.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c), 501.3, and 501.6(d) the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

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

¹ See Docket No. 14-354 (issued September 2, 2014).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a September 2, 2014 decision, the Board affirmed a June 5, 2013 decision of an OWCP hearing representative finding that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on November 2, 2012.³ The findings and facts as set forth in the prior decision are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

OWCP accepted that on March 30, 2006 appellant, then a 33-year-old medical records technician, tore her right medial meniscus when she tripped on a chair at work. The record also indicates that appellant was in a nonwork-related motor vehicle accident in 2006, and that she had nonemployment-related right knee surgery for a torn anterior cruciate ligament (ACL) in 2005. Appellant stopped work in January 2007 and did not return. On June 15, 2007 she underwent arthroscopic repair of medial meniscus tear. At that time the right ACL was evaluated and sutures from the 2006 surgery were removed. On June 11, 2009 Dr. David Butler, an attending Board-certified family practitioner, indicated that appellant reported that recently her right knee began swelling during a three-hour walk. In an October 21, 2009 report, Dr. Larry R. Pedegana, a Board-certified orthopedic surgeon and OWCP referral physician, opined that appellant was fully recovered from the effects of the March 22, 2006 employment injury and had no restrictions regarding activity involving the right knee but that she had an ongoing psychiatric disability. On April 28, 2010 Sarah Minor, Ph.D., appellant's physical therapist, noted that appellant had torn her Achilles tendon at home and had also been in another motor vehicle accident. Subsequent to Dr. Pedegana's October 21, 2009 second opinion evaluation, no medical evidence was submitted regarding the knee claim until Dr. Sanders Chai, Board-certified in occupational medicine, provided a treatment note on May 8, 2012. He noted that appellant was last seen by him on July 1, 2008 and had been lost to follow-up until that day. Following his physical examination, Dr. Pedegana advised that appellant had reached maximum medical improvement and could return to full duty at her usual job regarding her knee claim. He reiterated his conclusions on May 9, 2012, stating there were no objective findings to support a need for further treatment of the right knee. On November 2, 2012 OWCP terminated appellant's wage-loss compensation and medical benefits. Appellant timely requested a hearing and submitted a January 11, 2013 treatment note from Dr. Michael J. Franceschina, a Board-certified osteopath specializing in orthopedic surgery, who diagnosed degenerative arthritis and post-traumatic arthritis of the right knee. In a number of reports dated from November 13, 2012 to February 8, 2013, Dr. Michael S. McManus, Board-certified in occupational medicine, diagnosed right knee strain or sprain with tears of the medial and lateral menisci and partial tear of the ACL, right saphenous neuropathy, chondromalacia of the right knee, compartment syndrome of the lower extremity, unstable knee, status post arthroscopic repair of medial and lateral meniscectomies and chondroplasties, post-traumatic arthritis of the right knee, and status post-traumatic rupture of the right Achilles tendon. In duty status reports dated November 13, 2012 to February 8, 2013, Dr. McManus provided restrictions to appellant's physical activity. By decision dated June 5, 2013, an OWCP hearing representative affirmed the November 2, 2012 decision, finding that the medical evidence was sufficient to terminate appellant's compensation benefits for the accepted right knee condition.

³ Docket No. 14-354 (issued September 2, 2014).

Regarding her right knee condition, during the pendency of appellant's appeal before the Board, she submitted a July 25, 2013 report in which Dr. McManus referred to a November 13, 2013 report. Dr. McManus reiterated his diagnoses.⁴ On August 26, 2015 appellant, through counsel, requested reconsideration and advised that a new medical report dated July 21, 2015 had been submitted. In a nonmerit decision dated August 27, 2015, OWCP denied further merit review of the prior decision. It noted that the record did not contain a July 21, 2015 medical report.

On August 31, 2015 OWCP received a July 21, 2015 report in which Dr. McManus advised that appellant had a recurrent partial thickness tear of the right knee ACL graft with ongoing knee instability, chondromalacia patella, post-traumatic osteoarthritis of the right knee, and chronic saphenous neuropathy. Dr. McManus opined that all were directly related to the March 22, 2006 employment injury.

In correspondence received by OWCP on September 3, 2015, appellant requested reconsideration. She maintained that the July 21, 2015 report established that the partial ACL tear was caused by the March 22, 2006 employment injury.⁵

By decision dated October 9, 2015, OWCP denied appellant's reconsideration request, finding that the request was untimely filed and that she failed to demonstrate clear evidence that OWCP's last merit decision was incorrect.

On appeal appellant asserts that her reconsideration request was timely filed because it was received by OWCP on August 31, 2015, and she generally asserts that the October 9, 2015 decision contained insufficient findings.

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁷ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁸ OWCP, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP 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 the last merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request (the "received date") in the Integrated Federal Employee's Compensation System (iFECS).⁹ The Board has found that the imposition

⁴ *Supra* note 3.

⁵ Under the emotional condition claim, by decision dated September 28, 2015 an OWCP hearing representative affirmed the January 8, 2015 decision. Appellant has not filed an appeal with the Board of the September 28, 2015 decision.

⁶ 5 U.S.C. § 8128(a).

⁷ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁸ *Id.*

⁹ 20 C.F.R. § 10.607; *G.F.*, Docket No. 15-1053 (issued September 11, 2015).

of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).¹⁰

In those cases where requests for reconsideration are untimely 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.¹¹ OWCP procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP regulations, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹²

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 be manifest on its face that OWCP committed an error. Evidence which 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 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.¹³ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴ The Board must make 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.¹⁵

ANALYSIS

On September 3, 2015 appellant requested reconsideration regarding her right knee condition. The Board finds that as more than one year elapsed between the most recent merit decision on this issue, the Board's September 2, 2014 decision, and appellant's request for reconsideration received by OWCP on September 3, 2015, her request for reconsideration was untimely.¹⁶

The Board also finds that appellant failed to demonstrate clear evidence of error. On reconsideration appellant maintained that a July 21, 2015 medical report established that her

¹⁰ *Thankamma Mathews, supra* note 7.

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

¹³ *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ *Nancy Marcano*, 50 ECAB 110 (1998).

¹⁶ *See supra* note 12 at Chapter 2.1602.4a (October 2011), which provides that a right to reconsideration within one year accompanies any subsequent merit decision, including any merit decision by the Board.

partial ACL tear was caused by the March 22, 2006 employment injury, accepted for a medial meniscus tear of the right knee.

In its September 2, 2014 decision, the Board affirmed a June 5, 2013 merit decision in which an OWCP hearing representative had affirmed a November 2, 2012 OWCP decision that terminated appellant's wage-loss compensation and medical benefits that day. Absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.¹⁷

The term "clear evidence of error" is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.¹⁸ With her September 3, 2015 reconsideration request, appellant referenced a July 21, 2015 report and asked that a partial ACL tear be accepted.¹⁹ In the July 21, 2015 report, Dr. McManus noted right knee diagnoses, including a recurrent ACL tear. He opined that all appellant's right knee conditions were caused by a March 22, 2006 employment injury.

The Board has long held that a mere conclusion without the necessary medical rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet the claimant's burden of proof. The medical evidence must also include rationale explaining how the physician reached the conclusion he or she is supporting.²⁰ The Board finds that Dr. McManus' July 21, 2015 report is of limited probative value on the issue of causal relationship as it only contains a conclusion regarding causal relationship which is unsupported by medical rationale.²¹ Thus, the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the June 5, 2013 OWCP decision.

As to appellant's argument on appeal that the October 9, 2015 decision contained insufficient findings, a review of that decision indicates that OWCP properly performed a limited review of the argument and evidence submitted by appellant with her September 3, 2015 reconsideration request to ascertain whether it demonstrated clear evidence of error in the June 5, 2013 decision and correctly determined that it did not, and thus properly denied appellant's untimely request for a merit reconsideration on that basis.²²

¹⁷ See *T.B.*, Docket No. 15-0001 (issued July 1, 2015). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

¹⁸ *Supra* note 14.

¹⁹ *Supra* note 3. As noted, appellant had ACL surgery on her right knee in 2005, prior to the June 22, 2006 employment injury. She has not worked since January 2007.

²⁰ *Beverly A. Spencer*, 55 ECAB 501 (2004).

²¹ See *T.M.*, Docket No. 08-975 (issued February 6, 2009).

²² 20 C.F.R. § 10.607(b); see *D.G.*, 59 ECAB 455 (2008).

CONCLUSION

The Board finds that, as appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error, OWCP properly denied a merit review of her claim.

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2016
Washington, DC

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

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

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