

FACTUAL HISTORY

On July 22, 2015 appellant, then a 37-year-old cook, filed an occupational disease claim (Form CA-2) alleging that on October 13, 2014 she first became aware of her bilateral knee condition. However, it was not until July 22, 2015 that she realized that the condition had been caused or aggravated by her federal employment duties which required a lot of lifting and bending. Appellant did not stop working.

In a letter dated August 4, 2015, OWCP informed appellant that the evidence of record was insufficient to establish her claim. She was advised regarding the medical and factual evidence required and afforded 30 days to provide the requested information.

In response to OWCP's request appellant submitted magnetic resonance imaging (MRI) scans of her knees dated July 28, 2015, a position description, as well as her own statement responding to OWCP's questions, and a statement by W.F., a cook foreman, regarding her work duties. On August 20, 2015 OWCP received additional medical evidence.

In a July 22, 2015 report, Dr. David Melvin Walker, an employing establishment family practice physician, diagnosed knee strain and knee swelling. He again diagnosed right knee strain and swelling and provided work restrictions in an August 3, 2015 report.

By decision dated September 9, 2015, OWCP denied appellant's claim. It found she had failed to submit any medical evidence causally relating a diagnosed medical condition to accepted factors of her federal employment.

On October 5, 2015 OWCP received appellant's September 28, 2015 request for reconsideration.

By decision dated October 8, 2015, OWCP denied appellant's request for reconsideration. It found that she failed to submit any new evidence or clearly identify the basis for her reconsideration request.

On December 7, 2015 OWCP received additional medical evidence

In an August 25, 2015 report Dr. Daniel Dare, a treating Board-certified orthopedic surgeon, noted that appellant was seen for bilateral knee problems. He diagnosed bilateral patella chondromalacia and lateral meniscus knee cartilage tear. The report noted that appellant injured herself at home when she fell and that it was not a work injury.

Appellant underwent right knee arthroscopic surgery on September 3, 2015.

In a September 15, 2015 report, Erin Hines, a nurse practitioner, noted that appellant was seen for postoperative right knee complaints. She related appellant's work restrictions and she answered "no" to the question of whether appellant had a work-related injury. On October 13, 2015 Ms. Hines provided work restrictions for appellant and diagnosed right knee chondromalacia.

By report dated November 18, 2015, Dr. Dare diagnosed appellant with right knee chondromalacia, and right knee lateral meniscus tear. He also noted appellant's work restrictions.

On December 7, 2015 OWCP received appellant's December 2, 2015 request reconsideration.

By decision dated February 8, 2016, OWCP denied modification. It found the medical evidence appellant submitted failed to establish causal relationship between the accepted work factors and the diagnosed knee conditions.

In an appeal request form dated March 28, 2016 and received on May 11, 2016, appellant requested reconsideration. In support of her request appellant submitted a copy of her position description as a cook.

In a letter dated May 18, 2016, OWCP advised counsel that it could not communicate with the firm as no written authorization by appellant had been submitted. A copy of the letter was sent to appellant.

By decision dated May 19, 2016, OWCP denied reconsideration. It advised appellant that any request for reconsideration must be made within one year of February 8, 2016, the last merit decision. It found the evidence submitted was duplicative and insufficient to warrant a merit review.

In an undated letter received on February 22, 2017 appellant requested reconsideration. She detailed her work duties as a cook and provided pictures of her work environment.

On February 28, 2017 OWCP received a letter dated February 8, 2017 from appellant requesting reconsideration of the merits of her claim.

By decision dated April 6, 2017 OWCP determined that appellant's request for reconsideration was untimely filed and failed to 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.³ OWCP will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in

³ *Supra* note 1. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. *See J.S.*, Docket No. 10-385 (issued September 15, 2010); *Andrew Fullman*, 57 ECAB 574 (2006); *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

⁴ 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Debra McDavid*, 57 ECAB 149 (2005); *Alan G. Williams*, 52 ECAB 180 (2000).

OWCP's Integrated Federal Workers' Compensation System.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.⁷ OWCP procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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 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 makes an independent determination of whether a claimant has submitted clear evidence

⁵ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *B.W.*, Docket No. 10-323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007) *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ See *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Leon J. Modrowski*, *supra* note 7; *Jesus D. Sanchez*, *supra* note 7.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *supra* note 9.

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 6.

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 determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

OWCP properly found that appellant's requests for reconsideration received on February 22, and 28, 2017 were untimely filed as more than one year elapsed between the last merit decision issued in this case on February 8, 2016 and the date these requests for reconsideration were scanned as received by OWCP.¹⁷

The Board also finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in denying appellant's claim.

In reconsideration requests, appellant requested a merit review of the denial of her claim. She described her work duties and submitted photographs of her work area. However, OWCP had accepted the alleged factors of federal employment. OWCP denied appellant's claim because the record was devoid of any medical evidence establishing causal relationship between a diagnosed medical condition and the accepted work factors. The evidence submitted with an untimely request for reconsideration must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁸ Since OWCP had accepted appellant's implicated federal employment factors, her description of her work duties and the photographs submitted were irrelevant to the underlying medical issue and were insufficient to demonstrate clear evidence of error.¹⁹

For these reasons, appellant has not demonstrated clear evidence of error by OWCP in its April 6, 2017 decision.

On appeal appellant contends that it was her counsel's fault for failing to timely request reconsideration of her claim. She contends that she was unaware that no signed attorney authorization form had been submitted to OWCP. Contrary to appellant's contention that she was unaware of the May 18, 2016 letter to her attorney, the record reflects OWCP also mailed her a copy of the letter that was sent to her attorney. The letter informed counsel that OWCP was not authorized to provide it with any information regarding appellant's claim as no signed authorization had been submitted from appellant.²⁰

¹⁶ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁷ 20 C.F.R. § 10.607(a).

¹⁸ *Supra* note 11.

¹⁹ See *B.L.*, Docket No. 17-1452 (issued October 25, 2017).

²⁰ See 20 C.F.R. § 10.700 regarding representation before OWCP.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 6, 2017 is affirmed.

Issued: December 13, 2017
Washington, DC

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

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

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