



## ISSUE

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

## FACTUAL HISTORY

On September 13, 1997 appellant, then a 33-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging a right knee condition that she first became aware of on January 30, 1997. She indicated that her right knee hurt when she walked up and down stairs, walked for long distances, or carried her mailbag. Appellant stopped work on January 31, 1997 and returned to light-duty work shortly thereafter.

On June 11, 1998 OWCP accepted appellant's claim for a right knee strain.

Appellant stopped work on March 26, 1999. On that same date, Dr. Alan P. Newman, an attending Board-certified orthopedic surgeon, performed OWCP-authorized right knee surgery, including right partial medial and lateral meniscectomies. OWCP subsequently expanded the accepted conditions to include medial and lateral meniscus tears of the right knee.

On April 12, 1999 appellant returned to light-duty work at the employing establishment for four hours per day and, on July 12, 1999, she returned to light-duty work for eight hours per day.

Appellant stopped work again on September 12, 2000. On that same date, Dr. Newman performed OWCP-authorized right knee surgery, including a right partial lateral meniscectomy. On December 12, 2000 she began another light-duty job for the employing establishment and, in an October 18, 2002 decision, OWCP adjusted her compensation to reflect its determination regarding her loss of wage-earning capacity based on her ability to earn wages in that position.

Appellant again stopped work on January 20, 2004. On that same date, Dr. Newman performed OWCP-approved right knee surgery, including right medial meniscectomy with anterior cruciate ligament reconstruction (patellar tendon autograft).<sup>3</sup> On March 24, 2004 OWCP accepted the additional condition of anterior cruciate ligament tear of the right knee.

On April 29, 2004 appellant returned to work in a light-duty job and, on July 14, 2005, she filed a claim for a schedule award (Form CA-7). By an April 27, 2006 decision, OWCP granted her a schedule award for 16 percent permanent impairment of her right lower extremity.<sup>4</sup>

In December 2011 appellant began working in a light-duty job on a part-time basis.

In a June 27, 2013 report, Dr. Lindsey S. Martinson, an attending Board-certified occupational medicine physician, indicated that appellant had permanent work restrictions of

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<sup>3</sup> Appellant received disability compensation on the daily rolls beginning January 20, 2004.

<sup>4</sup> In a Form CA-7 received on May 31, 2011 appellant claimed an additional schedule award. By an August 26, 2011 decision, OWCP denied modification of its April 27, 2006 schedule award determination.

lifting, carrying, pushing, and pulling no more than 10 pounds; performing sedentary desk work only; sitting, standing, and walking as tolerated; and using an ergonomic chair. She noted that, if such modified activity was not accommodated by the employing establishment, appellant would then be considered temporarily and totally disabled from work and a separate off-work order would not be required.

Appellant stopped work on January 27, 2014. On February 11, 2014 she filed a claim for compensation (Form CA-7) alleging that she was totally disabled from work for the period January 27 to February 7, 2014 due to her accepted work injuries. Appellant filed additional CA-7 forms claiming disability for the period February 7 to October 31, 2014. She claimed that she sustained such disability because the employing establishment failed to provide her with light-duty work within her work restrictions.

In an August 5, 2014 decision, OWCP denied appellant's claim for wage-loss compensation beginning January 27, 2014 and continuing. It found that she failed to submit sufficient medical evidence to establish a worsening of her work-related medical condition which prevented her from working on or after January 27, 2014.

On October 7, 2014 appellant requested reconsideration. She continued to argue that she sustained disability beginning January 27, 2014 because the employing establishment failed to provide her with light-duty work within her work restrictions.

In an October 31, 2014 decision, OWCP denied modification of its August 5, 2014 decision. It found that appellant had not established her claim for ongoing wage-loss compensation beginning January 27, 2014 because she had failed to submit sufficient medical evidence to establish a worsening of her work-related medical condition which prevented her from working on or after January 27, 2014.<sup>5</sup>

On October 30, 2015 appellant, through her representative, again requested reconsideration. He noted that appellant's work restrictions had not changed and argued that she sustained disability beginning January 27, 2014 because the employing establishment failed to provide her with light-duty work within her work restrictions.

Appellant submitted a November 12, 2015 report from Dr. Martinson who indicated that she had permanent work restrictions of lifting, carrying, pushing, and pulling no more than 10 pounds; performing sedentary desk work only; sitting, standing, and walking as tolerated; and using an ergonomic chair.<sup>6</sup>

In a January 14, 2016 decision, OWCP denied modification of its October 31, 2014 decision. It found that appellant had not established her claim for wage-loss compensation beginning January 27, 2014 because she failed to submit sufficient medical evidence to establish

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<sup>5</sup> The record reflects that appellant returned to work for the employing establishment in late-October 2014.

<sup>6</sup> Dr. Martinson noted that, if such modified activity was not accommodated by the employing establishment, appellant would then be considered temporarily and totally disabled from work and a separate off-work order would not be required.

a worsening of her work-related medical condition which prevented her from working on or after January 27, 2014.

In a January 14, 2017 letter, received by OWCP on January 16, 2017, appellant's representative requested reconsideration of OWCP's January 14, 2016 decision on behalf of appellant. He indicated that OWCP had repeatedly denied appellant's claim for disability beginning January 27, 2014 because she failed to provide medical evidence establishing a worsening of her work-related medical condition. The representative noted, however, that appellant was working on a part-time basis and claimed disability not because her work-related medical condition had worsened, but rather because the employing establishment failed to provide her with full-time modified work within her current medical restrictions. He asserted that appellant was willing to work during the claimed period of disability, but noted that in January 2014 the employing establishment only provided her part-time work with variable hours that was not within her work restrictions. This lack of availability of appropriate work continued until the employing establishment located full-time modified work within appellant's restrictions in October 2014. The representative indicated that appellant's work-related condition and medical restrictions had not changed. He noted that appellant had continued to work on a full-time basis performing modified work from late-October 2014 through to the present.

The representative also noted that the record contained several job offers the employing establishment made to appellant beginning in February 2014 which did not provide full-time work and were not within her work restrictions. He asserted that OWCP did not address this evidence in its decisions denying appellant's disability claim. The representative indicated that the record also contained CA-7 forms, produced during the period of appellant's claimed disability, in which an employing establishment manager acknowledged that full-time modified work was not available for appellant. He asserted that the relevant precedent dictated that appellant was due wage-loss compensation beginning January 27, 2014 due to the employing establishment's failure to provide her full-time modified work within her medical restrictions.

Appellant submitted several documents in support of her reconsideration request, including a document describing a modified assignment offered by the employing establishment on August 11, 2016.

In a January 9, 2017 narrative report, Dr. Amy Kerfoot, an attending Board-certified occupational medicine physician, described the findings of an examination performed on that date, diagnosed stable right knee arthritis, and indicated that appellant had permanent work restrictions. In a January 9, 2017 duty status report (Form CA-17), she detailed those restrictions, including no lifting more than 20 pounds, no standing or walking for more than four hours per day, and no climbing, kneeling, bending, or twisting.

Appellant also resubmitted a copy of the November 12, 2015 report in which Dr. Martinson, an attending physician, delineated her permanent work restrictions.

In a January 25, 2017 decision, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found that appellant failed to file a timely request for reconsideration because her request for reconsideration was not received until January 16, 2017, more than one year after issuance of its

January 14, 2016 merit decision. OWCP also determined that appellant had not demonstrated clear evidence of error on its part in issuing its January 14, 2016 decision.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.<sup>7</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System.<sup>9</sup> However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision.<sup>10</sup> 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 be manifest on its face that OWCP committed an error.<sup>11</sup>

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>12</sup> The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>13</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>14</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> This entails a limited

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4(b) (February 2016).

<sup>10</sup> OWCP's regulations provide that, where the request for reconsideration is untimely and fails to demonstrate clear evidence of error, OWCP will deny the application for reconsideration without reopening the case for a review on the merits. 20 C.F.R. § 10.608(b).

<sup>11</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>12</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>13</sup> *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

<sup>14</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>15</sup> *Id.*

review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>16</sup> The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>17</sup>

### ANALYSIS

OWCP accepted that appellant sustained several occupational right knee injuries, including a strain, medial and lateral meniscus tears, and anterior cruciate ligament tear, and it approved right knee surgeries which were performed in 1999, 2000, and 2004. Appellant claimed that she had disability beginning January 27, 2014 due to her accepted employment conditions. In decisions dated August 5 and October 31, 2014 and January 14, 2016, OWCP denied appellant's claim, finding that she failed to submit sufficient medical evidence to establish a worsening of her work-related medical condition which prevented her from working on or after January 27, 2014. On January 16, 2017 appellant requested reconsideration of OWCP's January 14, 2016 decision.

In a January 25, 2017 decision, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that she failed to file a timely request for reconsideration because her request for reconsideration was not received until January 16, 2017, more than one year after issuance of its January 14, 2016 merit decision.

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>18</sup> As appellant's request for reconsideration was not received by OWCP until January 16, 2017, more than one year after issuance of its January 14, 2016 merit decision, it was untimely filed.<sup>19</sup> Consequently, she must demonstrate clear evidence of error by OWCP in its January 14, 2016 decision.

In its January 25, 2017 decision, OWCP also determined that appellant failed to demonstrate clear evidence of error on its part in issuing its January 14, 2016 decision. In making this determination, it did not provide any discussion of the evidence and argument appellant submitted in connection with her request for reconsideration or provide any reasoning for its determination that she had failed to demonstrate clear evidence of error on its part in issuing its January 14, 2016 decision.

In connection with her reconsideration request, appellant submitted a January 14, 2017 letter from her representative which contained extensive argument in support of her claim for work-related disability beginning January 27, 2014. In its January 25, 2017 decision denying merit review, OWCP did not address the argument presented by appellant's representative.

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<sup>16</sup> *Id.*

<sup>17</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>18</sup> *See supra* note 8.

<sup>19</sup> The 365-day period for filing a timely request for reconsideration ended on Friday, January 13, 2017.

Appellant submitted documents in support of her reconsideration request, including several medical reports and an offer of light-duty work. However, OWCP also failed to address this evidence in its January 25, 2017 decision.

The Board finds that OWCP did not provide adequate facts and findings in its January 25, 2017 decision explaining its reasoning for determining that appellant failed to demonstrate clear evidence of error on its part with respect to its January 14, 2016 decision. In deciding matters pertaining to a given claimant's entitlement to compensation benefits, OWCP is required by statute and regulation to make findings of fact.<sup>20</sup> OWCP procedure further specifies that a final decision of OWCP "should be clear and detailed so that the reader understands the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim."<sup>21</sup> These requirements are supported by Board precedent.<sup>22</sup>

Given its lack of adequate factual findings, OWCP's January 25, 2017 decision would not allow appellant to understand the reason for the disallowance of the benefit or the evidence necessary to overcome the defects of her claim.<sup>23</sup> In its January 25, 2017 decision, OWCP did not discuss the evidence submitted, or explicitly provide the basis for its finding that the evidence was insufficient to require reopening of appellant's claim for merit review.<sup>24</sup> For these reasons, the case must be remanded to OWCP for further development to include the issuance of an appropriate decision containing adequate factual findings with respect to appellant's untimely reconsideration request.

### CONCLUSION

The Board finds that the case is not in posture for decision.

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<sup>20</sup> 5 U.S.C. § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

<sup>21</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5c(3)(e) (February 2013).

<sup>22</sup> See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960). OWCP procedures provide that, if clear evidence of error has not been presented, the request should be denied according to 20 C.F.R. § 10.608(b) and OWCP's claims examiner should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding that clear evidence of error has not been shown. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5b (February 2016).

<sup>23</sup> See *supra* note 19.

<sup>24</sup> As noted above, OWCP procedures provide that a decision finding that clear evidence of error has not been shown should include a discussion of the evidence submitted in support of the request for reconsideration. See *supra* note 20.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 25, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: December 4, 2017  
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