

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

B.W., Appellant)
and) Docket No. 16-1310
U.S. POSTAL SERVICE, POST OFFICE,) Issued: February 17, 2017
Tampa, FL, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 7, 2016 appellant filed a timely appeal from a March 3, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated June 19, 2014 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

On appeal, appellant contends that his injury was caused and/or aggravated while employed by the employing establishment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 17, 2012 appellant, then a 60-year-old retired rural carrier, filed an occupational disease claim (Form CA-2), alleging that he developed a left knee condition due to factors of his federal employment, including repetitive movements.

By decision dated January 31, 2013, OWCP denied the claim as the medical evidence failed to establish a causal relationship between appellant's conditions and factors of his federal employment.

On February 26, 2013 appellant requested reconsideration. By decision dated March 29, 2013, OWCP denied modification of its prior decision.

On March 31, 2014 appellant again requested reconsideration and submitted a March 20, 2014 report from Dr. John C. Kagan, a Board-certified orthopedic surgeon, who opined that working for the employing establishment for 27 years would be of sufficient time to produce degenerative changes to the left knee.

By decision dated June 19, 2014, OWCP denied modification of its prior decision.

On June 25, 2015 appellant again requested reconsideration and resubmitted the March 20, 2014 report from Dr. Kagan.

By decision dated August 12, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On February 12, 2016 appellant again requested reconsideration and submitted narrative statements and documentation indicating that his third request for reconsideration had been postmarked on June 16, 2015.

By decision dated March 3, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It noted that it had reviewed the evidence of record and explained that OWCP procedures provided that the timeliness of a request for reconsideration was based on the date it was received by OWCP, not the postmark date.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ One such limitation provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which

² See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

review is sought.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁵

Section 10.607(b) provides that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁷ The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² 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.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP's regulations¹⁴ and procedures establish a one-year

⁴ 20 C.F.R. § 10.607(a).

⁵ See *Jesus D. Sanchez*, *supra* note 2; F.R., Docket No. 09-575 (issued January 4, 2010).

⁶ 20 C.F.R. § 10.607(b).

⁷ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

⁸ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

⁹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁴ 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The Board held that for OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the “received date” as recorded in the Integrated Federal Employee’s Compensation System (iFECS).¹⁵ The most recent merit decision was OWCP’s June 19, 2014 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since appellant’s request was not received by OWCP until February 12, 2016, it was filed outside the one-year time period. As appellant’s February 12, 2016 request for reconsideration was received more than one year after the June 19, 2014 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.¹⁶

The Board finds that in order to demonstrate clear evidence of error, appellant must submit evidence relevant to the issue which was decided by OWCP. He did not submit any new medical evidence with his request, relevant to the underlying issue in this case. As OWCP noted in its prior decisions, the issue was whether there is a causal relationship between appellant’s left knee conditions and factors of his federal employment. This is medical in nature. Appellant’s narrative statements and documentation merely restate his own arguments previously rejected by OWCP, that he had submitted a timely request for reconsideration. The Board finds that the evidence submitted by appellant in support of his request for reconsideration does not raise a substantial question as to the correctness of OWCP’s June 19, 2014 merit decision or shift the weight of the evidence of record in his favor. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review.¹⁷

On appeal, appellant contends that his injury was caused and/or aggravated while employed by the employing establishment. The Board finds that OWCP’s March 3, 2016 decision denied appellant’s request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error and explained that it had reviewed the evidence submitted to determine whether its June 19, 2014 decision was incorrect. The Board noted above that it only has jurisdiction over OWCP’s March 3, 2016 nonmerit decision which denied appellant’s request for reconsideration and therefore is precluded from conducting a merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant’s request for reconsideration because it was not timely filed and failed to demonstrate clear evidence of error.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016); *see supra* note 12. *See also C.B.*, Docket No. 13-1732 (issued January 28, 2014).

¹⁶ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ *See A.F.*, Docket No. 13-7 (issued February 8, 2013).

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 17, 2017
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