

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.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 25, 2014 appellant, then a 52-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 25, 2014 she sustained an injury to her right knee when she was walking and her knee gave out, causing her to fall on her right knee. She stopped work on August 8, 2014 and returned on August 12, 2014.⁵

Dr. Timothy P. Vanderbilt, a Board-certified orthopedic surgeon, treated appellant. In an April 8, 2013 progress report, he related appellant's complaints of persistent left knee and right knee pain. Dr. Vanderbilt explained that appellant felt she was putting more stress on her right knee in order to protect her left knee when she began to work 12-hour days. Upon examination of the bilateral lower extremities, he observed no joint swelling and full range of motion. Dr. Vanderbilt also noted tenderness to palpation at the right knee lateral joint and left knee medial joint. He indicated that appellant had "early arthritic changes, with overuse secondary to her job as a mail carrier, being on her feet for 12 hours a day, 6 days a week."

In an April 8, 2013 x-ray of the right knee, Dr. Jason W. Stephenson, a Board-certified diagnostic radiologist, reported no acute fracture or subluxation. He opined that appellant had mild patellofemoral joint and medial compartment osteophyte formation without joint space narrowing.

On August 11, 2014 Mary Evenson, a physician assistant, noted that appellant was unable to work from August 9 through 10, 2014.

By letter dated August 25, 2014, OWCP advised appellant that the evidence submitted was insufficient to establish her traumatic injury claim. It requested additional factual evidence to substantiate the factual elements of her claim and medical evidence to demonstrate that she sustained a diagnosed condition causally related to the July 25, 2014 employment incident. No additional evidence was received.

OWCP denied appellant's claim in a decision dated September 29, 2014 finding that appellant failed to establish fact of injury. It determined that the evidence of record was

⁴ Docket No. 15-1438 (issued October 9, 2015).

⁵ The record reveals that appellant had a previously accepted claim under OWCP File No. xxxxxx501 for an August 21, 2009 employment injury to her left knee. Her claim was accepted for aggravation of osteoarthritis of the left knee. OWCP reviewed the medical evidence from OWCP File No. xxxxxx501 and copied pertinent medical evidence into this present claim.

insufficient to substantiate that the July 25, 2014 incident occurred as alleged or that she had sustained a medical condition causally related to the alleged work incident.

Dr. Geoffrey S. Baer, a Board-certified orthopedic surgeon, began to treat appellant. In reports dated November 10, 2014 to February 2, 2015, he related appellant's complaints of continued pain localized to the lateral and medial aspects of her right knee. Dr. Baer noted that appellant currently worked with restrictions as a letter carrier for the employing establishment. Upon examination of appellant's right lower extremity, he observed tenderness over the medial joint line and medial and lateral patellar facets. Sensation was normal to light and patellar apprehension and firm endpoint were negative. Dr. Baer reviewed an October 27, 2014 magnetic resonance imaging (MRI) scan report of appellant's right knee, which revealed a posterior root tear of the medial meniscus with multifocal cartilage loss along the central and posterior weight bearing surfaces of the medial and lateral patellofemoral articular surfaces. He opined that appellant had an "aggravation of right tricompartmental degenerative knee joint disease (DJD) with underlying medial meniscus tear." In a February 2, 2015 work restriction note, Dr. Baer indicated that appellant should remain off work beginning January 31, 2015 due to worsening knee pain.

On February 17, 2015 OWCP received appellant's request for reconsideration. She resubmitted her Form CA-1, the physician assistant notes dated January 3 to September 24, 2014, and Dr. Baer's reports.

OWCP received appellant's response to its August 25, 2014 development letter on February 23, 2015. Appellant related that on July 25, 2014 she felt her right knee give out when she went down some steps while delivering mail. She indicated that she did not work the next day and stayed off her feet over the weekend. Appellant indicated that she went to the doctor's office on August 8, 2014 and submitted her claim the next day. She reported that she had a previous job-related knee injury when she fell onto both her knees. Appellant also submitted an authorization for examination and/or treatment (Form CA-16), which was mostly illegible.

Appellant continued to receive medical treatment from Dr. Baer. In progress notes dated February 12 and March 5, 2015, Dr. Baer indicated that he treated appellant for tricompartmental DJD of the right knee. He related that appellant had undergone physical therapy treatments and cortisone injections, but still complained of her knee giving out and getting stuck periodically. Dr. Baer provided examination findings and diagnosed right knee tricompartmental DJD with mechanical symptoms.

In a March 5, 2015 preoperative evaluation, Leslie L. Goodavish, a physician assistant, discussed appellant's history and conducted an examination. She observed tenderness over the medial line and pain on the patella. Ms. Goodavish diagnosed right knee medial meniscus tear.

On March 16, 2015 appellant underwent right knee surgery.

By decision dated April 9, 2015, OWCP affirmed the September 29, 2014 denial decision with modification. It accepted that the July 25, 2014 employment incident had occurred as alleged, but denied the claim finding insufficient medical evidence to establish that she sustained a right knee condition causally related to the accepted incident.

Appellant appealed to the Board. By decision dated October 9, 2015, the Board affirmed the April 9, 2015 OWCP decision finding that appellant failed to meet her burden of proof to establish her traumatic injury claim. It found that the medical evidence of record was insufficient to establish that appellant sustained a right knee condition causally related to the July 25, 2014 employment incident.⁶

On January 6, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for the period March 16 to June 15, 2015. In a letter dated January 12, 2016, OWCP advised appellant that her Form CA-7 claim was not payable because her initial traumatic injury claim was denied in a decision dated September 29, 2014, which was upheld by reconsideration decision dated April 29, 2015 and by the Board on October 9, 2015.

On October 24, 2016 OWCP received appellant's request, through counsel, for reconsideration in a letter dated October 19, 2016. He alleged that OWCP committed clear error because it never considered evidence that was submitted after the April 9, 2015 OWCP decision and failed to fully develop appellant's claim. Counsel observed that the Board had noted this evidence in its decision of October 9, 2015. He asserted that this new evidence established appellant's traumatic injury claim. Counsel cited to and included copies of ECAB decisions *I.C.*, Docket No. 14-170 (issued June 3, 2014) and *A.B.*, Docket No. 10-1070 (issued March 8, 2011).

By decision dated November 1, 2016, OWCP denied appellant's October 24, 2016 reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error. It determined that the Board's October 9, 2015 decision was the last merit review of the case and appellant's reconsideration request was received on October 24, 2016. The request for reconsideration was not made within one year of the last merit decision and was therefore untimely. OWCP further found that appellant's reconsideration request and evidence submitted failed to demonstrate clear evidence that OWCP's most recent merit decision was in error. It specifically noted that, despite appellant's attorney's allegations, no new medical evidence was received after OWCP's April 9, 2015 decision and before the Board's October 9, 2015 decision.

LEGAL PRECEDENT

OWCP regulations provide that to be entitled to a merit review of an OWCP decision, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ 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.⁸

⁶ *Supra* note 4.

⁷ 20 C.F.R. § 10.607(a). 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. 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (February 2016).

OWCP, however, may not deny an application for review solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.⁹ In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹

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.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ The Board has held that even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.¹⁵ OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁶ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹⁷

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁸

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ See 20 C.F.R. § 10.607(b); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

¹³ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁵ A.R., Docket No. 15-1598 (issued December 7, 2015).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5a (October 2011).

¹⁷ *Id.*

¹⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The last merit decision in this case was the Board's October 9, 2015 decision, which affirmed the denial of appellant's traumatic injury claim. On October 24, 2016 OWCP received appellant's request for reconsideration. In a decision dated November 1, 2016, it denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. The one-year time limitation runs from the last merit decision of the case.¹⁹ Appellant therefore had one year from the Board's October 9, 2015 decision to request reconsideration before OWCP. OWCP received appellant's latest request for reconsideration on October 24, 2016, which was outside the one-year time limit.²⁰ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her traumatic injury claim.²¹

The Board has reviewed the record and finds that the evidence submitted in the untimely request for reconsideration does not raise a substantial question as to the correctness of OWCP's last merit decision and is therefore insufficient to demonstrate clear evidence of error.

Appellant's traumatic injury claim was denied because the medical evidence of record failed to establish that appellant sustained a right knee condition causally related to the July 25, 2014 employment incident. Counsel asserted that OWCP committed error because it did not consider evidence that was submitted after the April 9, 2015 OWCP decision. He provided copies of the ECAB decisions, which he asserted supported his argument that OWCP should further review appellant's case.

The Board finds that this evidence does not demonstrate clear evidence of error. Although counsel asserted that OWCP failed to consider medical evidence, a review of the record demonstrates that no medical evidence was received by OWCP after the April 9, 2015 reconsideration decision and before the Board's October 9, 2015 decision. The Board finds that the argument submitted by appellant in support of her reconsideration does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The underlying issue is a medical one, and had to be established through the submission of medical evidence. Appellant did not submit any additional medical evidence in support of her request for reconsideration of the April 9, 2015 decision. All of the evidence of record had been considered and reviewed by OWCP and the Board in the prior merit decisions. Appellant's request for reconsideration does not demonstrate on its face that OWCP's merit

¹⁹ *Supra* note 7.

²⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(4) (October 2011). For decisions issued on or after August 29, 2011, the one-year period begins on the date of the original decision, and the application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.

²¹ *Supra* note 8; *Debra McDavid*, 57 ECAB 149 (2005).

decision was erroneous.²² Consequently, the reconsideration request is insufficient to establish clear error by OWCP with respect to her traumatic injury claim.

The Board has found that the term “clear evidence of error” is intended to represent a difficult standard.²³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁴ The evidence submitted 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.²⁵

On appeal, counsel alleges that OWCP’s decision was contrary to fact and law. As stated above, the Board finds that appellant has failed to support her reconsideration request with evidence or argument demonstrating that OWCP’s decision denying her traumatic injury claim was clearly erroneous.

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.

²² See *E.T.*, Docket No. 16-1912 (issued March 6, 2017).

²³ *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

²⁴ *Supra* note 12.

²⁵ *Supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 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