

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

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**N.M., Appellant**

**and**

**DEPARTMENT OF HEALTH & HUMAN  
SERVICES, Washington, DC, Employer**

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**Docket No. 18-0180  
Issued: August 20, 2018**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 31, 2017 appellant filed a timely appeal from a May 4, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision dated April 26, 2016, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated March 15, 2018, the Board denied the request for oral argument as it did not have jurisdiction over the merits of the case and thus, appellant's arguments on appeal could adequately be addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-0180 (issued March 15, 2018).

## 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 March 10, 2016 appellant, then a 44-year-old legal assistant, filed a traumatic injury claim (Form CA-1) alleging that, on March 1, 2016, she fell when she was struck by copy room door at the employing establishment and knocked off her crutches. She claimed that her right knee, which already had a torn anterior cruciate ligament, jerked and was very sore to the touch. Appellant listed her injury as right knee medial collateral ligament/posterior cruciate ligament tear (MCL/PCL). She submitted illegible documents in support of her claim.

By development letter dated March 24, 2016, OWCP advised appellant that additional information was necessary to support her claim, including further information with regard to how the alleged incident occurred and medical information showing causal relationship between a medical diagnosis and the alleged employment event. It afforded her 30 days to submit the necessary evidence.

In response, appellant submitted multiple reports from Kaiser Permanente. These reports included a February 1, 2016 report wherein Dr. Sangeeta Iyer, a Board-certified internist, diagnosed right knee medial collateral ligament tear and obesity. Dr. Iyer indicated that appellant should continue to use crutches. In an April 1, 2016 report, Dr. Gregory Ford, a Board-certified orthopedic surgeon, noted that appellant was initially injured in a nonemployment injury on January 22, 2016, and suffered exacerbation of the injury on March 1, 2016 when she fell at work. Appellant's diagnoses were listed as right knee PCL tear, subsequent, and right knee MCL tear, subsequent. Dr. Ford found appellant able to work full capacity on May 18, 2016.

In a decision dated April 26, 2016, OWCP denied appellant's claim as it determined that she failed to meet the factual component of her claim. It noted that she had not provided additional factual information in response to its March 24, 2016 development letter. OWCP further noted that appellant had not submitted medical evidence to establish that a diagnosed medical condition was causally related to the alleged work injury or event. The FECA appeal rights accompanying the decision provided, in part, the following under appeal right number 2, entitled **"RECONSIDERATION: The request must be signed, dated and received within one calendar year of the date of the decision."** (Emphasis in the original).

Additional medical evidence was received by OWCP after the April 26, 2016 decision. These included reports that predated the March 1, 2016 alleged incident. In a January 25, 2016 report, Dr. Robert Miles, a Board-certified family practitioner, indicated that appellant sustained a right knee injury three days prior when she fell on some icy steps and twisted her left knee. He diagnosed right knee chondral injury and right knee sprain. Records indicate that appellant continued to receive treatment for her injured right knee. In a February 12, 2016 magnetic resonance imaging (MRI) scan, Dr. Christopher Wu, a Board-certified radiologist, interpreted an MRI scan as evincing a full-thickness tear of the MCL and probably full-thickness tear of the PCL at the tibial attachment. He also noted early cartilage disease in the central trochlear groove.

On March 8, 2016 appellant was treated by Mr. Waters and his reports were reviewed by Dr. Mychelle Shegog, a Board-certified orthopedic surgeon. Mr. Waters noted that appellant had her crutch knocked out from under her last week at work, causing her right knee to give out backwards. He noted that her MRI scan showed a complete proximal MCL tear and PCL tears, otherwise minimal damage/degeneration. Mr. Waters recommended that appellant continue to use her crutches and indicated that he would refer her to a surgeon for evaluation. Appellant also submitted physical therapy reports.

On May 1, 2017 appellant requested reconsideration. She submitted a statement in which she alleged that she sent paperwork from her doctor that contained a specific statement that the workplace injury resulted in an exacerbation of her prior injury. Appellant also stated that she could not specify in more detail about the incident as it happened so quickly. She stated that the “Chair of the Departmental Appeals Board” as well as her supervisor were on the scene when emergency services came to help her off the floor. Appellant noted that her supervisor was with her as she left the office, got into the ambulance, went to the hospital emergency department, and that her supervisor stayed until she received the x-rays and her husband arrived. She also submitted an e-mail from her supervisor memorializing a discussion they had relative to modified work activity.

By decision dated May 4, 2017, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **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 facts found on review, may end, decrease, or increase the compensation awarded, or award compensation previously refused or discontinued.<sup>3</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 regulation provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.<sup>4</sup> Timeliness is determined by the document receipt date (*i.e.*, the received date in OWCP’s Integrated Federal Employees’ Compensation system).<sup>5</sup> When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, a Sunday, or a legal holiday.<sup>6</sup> The Board has

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>6</sup> *Id.*

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.<sup>7</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 demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. 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 manifest on its face that OWCP committed an error.<sup>8</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 it 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>9</sup> The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>10</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>11</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>13</sup> The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>14</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>15</sup> As appellant's request for reconsideration was not received by OWCP until May 1, 2017, more than one year after the April 26, 2016 merit decision, it was untimely filed. Appellant contends that, based on the practice in her office, her understanding was that her reconsideration request must be mailed by April 26, 2017. However, in the statement with regard to appellant's FECA appeal rights that was mailed to her with the decision, OWCP clearly noted and highlighted that any request for

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<sup>7</sup> 5 U.S.C. § 81328(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989)

<sup>8</sup> *Supra* note 4 § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>9</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>10</sup> *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

<sup>11</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>15</sup> 20 C.F.R. § 10.607(a).

reconsideration must be signed, dated, and received by OWCP within one-calendar year of the date of the decision. Consequently, appellant must demonstrate clear evidence of error by OWCP in its April 26, 2016 decision.

The Board also finds that appellant has not demonstrated clear evidence of error in the April 26, 2016 merit decision. The underlying issue is whether appellant has established that the claimed March 1, 2016 employment incident occurred as alleged -- *i.e.*, that she in fact fell off her crutches when she was hit by a copy room door, and that this alleged incident caused her diagnosed conditions. The Board finds that the arguments and evidence submitted by appellant in support of her request for reconsideration did not raise a substantial question as to the correctness of the denial of the claim.<sup>16</sup>

The term clear evidence of error is intended to represent a difficult standard, and appellant's statement about her supervisor accompanying her to the hospital and that the Chairman of the employing establishment's appeals board was on the scene when the emergency personnel arrived is not the type of positive, precise, and explicit argument which manifested on its face that OWCP committed an error as it does not describe a mechanism of injury.<sup>17</sup> Appellant's statement and email memorializing a conversation relative to modified work is of insufficient probative value to shift the weight in her favor and raise a substantial question as to the correctness of the denial of claim in OWCP's April 26, 2016 merit decision.<sup>18</sup>

In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>19</sup> The only evidence submitted on reconsideration was medical evidence. Clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>20</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>21</sup> The medical evidence appellant submitted on reconsideration did not on its face establish that the alleged incident caused an injury. Consequently, the medical evidence is insufficient to demonstrate clear evidence of error.

The Board finds that appellant's request for reconsideration does not demonstrate that OWCP committed error when it denied appellant's claim on April 26, 2016.<sup>22</sup> As noted, clear

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<sup>16</sup> *D.B.*, Docket No. 17-1197 (issued November 1, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> *See J.P.*, Docket No. 17-0053 (issued March 23, 2017).

<sup>19</sup> *B.C.*, Docket No. 16-1404 (issued April 14, 2017).

<sup>20</sup> *James R. Mirra*, 56 ECAB 738 (2005); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

<sup>21</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>22</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

evidence of error is intended to represent a difficult standard and appellant has not met this standard in this case.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's April 26, 2016 merit decision and OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's reconsideration request, finding that it 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 May 4, 2017 is affirmed.

Issued: August 20, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy 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