

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

B.R., Appellant

and

**DEPARTMENT OF THE AIR FORCE, TINKER
AIR FORCE BASE, OK, Employer**

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**Docket No. 17-1213
Issued: January 18, 2018**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 18, 2017 appellant filed an appeal from March 16 and 22, 2017 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated November 24, 2014, to 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.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration of the merits of appellant's claim for an additional schedule award pursuant to 5 U.S.C. § 8128(a); and (2) whether OWCP properly denied appellant's request for reconsideration regarding continuing employment-related disability, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 12, 1986 appellant, then a 29-year-old aircraft mechanic, injured his knees at work and returned to work shortly thereafter. OWCP assigned File No. xxxxxx936. Appellant also filed a claim, under File No. xxxxxx083, alleging that on April 4, 1988 he slipped in hydraulic fuel and fell, injuring his right knee. OWCP administratively combined appellant's claims, with OWCP File No. xxxxxx936 serving as the master file. Appellant stopped work on September 27, 1988, returned briefly in 1989, and was placed on the periodic rolls. OWCP accepted right knee strain, internal right knee derangement, and right knee chondromalacia patellae.

By decision dated July 30, 1991, OWCP granted appellant a schedule award for 45 percent permanent impairment of the right leg.³

On March 6, 2006 OWCP proposed to terminate appellant's wage-loss compensation benefits. It finalized the termination by decision dated April 6, 2006.

On May 23, 2012 Dr. Andrew K. Lee, an attending Board-certified orthopedic surgeon, performed authorized arthroscopic partial medial meniscectomy, synovectomy, and chondroplasty of the right knee. On July 26 and October 19, 2012 Dr. Lee provided follow-up care and advised that appellant could not work. He recommended a functional capacity evaluation that was performed by Dr. Rogelio G. Rodriguez, a chiropractor, on November 12, 2012 who indicated that appellant could perform work at a light physical demand level.

On January 7, 2013 Dr. Lee noted appellant's report that he was doing fine until November 28, 2012 when his car hit a deer and traumatized his right knee. He noted minimal swelling and edema on right knee examination. Dr. Lee diagnosed right knee pain, deranged medial and lateral menisci, knee osteoarthritis, status post debridement, and resolving contusion. He advised that appellant could return to modified duty.

In reports dated February 4 and March 4, 2013, Dr. Lee indicated that appellant was improving and could work with physical restrictions.

On August 19, 2013 appellant submitted a claim for wage-loss compensation (Form CA-7) for disability from work April 6, 2006 to August 19, 2013. He also claimed a schedule

² Docket No. 98-0336 (issued January 6, 2000); Docket No. 06-2100 (issued August 7, 2007); Docket No. 08-0252 (issued June 10, 2008); Docket No. 09-0330 (issued September 1, 2009); Docket No. 10-1728 (issued March 2, 2011); Docket No. 13-1808 (issued February 4, 2014).

³ Appellant worked periodically in the private sector, and in 1994 was referred for vocational rehabilitation and retrained as an auto mechanic technician. In a June 21, 1996 decision, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as a carburetor fuel injection mechanic-apprentice, effective June 23, 1996. Appellant had authorized corrective surgery in 1988, 1989, and 1998. He was involved in nonwork-related motor vehicle accidents in March 1990 and July 1995 in which he had right knee injuries.

award. Appellant indicated on the claim form that he was in the receipt of federal retirement compensation. In attached correspondence, he noted that he had been in a “deer accident” in November 2012. The employing establishment controverted the claim and attached a notification of personnel action (Standard Form 50-B) indicating that appellant was terminated due to disability, effective January 22, 1991.

In reports dated July 8, 2013, Dr. Lee noted that appellant was doing well following the May 2012 surgery. He advised that appellant could return to his usual work with lifting restrictions of 30 pounds constant and 50 pounds occasional. Walking was limited to six hours daily and climbing to two hours.

In September 2013 OWCP referred appellant to Dr. James E. Butler, Board-certified in orthopedic surgery, for a second opinion evaluation and impairment evaluation. On October 7, 2013 Dr. Butler noted the history of injury, his review of the record, and appellant’s complaints of bilateral leg and knee pain with right lower extremity numbness and tingling, and chronic pain. Right knee examination demonstrated mild effusion and crepitation, normal observed range of motion, normal sensory testing, and 5/5 strength. Dr. Butler diagnosed right knee medial and lateral meniscus tears, chondromalacia patella, internal derangement, and osteoarthritis. He indicated that maximum medical improvement had been reached on October 18, 2012. Dr. Butler diagnosed osteoarthritis and noted that an October 7, 2013 right knee x-ray demonstrated a medial knee joint space narrowing of two to three millimeters. He advised that, in accordance with Table 16-3 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),⁴ appellant had a class 2 impairment due to right knee osteoarthritis which had a default value of 20 percent. Dr. Butler found functional history and physical examination modifiers of 1 and, after applying the net adjustment formula, concluded that appellant had 16 percent right leg permanent impairment.

By report dated November 25, 2013, an OWCP medical adviser agreed with Dr. Butler that appellant had 16 percent right leg permanent impairment. The medical adviser noted that, since appellant had previously received a schedule award for 45 percent permanent impairment of the right knee, he was not entitled to an additional award.

In a January 21, 2014 decision, OWCP denied appellant’s claim for an additional schedule award for right lower extremity permanent impairment.

In reports dated January 23 and 27, 2014, Dr. Lee reiterated his findings and conclusions.

By decision dated February 4, 2014, the Board affirmed merit decisions of OWCP dated January 29 and June 19, 2013, finding that appellant had not established that he continued to be disabled from work after April 4, 2006 due to his employment-related right knee injury.

On an OWCP appeal rights form dated February 28, 2014 and postmarked March 7, 2014, appellant requested a review of the written record before a representative of OWCP’s

⁴ A.M.A., *Guides* (6th ed. 2009).

Branch of Hearings and Review with regard to OWCP's January 21, 2014 schedule award decision. By decision dated May 6, 2014, the Branch of Hearings and Review denied appellant's request for a review of the written record, noting that it had been untimely filed. It considered the request and determined that the case could equally be addressed by requesting reconsideration with OWCP and submitting new evidence.

In correspondence received by OWCP on August 26, 2014, appellant requested reconsideration of the January 21, 2014 decision. He attached a November 12, 2012 impairment worksheet in which Dr. Rogelio G. Rodriguez, a chiropractor, advised that appellant had 10 percent permanent right leg impairment, and Dr. Butler's impairment analysis of 16 percent. Appellant asserted that these reports supported that he was entitled to an increased award.

By merit decision dated November 24, 2014, OWCP denied modification of the January 21, 2014 decision. It found that the weight of the medical evidence rested with the reports of Dr. Butler and OWCP's medical adviser who opined that appellant had 16 percent permanent right lower extremity impairment, which was less than the 45 percent previously awarded. It noted that appellant had submitted no evidence to support an increased award.

On August 5, 2015 appellant requested reconsideration of the November 24, 2014 decision that denied his claim for an additional schedule award. He submitted evidence previously of record.

In a report dated January 5, 2015, Dr. Lee recorded appellant's complaint of persistent grinding pain in the right knee making it stiff and more difficult to walk. Right knee examination demonstrated minimal swelling and edema with good range of motion and some stiffness. Dr. Lee repeated his diagnoses, noting that it appeared that appellant's current condition was most likely due to osteoarthritis. On June 4, 2015 he additionally commented that he informed appellant that some temporary swelling and discomfort were not uncommon and should improve over time.

By decision dated October 28, 2015, OWCP denied appellant's August 5, 2015 request for reconsideration without conducting a merit review. It noted that two previous merit decisions had been issued which explained that, as appellant had previously received a schedule award for 45 percent right knee permanent impairment, and that the current medical evidence only supported 16 percent permanent impairment, which was less than that previously awarded, he was not entitled to an increased schedule award for his right knee.

On August 10, 2016 appellant requested reconsideration of the Board's February 4, 2014 decision regarding whether he had continuing disability due to his accepted right knee injury, and, on October 18, 2016, appellant again requested reconsideration of the November 24, 2014 denial of his schedule award claim. He asserted that OWCP did not properly review the evidence of record which, he maintained, established entitlement to an increased schedule award and entitlement to disability compensation. Appellant submitted medical records previously of record, with Dr. Lee's January 5 and June 4, 2015 reports. In correspondence received on February 8, 2017 he again asserted entitlement to wage-loss compensation benefits beginning April 6, 2006. Appellant submitted evidence previously of record and a log of evidence he believed pertinent to his claim.

In a June 26, 2015 report, Dr. Lee reviewed appellant's history regarding his right knee. He noted complaints of right knee pain, weakness, give way, grinding, locking, popping, and swelling. Examination showed no swelling or edema and good knee range of motion with some stiffness, mild tenderness over the medial and lateral joint lines, and positive patellar grinding. Dr. Lee diagnosed acute medial meniscal tear, lateral meniscus derangement, and localized primary osteoarthritis. He informed appellant that some temporary swelling and discomfort were not uncommon and would improve over time.

In a March 16, 2017 decision, OWCP denied appellant's October 18, 2016 request for reconsideration regarding his schedule award claim without conducting a merit review. It found that he had not submitted relevant evidence not previously considered and had not demonstrated that OWCP erroneously applied or interpreted a point of law.

By decision dated March 22, 2017,⁵ OWCP denied appellant's August 10, 2016 request for reconsideration regarding continuing disability, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁶ Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards enumerated in section 10.606(b)(3).⁷ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁹

ANALYSIS -- ISSUE 1

OWCP issued a July 30, 1991 decision granting appellant a schedule award for 45 percent permanent impairment of the right lower extremity. The last merit decision in this claim

⁵ OWCP initially issued a decision on March 15, 2017 that did not include appeal rights. The decision was reissued on March 22, 2017.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.608(a).

⁸ *Id.* at § 10.608(b)(3).

⁹ *Id.* at § 10.608(b).

regarding entitlement to a schedule award is OWCP's November 24, 2014 decision which found that appellant had 16 percent right lower extremity permanent impairment, which was less than the 45 percent previously received.

On October 18, 2016 appellant requested reconsideration. He asserted that the medical evidence of record established entitlement to a greater schedule award. The only evidence submitted subsequent to the November 24, 2014 merit decision consisted of treatment notes from Dr. Lee, an attending orthopedist, dated January 5 and June 1 and 26, 2015. In these reports, Dr. Lee reviewed appellant's medical and surgical history regarding the right knee, noted his complaints, and described examination findings. He diagnosed acute medial meniscal tear, derangement of lateral meniscus, and localized primary osteoarthritis. Dr. Lee, however, did not provide an impairment rating. On March 16, 2017 OWCP found that the evidence and argument submitted by appellant in support of reconsideration was insufficient to warrant a merit review of the claim.

The Board first finds that OWCP properly considered appellant's correspondence as a request for reconsideration and not as a claim for an increased schedule award. Appellant did not claim a new award based on a new rating of permanent impairment.¹⁰ The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of his claim. In his correspondence requesting reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. He merely maintained that OWCP did not properly review the evidence of record. Thus, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).¹¹

The underlying issue is whether appellant has submitted sufficient evidence to establish entitlement to a schedule award greater than 45 percent previously awarded. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but in this case appellant did not submit any relevant and pertinent new evidence with his reconsideration requests as he did not submit any new medical evidence containing an impairment evaluation. The evidence submitted was, therefore, irrelevant regarding the extent of permanent impairment of appellant's right lower extremity. As such, the evidence submitted on reconsideration of the November 24, 2014 decision was irrelevant, and insufficient to warrant reconsideration of appellant's claim.

As to any arguments raised, these had previously been considered. The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) and thus OWCP properly denied merit review. Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal

¹⁰ See *A.C.*, Docket No. 13-1810 (issued January 6, 2014).

¹¹ See *J.B.*, Docket No. 17-0628 (issued June 28, 2017).

argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered.¹²

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA¹³ does not entitle a claimant to a review of an OWCP decision as a matter of right.¹⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁵ OWCP, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of the last merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request (the “received date”) in the Integrated Federal Employees’ Compensation System.¹⁶ 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).¹⁷

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁸ OWCP procedures state that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in OWCP regulations, if the claimant’s request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹⁹

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. Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of

¹² *Id.*

¹³ 5 U.S.C. § 8128(a).

¹⁴ *Thankamma Mathews*, 44 ECAB 765 (1993).

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.607; *G.F.*, Docket No. 15-1053 (issued September 11, 2015).

¹⁷ *Supra* note 14.

¹⁸ *Id.*

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

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.²⁰ The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate 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.²¹ The Board must make an independent determination of whether a claimant has demonstrated 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.²²

ANALYSIS -- ISSUE 2

In correspondence received by OWCP on August 10, 2016 appellant requested reconsideration of the Board's February 4, 2014 decision regarding whether he continued to be disabled due to his employment-related right knee injury. The Board notes that OWCP is not authorized to review Board decisions.²³ Although the February 4, 2014 Board decision was the last merit decision of record, the January 29 and June 19, 2013 OWCP decisions are the appropriate subjects of possible modification by OWCP.²⁴

The Board finds that, as appellant's request for reconsideration was received by OWCP on August 10, 2016, more than one year after the most recent merit decision on this issue, which was the Board's February 4, 2014 merit decision, the request for reconsideration was untimely filed.²⁵ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.

The Board finds that appellant failed to demonstrate clear evidence of error.

The term clear evidence of error is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.²⁶ With the August 10, 2016 reconsideration request and appellant's later correspondence, he asserted that the evidence of record, including evidence previously reviewed by OWCP and the Board, established continuing disability due the employment-related right knee injury. Appellant did not explain how resubmission of this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for further disability compensation.

²⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

²¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²² *Nancy Marcano*, 50 ECAB 110 (1998).

²³ Board decisions are not subject to review except by the Board and they become final after 30 days. *See* 20 C.F.R. § 501.6(d).

²⁴ *Id.*

²⁵ *See supra* note 19 at Chapter 2.1602.4a (February 2016), which provides that a right to reconsideration within one year accompanies any subsequent merit decision, including any merit decision by the Board.

²⁶ *Supra* note 20.

As to the medical evidence submitted subsequent to the June 19, 2013 OWCP decision the Board notes only reports from Drs. Lee and Rodriguez. While Dr. Lee described examination findings and provided physical restrictions, he did not relate his findings to appellant's employment or the April 4, 1988 work injury. Moreover, as a chiropractor, Dr. Rodriguez's report is irrelevant to a schedule award determination as the Board has held that, a chiropractor is not an extremity expert, thus a chiropractor's opinion in evaluation of an extremity award case is of no probative medical value.²⁷

As noted, evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.²⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁹ The Board finds that the evidence and argument submitted by appellant does not demonstrate clear evidence of error on the part of OWCP.

Thus, the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the June 19, 2013 OWCP decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim for an additional schedule award pursuant to 5 U.S.C. § 8128(a). The Board further finds that OWCP properly denied appellant's request for reconsideration regarding continuing employment-related disability, finding that it was untimely filed and failed to demonstrate clear evidence of error.

²⁷ *George E. Williams*, 44 ECAB 530, 534 (1993). Furthermore, under section 8101(2) of FECA, the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. 5 U.S.C. § 8101(2); *see D.S.*, Docket No. 09-0860 (issued November 2, 2009).

²⁸ *Supra* note 20.

²⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 22 and 16, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 18, 2018
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