

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

A.C., Appellant)	
)	
and)	Docket No. 17-0843
)	Issued: July 9, 2018
DEPARTMENT OF THE ARMY, U.S. ARMY)	
RESERVE COMMAND, Fort McPherson, GA,)	
Employer)	
)	

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 March 6, 2017 appellant filed a timely appeal from a September 8, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 13, 2015, 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 the claim.²

¹ 5 U.S.C. § 8101 *et seq.*

² Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated June 11, 2018, the Board denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0843 (issued June 11, 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 January 24, 2011 appellant, then a 52-year-old supervisory accountant, filed a traumatic injury claim (Form CA-1) claiming that, on January 18, 2011, she sustained injury when she fell on a wet floor while entering the building where she worked. She asserted that she fell on her right side and injured her right thumb, wrist, arm, and shoulder. A coworker indicated on the form that he witnessed appellant using her right hand to break her fall. Appellant did not stop work, but she began performing limited-duty work for the employing establishment without wage loss.

In a January 20, 2011 injury status report, Dr. John P. Kelley, an attending Board-certified orthopedic surgeon, diagnosed rotator cuff syndrome of the right shoulder, right thumb sprain, and right wrist sprain.

OWCP accepted appellant's claim for complete rotator cuff tear of the right shoulder, right thumb sprain, and right wrist sprain.

On May 18, 2011 appellant underwent OWCP-approved right thumb surgery, including repair of old rupture of right ulnar collateral ligament, and temporary fixation with Kirshner wire and short arm casting.

On November 8, 2012 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to her accepted work conditions. By decision dated February 11, 2013, OWCP granted appellant a schedule award for two percent permanent impairment of her right upper extremity.

In a September 30, 2013 report, Dr. Paul F. Richin, an attending Board-certified orthopedic surgeon, indicated that appellant reported occasional aching in her left knee. He advised that a left knee MRI scan showed a small radial tear along with some mild tricompartmental arthritis and he noted that appellant had tenderness in the posterior corner of her left knee without swelling.³ Dr. Richin indicated, "I do think that this may have gotten torn or irritated when she had her fall a couple of years ago since it has been bothering her since then, but there is no way to definitely say that." He diagnosed radial tear of the medial meniscus posterior horn and mild arthritis of the left knee.

In a November 1, 2013 statement, appellant requested that OWCP expand the acceptance of her claim to include a left knee condition. She asserted that she had experienced left knee pain since her January 18, 2011 fall, but that she was initially more concerned with her right thumb

³ The record contains a September 20, 2013 magnetic resonance imaging (MRI) scan with the following impression: Joint effusion with Baker's cyst and radial tear of the posterior horn of the medial meniscus.

condition. Appellant indicated that the September 20, 2013 MRI scan of her left knee showed a small radial tear of the posterior horn of the medial meniscus.

In a November 18, 2013 development letter, OWCP requested that appellant submit additional evidence in support of her request to expand the acceptance of her claim, including a physician's opinion supported by a medical explanation as to how her left knee condition was related to the January 18, 2011 employment injury. It also requested that she provide a description of the history of her left knee problems. OWCP afforded appellant 30 days to submit a response.

Appellant submitted a December 9, 2011 statement in which she asserted that she had not suffered a left knee injury prior to January 18, 2011. She also submitted a copy of the November 18, 2013 development letter with notations which do not contain a signature.

By decision dated January 6, 2014, OWCP denied appellant's request for expansion of the acceptance of her claim to include a left knee condition. It found that she failed to submit medical evidence sufficient to establish that she sustained a left knee condition related to the January 18, 2011 employment injury.

On January 29, 2014 appellant requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on September 15, 2014, she testified that she experienced left knee symptoms since her January 18, 2011 employment injury. Appellant indicated that the left knee pain she initially experienced after the January 18, 2011 employment accident was not severe, but that the pain later became worse.

Appellant submitted a January 18, 2011 note from Dr. Patricia Glenn-Shaheed, an attending Board-certified internist, who noted, "[Left] knee swelling, pain after fell in snow at work in the building." In a December 30, 2011 note, Dr. Glenn-Shaheed indicated, "Right hip pain and lumbar strain as a result of falling and hurting [left] knee."

Appellant also submitted an April 7, 2014 report from Dr. Richin who advised that appellant did not mention experiencing left knee pain during her first visits to him after January 18, 2011. Dr. Richin noted that, after an unspecified date, when appellant mentioned left knee pain, he determined that she had a radial tear of the left medial meniscus. With respect to appellant's claim of sustaining a left knee condition on January 18, 2011, he noted, "I have no first-hand knowledge of this and I cannot find any information in Dr. [Kelley's] old chart that would indicate that she did talk to him about this so there is no other way I can say anything about this other than what the patient told me, that it happened at the time of her accident and has been bothering her ever since."

By decision dated December 3, 2014, OWCP's hearing representative affirmed OWCP's January 6, 2014 decision noting that the newly submitted medical evidence was insufficient to establish that appellant sustained a left knee condition causally related to the January 18, 2011 employment injury.

On July 16, 2015 appellant requested reconsideration of the December 3, 2014 decision.

In a December 1, 2014 report, Dr. Richin noted that appellant had a knee problem and that she was waiting for approval for meniscus surgery.⁴ In a March 30, 2015 report, he indicated that appellant had a knee problem which was “on her other insurance.”

In a May 29, 2015 report, Dr. Glenn-Shaheed advised that on January 18, 2011 she evaluated appellant due to swelling of her right arm. Appellant reported at that time that she fell on a slippery floor, caused by ice tracked in from a snowstorm, when she entered her workplace building. Dr. Glenn-Shaheed noted that appellant was limping and that she complained of left knee aches which started after the January 18, 2011 fall. She sent appellant for a same-day hand x-ray, ordered a left knee MRI scan, and prescribed “other regimens to treat the injuries.” Dr. Glenn-Shaheed indicated that she was attaching “the initial progress note that supports the complaints of the injuries that the patient sustained on [January 18, 2011].”⁵ She advised that appellant had presented on multiple office visits with consistent pain in her left knee and that she continued to require prescribed medications to suppress the pain.

By decision dated August 13, 2015, OWCP denied modification of its December 3, 2014 decision noting that appellant failed to submit medical evidence sufficient to justify expanding the acceptance of the claim to include a left knee condition.

On August 29, 2016 appellant requested reconsideration of the August 13, 2015 decision. In an August 25, 2015 letter, she asserted that OWCP’s August 13, 2015 decision affirming the denial of her request to expand the accepted conditions was “not correct.”

Appellant submitted reports of Dr. Richin discussing her visits on November 11, 2015 and June 21, 2016. In two reports dated November 11, 2015, Dr. Richin described appellant’s history of treatment for her right thumb condition, listed range of motion findings for her right thumb, and diagnosed chronic pain of the right thumb. In two reports dated June 21, 2016, he detailed her history of treatment for her right thumb condition, noted weakness of her right hand grip, and diagnosed chronic pain of the right thumb.

Appellant also submitted several administrative documents, including an undated letter in which the Dekalb Medical Physicians Group advised of an address change, an October 19, 2015 letter regarding appellant’s medical insurance benefits, and a May 17, 2016 letter in which the employing establishment requested OWCP to close the present claim due to inactivity.

By decision dated September 8, 2016, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It found that her request for reconsideration was untimely filed because it was not received until August 29, 2016, more than one year after issuance of its August 13, 2015 merit decision. OWCP further found that the evidence and argument appellant submitted in connection with her untimely reconsideration request failed to demonstrate clear evidence of error in its August 13, 2015 decision denying her request to expand the acceptance of her claim to include a left knee condition.

⁴ Dr. Richin advised that the knee problem was “a workman’s comp[ensation] [sic].”

⁵ No additional documents were attached to the May 29, 2015 note.

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.⁶

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.⁷ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System).⁸ 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.⁹

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 be manifest on its face that OWCP committed an error.¹⁰ 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.¹¹

The Board notes that clear evidence of error is intended to represent a difficult standard.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a).

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

⁹ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹⁰ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹³ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

clear error on the part of OWCP.¹⁵ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

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.

The Board initially 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.¹⁷ As appellant's request for reconsideration was not received by OWCP until August 29, 2016, more than one year after issuance of its August 13, 2015 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its August 13, 2015 decision.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its August 13, 2015 decision.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its August 13, 2015 decision.¹⁸ The evidence and argument she submitted did not raise a substantial question concerning the correctness of OWCP's decision. Appellant submitted a statement in which she asserted that she sustained a left knee condition related to the accepted January 18, 2011 employment injury.¹⁹ However, she did not identify any specific errors in OWCP's August 13, 2015 decision denying her request to expand the acceptance of her claim to include a left knee condition and she has not raised a substantial question as to the correctness of that decision.²⁰ Appellant merely asserted, without elaboration, that OWCP's August 13, 2015 decision was "not correct."

Appellant submitted several medical reports discussing her right thumb/hand condition. In reports dated November 11, 2015 and June 21, 2016, Dr. Richin detailed appellant's history of treatment for her right thumb condition, discussed examination findings from these dates, and diagnosed chronic pain of the right thumb. None of these reports discuss appellant's left knee condition or contain an opinion relating it to the January 18, 2011 employment injury.²¹ Therefore,

¹⁵ *Id.*

¹⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁷ *See supra* note 7.

¹⁸ *See supra* note 8.

¹⁹ OWCP accepted that appellant sustained complete rotator cuff tear of the right shoulder, right thumb sprain, and right wrist sprain due to a fall at work on January 18, 2011.

²⁰ *See supra* notes 9 and 11.

²¹ The Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship. *See Charles H. Tomaszewski*, 39 ECAB 461 (1988).

these reports would not tend to show that OWCP erred in issuing its August 13, 2015 decision which denied the expansion of the acceptance of her claim to include a left knee condition.

Appellant also submitted several administrative documents, including an undated letter in which the Dekalb Medical Physicians Group advised of an address change, an October 19, 2015 letter regarding appellant's medical insurance benefits, and a May 17, 2016 letter in which the employing establishment requested that OWCP close the present claim due to inactivity. However, none of these documents would tend to show that OWCP committed error in issuing its August 13, 2015 decision.²²

The Board finds that appellant's request for reconsideration does not show on its face that OWCP committed error when it denied expansion of the acceptance of her claim to include a left knee condition in its August 13, 2015 decision.²³ As noted, clear evidence of error is intended to represent a difficult standard²⁴ 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 August 13, 2015 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 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

²² *Id.*

²³ *See S.F.*, Docket No. 09-0270 (issued August 26, 2009).

²⁴ *See supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 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