

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

D.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Desert Hot Springs, CA, Employer**

)
)
)
)
)
)
)

**Docket No. 17-1750
Issued: March 8, 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 August 9, 2017 appellant filed a timely appeal from a February 14, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from December 11, 2015, the date of the most recent merit decision, 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 to review the merits of this case.²

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.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted new evidence on appeal. The Board's jurisdiction, however, is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

On appeal appellant contends that she timely filed her request for reconsideration as the request was postmarked December 9, 2016.

FACTUAL HISTORY

On October 15, 2015 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on September 15, 2015, she sustained a right knee injury while unloading a 40-plus pound parcel from a delivery vehicle at work. On the claim form, the employing establishment did not indicate that appellant stopped work.

OWCP, by development letter dated November 3, 2015, advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence.

OWCP received a work status note dated September 30, 2015 from Dr. Paul Stanton, a Board-certified orthopedic surgeon, which indicated a diagnosis of sprain of unspecified site of the right knee, initial encounter, that appellant was disabled from work from September 30 to October 31, 2015 and commencing on December 4, 2015.

In a supplemental statement dated November 22, 2015, appellant explained that she delayed filing her Form CA-1 because she treated her right knee injury with home remedies. She related that after no improvement of her condition she had no alternative but to file a claim.

OWCP received a December 4, 2015 doctor's first report of occupational injury or illness, by Dr. William Christensen, a Board-certified internist, who noted that appellant was injured on the job on September 15, 2015. Dr. Christensen provided a history of injury that she was unloading a 40-plus pound box from her work truck when she twisted her right knee. He examined appellant and diagnosed sprain of unspecified site of the right knee, initial encounter. Dr. Christensen checked a box marked "Yes" indicating that his findings and diagnosis were consistent with appellant's account of injury or onset of illness. He also checked a box marked "No" indicating that she could not perform her usual work.

By decision dated December 11, 2015, OWCP denied appellant's traumatic injury claim as her attending physician failed to provide a rationalized medical opinion explaining how her diagnosed right knee condition was caused by the accepted September 15, 2015 employment-related incident. Appeal rights accompanying the decision advised that a reconsideration request must be received within one calendar year of the date of the decision.

OWCP received an initial injury worksheet report and work injury physician report dated December 8, 2015 from a physician assistant. The physician assistant noted the September 15, 2015 work incident, provided findings on examination, and diagnosed sprain of unspecified site of the right knee, initial encounter. He indicated that appellant was off work from the date of his examination through December 15, 2015 due to pain.

OWCP also received a December 8, 2015 right knee x-ray report from Dr. Josephine T. Nguyen, a radiologist, who found no acute fracture or malalignment, a small-to-moderate joint effusion, no lipohemarthrosis, and minimal osteophytosis of the medial compartment, no joint space narrowing.

In a December 23, 2015 right hip magnetic resonance imaging (MRI) scan report, Dr. Penelope Block, a radiologist, provided impressions that included moderate right and mild-to-moderate left hip osteoarthritis, right hip acetabular labral tearing superiorly and laterally, and left hip acetabular labral tearing at least laterally, incompletely assessed. In a right knee MRI scan report also dated December 23, 2015, Dr. Block provided impressions that included low-grade inner margin tearing of the body of the lateral meniscus, grade 1 sprain of the tibial collateral ligament versus edema related to altered biomechanics, and tri-compartmental osteoarthritis most pronounced within the patellofemoral compartment.

Dr. Christensen, in a December 15, 2015 progress report, provided examination findings and reiterated his prior diagnosis of unspecified site of right knee, subsequent encounter. He also diagnosed right hip pain. Dr. Christensen recommended that appellant remain off work. In a December 15, 2015 work injury physician report of medical visit, he noted September 15, 2015 as the date of injury and placed appellant off work through December 29, 2015. In a December 29, 2015 progress report, Dr. Christensen released appellant from his care. He examined her and diagnosed primary tri-compartmental osteoarthritis of the right knee, primary osteoarthritis of the right hip, and degenerative tearing body of right lateral meniscus. Dr. Christensen noted in a December 29, 2015 work injury physician report a date of injury of September 15, 2015 and he advised that appellant's injury/illness was nonwork related.

In a December 15, 2015 bilateral hip x-ray report, Dr. Rafal Sosnowski, a Board-certified radiologist, provided an impression of degenerative changes of both hips, right greater than left. He found no evidence for fracture, dislocation avascular necrosis.

In an appeal request form dated December 2, 2016, and received on December 13, 2016, appellant requested reconsideration of OWCP's December 11, 2015 decision. In an undated statement, also received on December 13, 2016, she responded to OWCP's November 3, 2015 development letter by discussing the development of her claimed right knee injury as a result of the accepted September 15, 2015 employment incident.

With her request for reconsideration, appellant submitted reports dated August 24, September 23, and December 2, 2016 from Dr. Aimee N. French, a Board-certified neurologist. Dr. French noted a history of the September 15, 2015 employment incident and appellant's right knee complaints and medical treatment background. She also noted her letter carrier work duties. Dr. French reviewed appellant's medical records and discussed findings on physical examination. She diagnosed lateral meniscus tear, tibial collateral ligament edema and sprain, chronic acute osteoarthritis flare that was previously asymptomatic, joint effusion, popliteal cyst, acromioclavicular (ACL) degeneration, and acute sprain in the setting of chronic osteoarthritis as previously asymptomatic of the right knee. Dr. French also diagnosed traumatic right hip acetabular labral tearing, trochanteric bursitis, partial tearing of the hamstring tendon and tendinosis, and partial tearing of the right gluteus minimus tendon and tendinosis. In the August 24, 2016 report, she opined that, based on the September 15, 2015 work incident, examination findings, and her review of medical records, there was a direct correlation between appellant's right hip and right knee and lowering a heavy 70-pound box on September 15, 2015. Dr. French advised on September 23 and December 2, 2016 that appellant could return to modified work on those dates with certain restrictions.

By decision dated February 14, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date of the reconsideration request in the Integrated Federal Employees' Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁷ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁸ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁹ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question 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. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁰

³ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

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

⁶ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5(c) (September 2016) (the term clear evidence of error is intended to represent a difficult standard).

⁸ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP's regulations¹¹ and procedures¹² provide that a request for reconsideration must be received by OWCP within one year of the issuance of the most recent merit decision. The most recent merit decision in this case was OWCP's December 11, 2015 decision. Appellant had one year from that date to timely request reconsideration. However, because OWCP did not receive her request until December 13, 2016, more than one year after the December 11, 2015 merit decision, it was untimely filed. On appeal, appellant contends that she timely filed her request for reconsideration as the request was postmarked December 9, 2016.¹³ However, OWCP's procedures provide that timeliness of a reconsideration request is determined by the date that the request is received as recorded by the iFECS system.¹⁴ Appeal rights accompanying OWCP's December 11, 2015 decision also advised appellant of this requirement. As appellant's reconsideration request was received by OWCP after the one-year time period elapsed, she must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁵

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. The underlying issue in appellant's claim is medical in nature with respect to a medical condition causally related to the September 15, 2015 employment incident. The Board notes that the term clear evidence of error is intended to represent a difficult standard.¹⁶ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.¹⁷ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁸

Appellant submitted Dr. French's reports in which she opined that appellant's right knee and right hip conditions were caused by the September 15, 2015 employment incident. She examined her and diagnosed lateral meniscus tear, tibial collateral ligament edema and sprain, chronic acute osteoarthritis flare that was previously asymptomatic, joint effusion, popliteal cyst,

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

¹² *Supra* note 5 at Chapter 2.1602.4 (October 2016).

¹³ The envelope bearing a postmark is not in the case record.

¹⁴ See *supra* note 5.

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

¹⁶ *Supra* note 5 at Chapter 2.1602.5 (October 2016); see *Dean D. Beets*, *supra* note 8.

¹⁷ See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

¹⁸ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

ACL degeneration, and acute sprain in the setting of chronic osteoarthritis as previously asymptomatic of the right knee. Dr. French also diagnosed traumatic right hip acetabular labral tearing, trochanteric bursitis, partial tearing of the hamstring tendon and tendinosis, and partial tearing of the right gluteus minimus tendon and tendinosis. She advised that appellant could work within restrictions. As previously noted, 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.¹⁹ While Dr. French's opinion is generally supportive of causal relationship, it does not demonstrate clear error on the part of OWCP in rendering its December 11, 2015 decision.²⁰

In his first report of occupational injury or illness dated December 4, 2015, Dr. Christensen indicated by checking a box marked "yes" that sprain of unspecified site of the right knee resulted from appellant's description of the claimed injury, *i.e.*, unloading a 40-pound plus parcel. However, the Board has held that an affirmative check mark, without more by the way of medical rationale, is of little probative value and thus is insufficient to establish appellant's claim.²¹ Moreover, it fails to raise a substantial question as to the correctness of OWCP's decision. Appellant also submitted Dr. Christensen's December 15 and 29, 2015 reports. He offered right knee and hip diagnoses, but advised that her condition was nonwork related. Dr. Christensen did not opine that appellant's conditions and resultant disability were caused or aggravated by the September 15, 2015 employment incident. Thus, the Board finds that Dr. Christensen's reports do not raise a substantial question concerning the correctness of OWCP's decision.

The x-ray and MRI scan reports of Drs. Nguyen, Block, and Sosnowski addressed appellant's right knee and bilateral hip conditions. The reports, however, do not attribute any condition to the September 15, 2015 work incident and do not otherwise raise any error in underlying OWCP's December 11, 2015 denial of appellant's traumatic injury claim.²²

Appellant submitted reports from a physician assistant. The Board has held, however, that physician assistants are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.²³ Consequently, these reports are insufficient to demonstrate clear error by OWCP with respect to the underlying medical issue.

The Board finds that OWCP properly found that appellant's December 13, 2016 request for reconsideration failed to demonstrate clear evidence of error. OWCP therefore properly denied appellant's reconsideration request pursuant to 20 C.F.R. § 10.608.

¹⁹ *Supra* note 15.

²⁰ *K.T.*, Docket No. 16-0677 (issued June 16, 2016).

²¹ *See Richard G. Chasse*, Docket No. 99-1574 (issued June 27, 2000).

²² *M.N.*, *supra* note 18.

²³ 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002).

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.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 8, 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