

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

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**A.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Portland, ME, Employer**

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**Docket No. 17-1991  
Issued: March 9, 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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On September 25, 2017 appellant filed a timely appeal from an April 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated December 21, 2015, to the filing of this appeal, 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 to review the merits of appellant's claim.

**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**

On August 18, 2014 appellant, then a 59-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he developed degenerative joint disease and osteoarthritis of the

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

left knee as a result of prolonged standing and walking required in his job. He first became aware of his condition on October 1, 1999 and first realized it was causally related to his federal employment on October 15, 1999.<sup>2</sup> Appellant was last exposed to the work factors alleged to have caused his disease on July 26, 2007, which was also the date he was granted disability retirement. He explained that he did not file his claim within 30 days of the date he first became aware that his left knee condition was causally related to his employment because he was unsure of how to proceed and believed he needed to reach maximum medical improvement (MMI) before filing the claim.

In an undated statement, appellant indicated that he spent the majority of his time at work on his feet. He had a right knee injury at work in June 1979 and underwent several arthroscopic surgeries as well as a total knee replacement in September 1998. On October 1, 1999, while on his feet boxing mail, appellant had left knee pain which became progressively worse. He had left knee surgery on November 4, 1999. Appellant initially thought his left knee injury was an isolated incident, and not work related, and therefore he did not report his condition to his supervisor. His knee deteriorated and he had a subsequent left knee surgery on September 31, 2000. At this time appellant thought there was a correlation between his right knee and overcompensation of his left knee. He was granted disability retirement in 2007. Appellant indicated that he was informed that he was eligible for a schedule award, but all of his medical options would have to be exhausted prior to applying for the award. He noted being treated by Dr. Douglas W. Brown, a Board-certified orthopedist, and, after his last left knee surgery in 2014, his physician informed him that he reached MMI. Appellant reported filing a schedule award claim (Form CA-7). He advised that OWCP informed him that he must first file a Form CA-2 and his claim must be accepted before he could become eligible for a schedule award.

Appellant submitted a report from Dr. Brown dated September 11, 2014, who noted treating appellant since 1983 for a right knee injury. Dr. Brown performed arthroscopic surgery on the right knee in March 1984 and a total right knee replacement on September 18, 1998. He saw appellant on October 15, 1999 for the first time for left knee symptoms. Dr. Brown diagnosed left knee osteoarthritis and performed arthroscopic surgery on November 4, 1999, November 21, 2000, November 14, 2002, and April 15, 2014. He opined that appellant's left knee problems were progressive and were aggravated by his work where he spent considerable time on his feet.

By letter dated October 31, 2014, OWCP advised appellant of the type of evidence needed to establish his claim. It indicated that the evidence of record did not show that he provided timely notice of his injury and requested that he respond to a development questionnaire.

Appellant submitted reports from Dr. Brown from November 4, 1999 to December 3, 2014. Dr. Brown indicated that appellant never sustained an injury to his left knee, which could explain the onset of osteoarthritis, but he noted his left knee became more symptomatic at the time of his right knee arthroplasty. He opined that appellant's left knee

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<sup>2</sup> Appellant indicated that he had an accepted work-related right knee injury in 1979, File No. xxxxxx766. In 1998 he underwent a total right knee replacement. This other claim is not presently before the Board.

deterioration was causally related to having to compensate for his arthritic right knee for years. Appellant also submitted a February 24, 1982 medical report noting his right knee treatment as well as an October 22, 1999 left knee magnetic resonance imaging (MRI) scan.

In a statement dated December 5, 2014, appellant indicated that, in 1983, he gave up all active sport activities. Following his retirement in 2007, he worked as a retail manager until 2013, with limited standing and walking. Appellant indicated that he delayed filing his claim because he was waiting to reach MMI for his left knee. He noted receiving a letter from the Office of Personnel Management (OPM) approving his disability retirement in February 2008, which also indicated that he could be eligible for a schedule award. Appellant was referred to the Department of Labor website which indicated that, to be eligible for a schedule award, he needed to reach MMI. He was advised by Dr. Brown that he had reached MMI in April 2014 following left knee surgery. It was at this time that appellant reported filing a CA-7, claim for a schedule award under File No. xxxxxx766. In July 2014, OWCP instructed him to file a new occupational disease claim (Form CA-2) for his left knee before filing a claim for a schedule award. Appellant indicated that in April 2014 he became aware that he had a compensable injury and reached MMI and filed his claim for compensation. He asserted that he met the guidelines for filing within the three-year statute of limitations. Appellant submitted a copy of a document entitled, "How do I claim a Schedule Award?" which describes the procedure for filing an OWCP claim for a schedule award.

In a March 26, 2015 decision, OWCP denied the claim, finding that it was untimely filed under 5 U.S.C. § 8122.<sup>3</sup> It noted that he first became aware of his condition on October 1, 1999 and first became aware of the relationship between his employment and the claimed condition on October 15, 1999. Appellant did not file his claim until August 18, 2014, which was over three years after he was last exposed to work factors. OWCP also found that there was no evidence that appellant's supervisor had knowledge of a work-related injury within 30 days.

On April 14, 2015 appellant requested an oral hearing before an OWCP hearing representative, which was held on November 10, 2015. He testified that as early as 2008, or around the time that his OPM request for disability retirement was processed, he became aware that his left knee condition was employment related. Appellant restated why he delayed filing a claim and testified that he last worked for the employing establishment on July 26, 2007. By decision dated December 21, 2015, an OWCP hearing representative affirmed the March 26, 2015 decision.

On January 3, 2017 appellant requested reconsideration and contended that the delay in filing his claim was not his fault. He indicated that he was granted disability retirement in February 2008 due to bilateral knee arthritis and, according to the information provided from OPM, he did not have a compensable impairment until he reached MMI. He noted that he reached MMI after left knee surgery in April 2014 and at that point he became aware and promptly filed his claim as instructed. Appellant asserted that he met the guideline for filing his claim within three years of his knowledge of his condition.

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<sup>3</sup> 5 U.S.C. § 8122.

Appellant submitted a copy of an OWCP decision dated December 21, 2015 and an excerpt from a document entitled, “How do I claim a Schedule Award?”, both previously of record. Also submitted was a letter from OPM dated February 14, 2008 granting appellant’s application for disability retirement.

By decision dated April 19, 2017, OWCP denied appellant’s December 12, 2016 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.<sup>4</sup> When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a federal holiday.<sup>5</sup> Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s Integrated Federal Employees’ Compensation System).<sup>6</sup> 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.<sup>7</sup>

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.<sup>8</sup> OWCP regulations and procedures provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review demonstrates clear evidence of error on the part of OWCP.<sup>9</sup>

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 that 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 to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request

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<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 (February 2016); *see also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

<sup>6</sup> *Id.* at Chapter 2.1602.4(b) (February 2016).

<sup>7</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>8</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>9</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* 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>10</sup>

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>11</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>12</sup>

### ANALYSIS

In its April 19, 2017 decision, OWCP properly determined that appellant's request for reconsideration was untimely filed. Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.<sup>13</sup> The last merit decision in this case was dated December 21, 2015. Because appellant's request for reconsideration was received on January 3, 2017, more than one year after the December 21, 2015 merit decision, OWCP properly determined that it was untimely filed.<sup>14</sup> Therefore, appellant must demonstrate clear evidence of error on the part of OWCP with regard to its December 21, 2015 decision.

The Board finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP. In a letter dated December 12, 2016, appellant requested reconsideration of his claim for a left knee condition. He indicated that the delay in filing his claim was not his fault. Appellant was granted disability retirement in February 2008 due to bilateral knee arthritis. He indicated that, according to the information provided by OPM, he did not have a compensable impairment until he reached MMI. Appellant indicated that he had reached MMI after left knee surgery in April 2014 and at that point he first became aware of his disability and promptly filed his claim as instructed. He asserted that he met the guideline for filing his claim within three years of his knowledge of his condition. The Board notes that while appellant disagreed with OWCP's decision denying his claim, this does not demonstrate clear evidence of error as it does not raise a substantial question as to the correctness of OWCP's most recent merit decision

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<sup>10</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>12</sup> *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> *Id.*

which denied appellant's claim as the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122.<sup>15</sup>

Following the denial of his claim for compensation benefits, appellant submitted an OWCP decision dated December 21, 2015 and a document entitled, "How do I claim a Schedule Award?" excerpt on how to file a schedule award. However, OWCP had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation.<sup>16</sup> This evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and thus, these reports are insufficient to discharge appellant's burden of proof.

Appellant also submitted a letter from OPM dated February 14, 2008 granting his application for disability retirement. This letter does not raise a substantial question as to the correctness of OWCP's decision as it does not address the relevant issue which was decided by OWCP, whether appellant's occupational disease claim was timely filed in accordance with 5 U.S.C. § 8122. This evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and thus, this letter is insufficient to discharge appellant's burden of proof.

The term clear evidence of error is intended to represent a difficult standard, and the argument appellant provided on reconsideration is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.<sup>17</sup> Appellant has not otherwise presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

Consequently, OWCP properly found that appellant's December 12, 2016 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant argues that OWCP improperly determined that his reconsideration request was not filed within one year of the last merit decision dated December 21, 2015. He asserts that his request was mailed with the intent and purpose to be received by OWCP well before the deadline only to have the employing establishment misplace the letter. As explained above, appellant's request for reconsideration was received on January 3, 2017, more than one year after the December 21, 2015 merit decision. OWCP, therefore, properly determined that it was untimely filed.<sup>18</sup>

### **CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>15</sup> 5 U.S.C. § 8122.

<sup>16</sup> See *A.M.*, Docket No. 10-0526 (issued November 8, 2010).

<sup>17</sup> See *James R. Mirra*, 56 ECAB 738 (2005).

<sup>18</sup> *Supra* note 13.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board