

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

D.V., Appellant)	
)	
and)	Docket No. 19-0588
)	Issued: August 5, 2019
DEPARTMENT OF THE AIR FORCE,)	
PATRICK AIR FORCE BASE, FL, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 17, 2019 appellant filed a timely appeal from an August 2, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 14, 2017, 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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 September 27, 2016 appellant, then a 48-year-old computer engineer, filed a traumatic injury claim (Form CA-1) alleging that on September 23, 2016 he sustained a soft tissue injury of the left knee and surrounding area while participating in a work-related team-building event at an offsite location. He noted that at time of injury he was attempting to high step over logs horizontally stacked at abdomen height by kicking one leg over, readjusting his balance, and kicking his other leg over. Appellant claimed that during the second kicks he felt a pop in his left leg and then he could not bear full weight on his left leg. He also experienced constant ache, dull pain, stiffness, and inflammation around his left knee. Appellant related that he required medical treatment to obtain a better diagnosis. He stopped work on September 26, 2016.

Appellant submitted factual and medical evidence in support of his claim. In a medical report dated November 15, 2016, Dr. Luc Teurlings, an attending Board-certified orthopedic surgeon, noted that appellant presented with left knee complaints. He advised that appellant reported an injury that occurred during team-building activities on an obstacle course at work on September 23, 2016. Dr. Teurlings related that appellant noted that he had to maneuver himself over a beam and that he landed on his knee and heard it pop. He indicated that appellant described his symptoms since his injury as popping, stiffness, and swelling with moderate-to-severe pain intensity depending on an activity of the left knee. Appellant also described pain with sitting, standing, bending, using stairs, and engaging in twisting activities. Dr. Teurlings discussed findings on physical examination of the left knee. He provided impressions of left knee medial meniscus tear with grade 4 chondromalacia patella and grade 2 chondromalacia in the medial compartment. Dr. Teurlings recommended left knee arthroscopy and that appellant continue to perform only desk work.³ On December 6, 2016 he requested that OWCP authorize left knee arthroscopic surgery.

In a development letter dated January 25, 2017, OWCP advised appellant that when his claim was submitted it appeared to be a minor injury that necessitated minimal or no lost time from work and payment of a limited amount of medical expenses had been administratively approved. It explained that his claim was being reopened because he requested authorization for surgery. OWCP further explained that the evidence submitted was insufficient to establish appellant's claim because the Form CA-1 he filed was illegible and, thus, there were not enough details regarding his injury. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

OWCP subsequently received additional medical and factual evidence. In e-mails dated August 2 and September 6 and 7, 2016, the employing establishment noted that slots were still

³ A January 11, 2017 Form CA-3 (report of work status) indicated that appellant returned to full-time, modified-duty work on October 4, 2016.

available for the team-building event and that appellant's supervisor, M.H., had signed up his team to participate in the event.

On January 18, 2017 appellant responded to OWCP's January 25, 2017 development questionnaire. He described the events on September 23, 2016, explaining that he and his workgroup colleagues participated in an approved offsite team-building work event. Appellant related that their supervisor signed them up for the event. He further related that the team-building exercise was strongly recommended by management. Appellant reiterated that he heard a pop in his left knee and immediately experienced pain in the knee while participating in a high-step-over element of a course. He also reiterated that he could not put full weight on his left leg. Appellant completed the rest of the course with the help of his teammates. Thereafter, he notified M.H. and Colonel C. about his injury for which he subsequently sought medical treatment.

Appellant submitted additional factual and medical evidence, including a legible Form CA-1 for his claimed September 23, 2016 traumatic left knee injury. In a January 18, 2017 report, Dr. Teurlings restated his prior impressions of left knee meniscus tear with grade 4 chondromalacia patella and grade 2 chondromalacia in the medial compartment.

By decision dated January 25, 2017, OWCP accepted that the September 23, 2016 incident occurred as alleged and that a medical condition had been diagnosed in connection with the injury or event. However, it denied appellant's claim, finding that the evidence of record was insufficient to establish that he sustained an injury and/or medical condition that arose during the course of employment and within the scope of compensable work factors as defined by FECA. OWCP concluded, therefore, that "Performance of Duty, has not been met."

On March 16, 2017 appellant requested reconsideration and submitted additional factual and medical evidence. In an undated memorandum, the Commander, Colonel S.G., noted that appellant was injured while performing his official duties on September 23, 2016 and that his injuries required medical attention, including surgery. Further, he related that the September 23, 2016 incident was a valid team-building and leadership development exercise. Colonel S.G. indicated that he authorized all civilian participants to take part in this event as part of their regular duties.

By decision dated June 14, 2017, OWCP modified its January 25, 2017 decision, finding that appellant had established that he was in the performance of duty on September 23, 2016 based on Colonel S.G.'s statement. The claim, however, remained denied as the medical evidence of record did not contain a rationalized opinion explaining how or why his diagnosed left knee condition was causally related to the accepted September 23, 2016 employment incident.

On June 19, 2018 appellant requested reconsideration. He contended that Dr. Teurlings' reports dated November 15, 2016, January 18, 2017, and May 1, 2018⁴ established that he sustained a left knee injury which necessitated surgery due to the accepted September 23, 2016 employment incident.

⁴ The Board notes that the record does not contain a May 1, 2018 report from Dr. Teurlings.

Appellant submitted a letter, memorandum, and e-mails dated February 22, 23, and 24, 2017 from the employing establishment which indicated that the September 23, 2016 team-building event was work related and that he sustained an injury during the event.

Appellant also submitted an operative note dated February 13, 2017 from Dr. Teurlings who performed a left knee partial medial meniscectomy. His preoperative and postoperative diagnoses were left knee medial meniscus tear.

Appellant resubmitted the employing establishment's August 2, September 6 and 7 2016 e-mails, Colonel S.G.'s undated statement, his January 18, 2017 response to OWCP's development questionnaire, and Dr. Teurlings' November 15, 2016 report.

By decision dated August 2, 2018, OWCP denied appellant's request for reconsideration, finding that 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.⁵ 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.⁶ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁹ If an application demonstrates clear evidence of error, it will reopen the case for merit review.¹⁰

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

⁵ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

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 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 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

OWCP's 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.¹² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

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.

OWCP's regulations¹⁴ and procedures¹⁵ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ The most recent merit decision was OWCP's June 14, 2017 decision which modified its prior denial of appellant's traumatic injury claim to reflect that he had established that he was in the performance of duty on September 23, 2016, but the claim remained denied because the medical evidence of record was insufficient to establish causal relationship between his diagnosed left knee conditions and the accepted September 23, 2016 employment incident. As his request for reconsideration was not received by OWCP until June 19, 2018, more than one year after the June 14, 2017 decision, the Board finds that it was untimely filed. Because appellant's request was untimely, he must demonstrate clear evidence of error on the part of OWCP in having denied his traumatic injury claim.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. As stated, OWCP denied his traumatic injury claim

¹¹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹³ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

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

¹⁵ *Supra* note 7 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

as the medical evidence of record failed to establish that his diagnosed left knee conditions were causally related to the accepted September 23, 2016 employment incident.

Appellant's argument in his untimely request for reconsideration regarding the weight of the medical evidence is insufficient to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision because it constitutes a lay opinion which lacks evidentiary value.¹⁷

The February 13, 2017 operative note of Dr. Teurlings submitted by appellant with his June 19, 2018 reconsideration request is also insufficient to demonstrate clear evidence of error with respect to OWCP's June 14, 2017 merit decision. This evidence, which merely addressed appellant's left knee arthroscopic surgery, is insufficient to shift the weight of the medical evidence.

Additionally, the employing establishment's correspondences dated February 22, 23, and 24, 2017, which acknowledged that the September 23, 2016 team-building event was work related and that appellant sustained an injury during the event, are also insufficient to establish that OWCP erred in its denial of his claim. The underlying issue in this case is medical in nature, namely whether the evidence of record establishes a left knee condition causally related to the accepted September 23, 2016 employment incident. This issue must be addressed by medical evidence.¹⁸ The Board finds that this nonmedical evidence is insufficient to demonstrate clear evidence of error in the medical determination OWCP made in its June 14, 2017 decision.¹⁹

Appellant also submitted copies of the employing establishment's August 2, September 6 and 7 and 2016 e-mails, Colonel S.G.'s undated statement, his January 18, 2017 response to OWCP's January 25, 2017 development questionnaire, and Dr. Teurlings' November 15, 2016 report, which were previously of record. This evidence, however, does not manifest on its face that OWCP committed an error in its June 14, 2017 decision.²⁰

The Board finds that the evidence submitted in support of the untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in its June 14, 2017 decision. Accordingly, the Board finds that OWCP properly denied his reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹⁷ *M.M.*, Docket No. 19-0021 (issued May 6, 2019); *James A. Long*, 40 ECAB 538 (1989).

¹⁸ *See J.G.*, Docket No. 17-0709 (issued July 21, 2017).

¹⁹ *Id.*

²⁰ *See M.D.*, Docket No. 18-0017 (issued May 9, 2019); *S.M.*, Docket No. 17-0385 (issued June 26, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 5, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board