

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 May 2, 2017 appellant, then a 54-year-old electrician, file a traumatic injury claim (Form CA-1) alleging that on April 21, 2017 a custodian forcefully opened a door she was working behind, knocking her into a wall and causing a left knee injury while in the performance of duty. She stopped work on April 21, 2017 and returned on April 26, 2017.

In an April 24, 2017 report, Dr. Chesney Fowler-Lajczok, Board-certified in emergency medicine, diagnosed left knee pain. She held appellant off work for two days and returned her to full duty on April 26, 2017.

Jorge Solozano, a physical therapist, and Lawrence Waters, a physician assistant, held appellant off work on August 21, 22, and 29, 2017.

On August 28, 2017 OWCP imaged medical records dated August 24 and 25, 2017 pertaining to "L.B.," someone other than appellant, into the electronic case record for appellant's claim.

On September 21, 2017 appellant filed a claim for leave without pay (Form CA-7) used from August 21 to 29, 2017.

In a development letter dated September 22, 2017, OWCP informed appellant that the evidence of record was insufficient to establish her traumatic injury claim. It noted that she had not submitted evidence sufficient to establish the alleged April 21, 2017 employment incident as factual or that it had caused the claimed left knee injury -- in addition it also included the diagnoses and mechanism of injury set forth in a different claimant's medical records which were inadvertently included in her claim. OWCP advised her of the type of medical and factual evidence needed and provided a questionnaire for her completion. It afforded appellant 30 days to submit the necessary evidence.

In response, appellant provided a May 25, 2017 report by Dr. Gregory Ford, a Board-certified orthopedic surgeon, who noted the alleged April 21, 2017 employment incident and indicated that she had a resolved fracture of an inferior left patellar osteophyte in 2014. Dr. Ford diagnosed a left knee contusion and inferior patellar osteophyte.³ He returned appellant to full duty.

³ April 24, 2017 left knee x-rays demonstrated mild degenerative changes, a large osteophyte in the inferior aspect of the patella, and a small joint effusion. September 25, 2017 left knee x-rays demonstrated degenerative changes most pronounced in the medial compartment, chronic ossification of the proximal patellar tendon, mild joint effusion, and a possible medial meniscal tear. Appellant participated in physical therapy treatments in September and October 2017.

By decision dated November 2, 2017, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish the alleged April 21, 2017 employment incident had occurred as alleged. It further found that the medical evidence of record failed to establish causal relationship. OWCP quoted portions of the medical record pertaining to L.B. in its reasoning for denying appellant's claim.

On November 6, 2018 appellant requested reconsideration. She contended that her left knee remained swollen and painful following the July 11, 2018 procedure. Appellant submitted additional medical evidence.

In an October 31, 2017 report, Dr. Ford held appellant off work on October 27, 2017 due to left knee pain. He diagnosed osteoarthritis of the left knee warranting a total knee arthroplasty.

In a July 11, 2018 operative report, Dr. Ford noted performing an arthroscopic debridement of the left medial meniscus that day. He noted postoperative diagnoses of osteoarthritis of the left knee and a torn left medial meniscus.

Appellant also submitted copies of documents previously of record and a compact disc (CD) of medical records. OWCP noted in a November 6, 2017 evidence slip that it had not scanned materials from the CD into the case record.

By decision dated November 29, 2018, OWCP denied appellant's reconsideration request 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.⁴ This discretionary authority, however, is subject to certain restrictions.⁵ OWCP's regulations⁶ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁷ Timeliness is determined by the document receipt date, the received date in OWCP's integrated Federal Employees' Compensation System (iFECS).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

⁴ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

⁷ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

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

⁹ *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.¹⁰ OWCP 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, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.¹¹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹²

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹³ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁹

¹⁰ *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *See D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹² *V.G.*, *supra* note 6; *see E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *S.T.*, *supra* note 9; *see C.V.*, *supra* note 10; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ *S.T.*, *supra* note 9; *see E.P.*, *supra* note 12; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 6; *see C.V.*, *supra* note 10; *Leon J. Modrowski*, *supra* note 10; *Jesus D. Sanchez*, *supra* note 10.

¹⁶ *V.G.*, *supra* note 6; *see E.P.*, *supra* note 12; *Leona N. Travis*, *supra* note 14.

¹⁷ *L.B.*, *supra* note 15; *V.G.*, *supra* note 6; *see E.P.*, *supra* note 12; *Nelson T. Thompson*, *supra* note 12.

¹⁸ *D.G.*, *supra* note 11; *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁹ *See C.V.*, *supra* note 10; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The most recent merit decision was OWCP's November 2, 2017 decision, which denied appellant's traumatic injury claim finding that fact of injury had not been established. OWCP received her request for reconsideration on November 6, 2018, which was outside the one-year time limit. Consequently, appellant has the burden of proof to demonstrate clear evidence of error by OWCP in denying her claim for compensation.²⁰

The Board further finds that the evidence submitted by appellant in support of her request for reconsideration raises a substantial question as to the correctness of OWCP's November 2, 2017 merit decision and is sufficient to demonstrate clear evidence of error.

To determine whether appellant has demonstrated clear evidence of error, the Board will conduct a limited review of the evidence submitted and arguments raised in support of the request in order to determine whether such evidence or argument is sufficient to demonstrate error in its prior decision.²¹ OWCP's November 2, 2017 decision, which denied appellant's claim on the basis of fact of injury, was clearly erroneous as it was premised upon medical records from another claimant's file which set forth a claim based on "repetitive trauma from desk work for ten hours per day." The development letter sent to appellant on September 22, 2017, informed appellant that she needed to submit additional evidence and respond to a questionnaire. This development letter, however, noted that fact of injury was at issue because of the discrepancy as to the claimed mechanism of injury. The Board finds that the discrepancy as to the mechanism of injury was due to administrative error of OWCP because it had included medical records from another claimant in this claim file. That error was then perpetuated in the development letter and ultimately in its November 2, 2017 decision.

With her reconsideration request appellant submitted evidence which demonstrated OWCP's administrative error. She provided medical records consistent with a knee injury and provided a consistent history as set forth on her Form CA-1. This evidence demonstrates that the underlying development of the claim was in error. Appellant alleged, and it has not been contested, that she was injured when she fell into a wall when hit by a door while in the performance of duty. The Board, therefore, finds that appellant has raised a substantial question as to the correctness of the November 2, 2017 merit decision. The Board will reverse OWCP's November 29, 2018 decision and remand the case for an appropriate decision on the merits of appellant's claim. On remand, OWCP shall administratively remove all evidence relating to a different claimant's claim and provide consideration to all evidence submitted by appellant in support of her claim, including documentation submitted *via* CD.

²⁰ 20 C.F.R. § 10.607(b).

²¹ *Supra* note 17; *see also* *V.M.*, Docket No. 18-1184 (issued July 10, 2019).

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error in its November 2, 2017 merit decision, and thus, OWCP improperly denied her request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2018 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 23, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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