

FACTUAL HISTORY

On December 30, 2014 appellant, then a 53-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on September 27, 2014 she sustained a meniscus tear of the right knee when she slipped on melted ice in front of an ice machine and fell while in the performance of duty.

Appellant submitted a report dated December 16, 2014 from Dr. Bruce Levy, a Board-certified orthopedic surgeon, who examined her and diagnosed bone-on-bone medial compartmental arthrosis with osteophyte formation and some mild patellofemoral osteoarthritis. Dr. Levy noted that she had been doing well with her right knee up until “a couple months ago” when she slipped on water.

On December 23, 2014 Dr. Stephen Wisniewski, Board-certified in physical medicine and rehabilitation, administered a right knee joint injection due to a diagnosis of degenerative joint disease of the right knee.

In a development letter dated June 9, 2015, OWCP advised appellant of the deficiencies of her claim and requested that she respond to an attached questionnaire and submit a narrative medical report from her attending physician addressing how the reported work incident caused or aggravated a medical condition. It afforded her 30 days to submit additional evidence and to provide the requested information.

OWCP subsequently received a report dated August 22, 2011, wherein Dr. Levy diagnosed mild chondromalacia of the right knee and a possible small posterior horn meniscus tear. Appellant also submitted November 6, 2011 and January 11, 2012 reports from him, which indicated that she had undergone a cortisone injection in her right knee and that she wished to proceed with a right knee arthroscopy. She underwent the right knee arthroscopy with Dr. Levy on January 12, 2012. Dr. Levy followed up with appellant on January 23, 2012.

By letter dated June 19, 2015, appellant described a knee injury that occurred prior to the incident of September 27, 2014 and explained why she waited three months to report the latter incident.

By decision dated July 10, 2015, OWCP accepted that the September 27, 2014 employment incident occurred as alleged, but denied the claim because the medical evidence of record was insufficient to establish causal relationship between appellant’s diagnosed right knee conditions and the accepted September 27, 2014 employment incident.

On August 4, 2015 appellant requested reconsideration and submitted additional medical evidence in support of her claim, including a report dated July 31, 2015 from Dr. Levy. The report was similar to his December 16, 2014 report, with revisions noted to the history of present illness and diagnosis. Dr. Levy noted that appellant was doing well with her right knee until she slipped on some water in front of an ice machine while at work on September 27, 2014. He diagnosed bone-on-bone medial compartment arthrosis with osteophyte formation and some mild patellofemoral osteoarthritis of the right knee.

By decision dated October 26, 2015, OWCP denied modification of its prior decision because the medical evidence of record was insufficient to establish that appellant's right knee conditions were causally related to the accepted September 27, 2014 employment incident.

On April 7, 2016 appellant again requested reconsideration. She submitted additional medical evidence in support of her claim, including medical reports dated from April 5 and 14, 2011 from Dr. Steven Curtis, a Board-certified orthopedic surgeon, in which he noted an injury to her right knee when she slipped on ice in December 2010 and assessed her with right knee joint pain. A magnetic resonance imaging scan of April 7, 2011 demonstrated an anterior cruciate ligament sprain, mild prepatellar bursitis, and an intratendinous vessel versus sliver-like intratendinous tear. Appellant submitted reports from a physical therapist dated April 19 and August 9, 2011, and January 23, 2012. In an operative report dated August 19, 2011, Dr. Shawn Oxentenko, Board-certified in physical medicine and rehabilitation, described performing a right knee joint injection. She also resubmitted the August 22, 2011, January 12, 2012, and July 31, 2015 reports from Dr. Levy.

In a report dated February 1, 2016, Dr. Glennon Park, a Board-certified internist, noted that, in December 2010, he had treated appellant in the emergency department after she slipped on ice and injured her knee.

By decision dated July 18, 2016, OWCP denied modification of its prior decision because the medical evidence submitted was insufficient to establish that the accepted September 27, 2014 employment incident resulted in appellant's diagnosed conditions.

Beginning in January 2018, appellant continued to submit additional medical evidence in support of her claim. In a report dated January 18, 2018, Dr. Ryan Morgan, an orthopedic surgeon, examined her and diagnosed right knee medial compartment osteoarthritis. He noted that appellant had slipped on water at an ice machine at work and recommended a unicompartmental knee arthroplasty. In a supplement to this report dated February 14, 2018, Dr. Morgan noted that an injury sustained in 2012 due to a fall at work contributed to her meniscus condition and subsequent development of osteoarthritis.

Appellant requested reconsideration on May 14, 2018, but did not include the date of the decision from which she was requesting reconsideration. At the top of the form was the date July 10, 2015. Appellant informed OWCP that she had found a physician who would support her claim.

By letter dated May 17, 2018, OWCP requested clarification as to whether appellant was requesting reconsideration of either the October 26, 2015 or July 18, 2016 decision. By form dated May 26, 2018 and received on June 4, 2018, appellant resubmitted her reconsideration request, further noting that she was requesting reconsideration because a purported decision dated May 17, 2018 did not include the progress notes of Dr. Morgan.

By decision dated June 26, 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.² 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.³ 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).⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's reconsideration request is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁶ If the claimant 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 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 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.⁸

OWCP's procedures provide 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

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

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁵ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (February 2016).

⁸ *Robert G. Burns*, 57 ECAB 657 (2006).

error.⁹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁰

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 regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP merit decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹² The most recent merit decision in this claim was OWCP's July 18, 2016 decision. As OWCP did not receive appellant's initial reconsideration request until May 14, 2018, more than one year after the last merit decision, it was untimely filed.¹³ Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁴

Appellant submitted reports from Dr. Morgan dated January 18 and February 14, 2018. Dr. Morgan examined her and diagnosed right knee medical compartment osteoarthritis. He noted that appellant had slipped on water at an ice machine at work and recommended a unicompartmental knee arthroplasty. Dr. Morgan further noted that an injury sustained in 2012 due to a fall at work contributed to her meniscus condition and subsequent development of osteoarthritis. The issue in the case is whether appellant submitted sufficient medical evidence to establish a causal relationship between the accepted September 27, 2014 employment incident and her diagnosed right knee conditions. Dr. Morgan's reports, referencing an undated fall at work as part of her medical history and an incident in 2012 as the cause of her conditions, do not shift the weight of the evidence in her favor or raise a substantial question as to the correctness of OWCP's decision.¹⁵ Furthermore, even 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, does not demonstrate clear evidence of error.¹⁶

⁹ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 4 at Chapter 2.1602.5(a) (February 2016).

¹⁰ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹¹ 20 C.F.R. § 10.607(a); *supra* note 4 at Chapter 2.1602.4 (February 2016); *see Alberta Dukes*, 56 ECAB 247 (2005); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹² *Robert F. Stone*, 57 ECAB 292 (2005).

¹³ Appellant's June 4, 2018 reconsideration request is therefore also found to be untimely.

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

¹⁵ *See supra* note 8.

¹⁶ *See supra* note 9.

As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of OWCP's last merit decision, she has failed to demonstrate clear evidence of error.¹⁷

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2019
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

¹⁷ See *W.A.*, Docket No. 18-0297 (issued July 18, 2018).