

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

M.E., Appellant	)	
	)	
and	)	<b>Docket No. 18-1497</b>
	)	<b>Issued: March 1, 2019</b>
<b>DEPARTMENT OF COMMERCE,</b>	)	
<b>U.S. CENSUS BUREAU, Asheville, NC,</b>	)	
<b>Employer</b>	)	
	)	

*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 July 31, 2018 appellant filed a timely appeal from a February 1, 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 January 5, 2017, 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 over the merits of this case.

**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.

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

## **FACTUAL HISTORY**

On June 6, 2016 appellant, then a 61-year-old field representative, filed a traumatic injury claim (Form CA-1) alleging that on June 1, 2016 she sustained right knee torn medial meniscus, torn lateral meniscus, partial tear of anterior cruciate ligament attachment, chondrocalcinosis, and severe degenerative arthritis when she twisted her right knee ascending and descending stairs while in the performance of duty. On the reverse side of the claim form, appellant's supervisor noted that appellant stopped working on June 2, 2016.

In a report dated June 2, 2016, Dr. David Mackel, a Board-certified orthopedic surgeon, noted that he obtained x-rays of appellant's knees which revealed a severe degenerative disease in both knees. He indicated that he suspected that appellant had a meniscus tear along with the preexisting, severe degenerative arthritis. Dr. Mackel noted that the disease was asymptomatic prior to the employment injury.

In a magnetic resonance imaging (MRI) scan report dated June 3, 2016, Dr. Andrew Deibler, Board-certified in diagnostic radiology, diagnosed right knee displaced flap tear posterior horn medial meniscus, patellofemoral predominant osteoarthritis, a large Baker's cyst containing hemorrhage, degenerative changes of the lateral meniscus without definite tear, parapatellar synovitis, large joint effusion, and thickened suprapatellar plica.

In a work excuse note dated June 8, 2016, Dr. Mackel indicated that appellant would be unable to return to work from that date until six weeks after her pending knee surgery.

In a development letter dated June 13, 2016, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit a narrative medical report by her attending physician which included the history and date of injury, and the physician's opinion supported by a medical explanation as to how the reported employment incident caused or aggravated a medical condition. OWCP afforded appellant 30 days to submit the requested evidence.

In an operative/procedure note dated June 14, 2016, Dr. Mackel related that he had performed appellant's right knee arthroscopic surgery. He noted postoperative diagnoses of torn medial meniscus, torn lateral meniscus, partial tear of anterior cruciate ligament attachment, severe degenerative arthritis, and chondrocalcinosis of the right knee.

In a work excuse note dated June 16, 2016, Dr. Mackel indicated that appellant would be unable to return to work until September 14, 2016.

By decision dated July 18, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that the claimed medical condition was causally related to the accepted employment incident. It noted that, although her physician had diagnosed knee conditions, he had not provided a rationalized medical opinion regarding the cause of her condition and how it related to the accepted employment incident, rather than the degenerative condition that preexisted the date of the injury.

On August 15, 2016 appellant requested a hearing before an OWCP hearing representative.

By decision dated January 5, 2017, an OWCP hearing representative conducted a review of the written record and affirmed the July 18, 2016 decision.

In a note dated December 26, 2017, Dr. J. Robert Anderson, Board-certified in family practice, indicated that appellant had been under his care since 1999. He noted that appellant had significant knee problems following an injury sustained while working on June 1, 2016. Dr. Anderson related that appellant had a misstep on a flight of stairs while working, which caused a significant injury to her right knee.

In an affidavit dated and postmarked January 3, 2018, received by OWCP on January 9, 2018, appellant requested reconsideration.

By decision dated February 1, 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.<sup>2</sup> 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.<sup>3</sup> 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).<sup>4</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>5</sup>

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.<sup>6</sup> If an application demonstrates clear evidence of error, it will reopen the case for merit review.<sup>7</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise, and explicit and

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<sup>2</sup> 5 U.S.C. § 8128(a); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>3</sup> 20 C.F.R. § 10.607(a).

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

<sup>5</sup> *J.W.*, *supra* note 2; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

<sup>7</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (February 2016).

<sup>8</sup> *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *see Dean D. Beets*, 43 ECAB 1153 (1992).

must manifest on its face that OWCP committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.<sup>14</sup> The claimant must present evidence which on its face shows that OWCP made an error. 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>15</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>16</sup>

### ANALYSIS

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

OWCP's regulations<sup>17</sup> and procedures<sup>18</sup> establish a one-year time limit 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.<sup>19</sup> The most recent merit decision was OWCP's January 5, 2017 decision. Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's iFECS).<sup>20</sup> Appellant had one

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<sup>9</sup> *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

<sup>10</sup> *J.D.*, *supra* note 8; *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *J.W.*, *supra* note 2; *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>14</sup> *Supra* note 7.

<sup>15</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 4 at Chapter 2.1602.5(a) (February 2016).

<sup>16</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>17</sup> 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>18</sup> *Supra* note 4 at Chapter 2.1602.4 (February 2016); see *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>19</sup> *J.W.*, *supra* note 2; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>20</sup> *Supra* note 4 at Chapter 2.1602.4(b) (February 2016).

year from the date of OWCP's January 5, 2017 decision to timely request reconsideration. One year from January 5, 2017 fell on Friday, January 5, 2018. As OWCP did not receive appellant's reconsideration request until January 9, 2018, more than one year after the January 5, 2017 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.<sup>21</sup>

Appellant submitted a narrative doctor's note dated December 26, 2017 and her own affidavit dated January 3, 2018. The underlying issue in this case is medical in nature, namely whether appellant had established causal relationship between her diagnosed knee condition and the accepted June 1, 2016 employment incident through the submission of rationalized medical opinion evidence. In the narrative doctor's note, Dr. Anderson reiterated appellant's diagnoses and noted that she had a misstep on a flight of stairs which caused her right knee condition. His report did not provide a rationalized medical opinion establishing causal relationship between the diagnosed conditions and the accepted June 1, 2016 incident. Clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed, well-rationalized medical report which, if submitted before the merit denial decision was issued, would have created a conflict in medical opinion requiring further development, is insufficient to demonstrate clear evidence of error.<sup>22</sup>

Similarly, appellant's arguments in her January 3, 2018 affidavit, which noted her interpretation of the requirement for medical evidence, her history of medical treatment, the details regarding the alleged injury incident, her recovery, and her fitness goal, lack probative value. Her honest belief that her work activities on June 1, 2016 caused her medical condition is not in question, but that belief, however sincerely held, does not shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's decision.<sup>23</sup>

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, appellant has failed to demonstrate clear evidence of error.<sup>24</sup>

### **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.

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<sup>21</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>22</sup> See *supra* note 14.

<sup>23</sup> *J.W.*, *supra* note 2; *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>24</sup> See *W.A.*, Docket No. 18-0297 (issued July 18, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 1, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 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