

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 8, 2017 appellant, then a 58-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her left knee when she tripped and fell after her right foot was caught in a handle strip while in the performance of duty. She stopped work on the date of injury. On May 22, 2017 appellant accepted a modified job offer.

After initial development of the claim, OWCP denied the claim on June 28, 2017 finding the medical evidence insufficient to establish that the diagnosed condition was causally related to the accepted May 8, 2017 employment incident.

On July 18, 2017 appellant requested reconsideration and submitted medical reports from Dr. Michael W. Cohen, Board-certified in occupational medicine, and a diagnostic report from his colleague, Dr. Kamran Ahmed, a Board-certified diagnostic radiologist.

In a decision dated October 13, 2017, OWCP found the evidence sufficient to vacate the June 28, 2017 decision as it found that the medical opinion evidence was sufficient to establish a left knee sprain due to the accepted May 8, 2017 employment injury. However, it further found that the medical evidence of record did not substantiate a diagnosis of a left knee degenerative condition which appellant alleged had been aggravated or caused by the fall on May 8, 2017.

In a decision of even date, OWCP accepted appellant's claim for left knee sprain.⁴

Following the October 13, 2017 decisions, OWCP received additional medical evidence.

In a report dated September 8, 2017, Dr. Ryan Everett Bennett, a Board-certified orthopedic surgeon, related that appellant had been referred for evaluation of her left knee pain. He related that she had complaints of left knee pain for the past four months, since she injured her left knee at work when she stepped wrong, her kneecap dislocated, and she fell. Dr. Bennett explained that appellant's knee cap popped back into place, but she had significant pain and swelling, and her x-rays and magnetic resonance imaging (MRI) scan demonstrated recent patellar dislocation with severe osteoarthritis of the patellofemoral joint and moderate osteoarthritis of the medial collateral ligament (MCL), and likely MCL sprain. He related that her continuing pain interfered with her ability to perform regular work and normal activities. In a progress note dated October 20, 2017, Dr. Bennett related that appellant was seen for follow up regarding her left knee MCL sprain, patellar dislocation, and arthritis. He related that her anterior pain had improved, but she still had significant pain. Dr. Bennett further related that it now appeared that appellant could claim workers' compensation since the injury did happen at work.

⁴ Appellant filed CA-7 claims for wage-loss compensation from September 2, 2017 through February 2, 2018. OWCP denied these claims by decisions dated March 21 and October 26, 2018. However, as appellant has not appealed to the Board from these decisions, they are not the subject of this appeal. *See* 20 C.F.R. § 501.3.

OWCP also received December 6 and 31, 2017 reports by Dr. Randall K. Schaeffer, a Board-certified orthopedic surgeon. Dr. Schaeffer, in the December 6, 2017 report, noted that appellant was seen for a left knee injury sustained from a fall at work on May 8, 2017. He diagnosed status post patellar dislocation, and severe left patellofemoral osteoarthritis. In the supplemental report, Dr. Schaeffer diagnosed severe patellofemoral osteoarthritis, which he attributed to appellant's trip and fall at work. He explained that the trip and fall caused patellar dislocation which as a result aggravated her preexisting patellofemoral osteoarthritis.

In an April 21, 2018 report, Dr. Schaeffer related that appellant was first seen on December 6, 2017 after her trip and fall at work on May 8, 2017. He noted that her x-rays revealed lateral patellar subluxation and lateral compartment arthritis. Appellant's MRI scan demonstrated lateral patellar dislocation and severe tricompartmental arthritis primarily involving the patellofemoral joint. Dr. Schaeffer related that appellant had a prior left knee injury at age 14 for which she had been treated with a cast and eventually resumed all activities. He explained that, while it was clear that she had preexisting osteoarthritis of her knee, it was also very clear based on her history that her knee condition had permanently worsened after the employment injury. As appellant had failed conservative medical treatment, she was now a candidate for knee replacement surgery.

In a December 13, 2018 report, Dr. Joel A. Weddington, an orthopedic surgeon, diagnosed left knee degenerative arthritis and status post left knee lateral patella dislocation. He noted medical and injury histories, reviewed medical evidence, and noted that OWCP only accepted knee sprain as due to the accepted May 8, 2007 employment injury. Dr. Weddington opined that the accepted conditions should be expanded to include aggravation of left knee arthritis. In support of this conclusion, he explained that the mechanism of injury wherein appellant sustained a severe left knee blunt trauma due to falling on concrete aggravated the left knee osteoarthritis, which had been stable and minimally symptomatic. Dr. Weddington recommended disability retirement for her if left knee replacement surgery was not performed.

On February 5, 2019 appellant through counsel requested reconsideration of the October 13, 2017 decision denying acceptance of a left knee degenerative condition. Counsel acknowledged that the request for reconsideration was made more than one year after OWCP's most recent merit decision, however, he related that the current medical evidence established that the initial diagnosis of left knee sprain was an under diagnosis of her condition, as the record as a whole now established a more serious set of diagnoses.

By decision dated April 12, 2019, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. In finding that she had not demonstrated clear evidence of error, it only reviewed the December 13, 2018 report from Dr. Weddington. OWCP did reference that medical reports dated from September 8, 2017 through April 21, 2018 had been previously considered by OWCP in its decisions dated March 21 and October 26, 2018 regarding appellant's claims for wage-loss compensation arising from her accepted left knee sprain.

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.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 request for reconsideration 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, OWCP 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.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the

⁵ 5 U.S.C. § 8128(a); *see A.B.*, Docket No. 19-1539 (issued January 27, 2020); *M.E.*, Docket No. 18-1497 (issued March 1, 2019); *W.C.*, 59 ECAB 372 (2008).

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 *See M.E.*, *supra* note 5; *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.E.*, *supra* note 5; *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹⁰ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

¹¹ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *see Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Id.*; *see also Leone N. Travis*, 43 ECAB 227 (1999).

¹³ *J.F.*, *supra* note 11; *J.D.*, *supra* note 11; *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

¹⁵ *Id.*

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁶

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁷ 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.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁹

ANALYSIS

The Board finds that this case is not in posture for decision.

In the case of *William A. Couch*²⁰ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. While OWCP referenced the December 13, 2018 report from Dr. Weddington in its April 12, 2019 decision, it did not reference a number of additional reports from Drs. Bennett, Schaeffer, and Weddington in its analysis of whether appellant had established clear evidence of error in the denial of her request for expansion of the acceptance of the claim to include additional diagnosed left knee conditions. As the Board's decisions are final as to the subject matter appealed,²¹ it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.²²

For this reason, the case will be remanded to OWCP to enable it to properly consider all the evidence submitted at the time of the April 12, 2019 decision followed by an appropriate decision on whether appellant has demonstrated clear evidence of error.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁶ *J.F.*, *supra* note 11.

¹⁷ *See G.G.*, *supra* note 10.

¹⁸ *J.F.*, *supra* note 11; *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

¹⁹ *E.C.*, Docket No. 19-0646 (issued February 26, 2020); *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

²⁰ 41 ECAB 548 (1990); *see G.M.*, Docket No. 19-1395 (issued February 6, 2020).

²¹ 20 C.F.R. § 501.6(d).

²² *Supra* note 23.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 6, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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