

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

_____)	
L.F., Appellant)	
)	
and)	Docket No. 19-0324
)	Issued: January 2, 2020
DEPARTMENT OF THE ARMY, ARMY)	
CORPS OF ENGINEERS, CRANEY ISLAND)	
PROJECT, Portsmouth, VA, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 26, 2018 appellant filed a timely appeal from an October 17, 2018 merit decision and an October 24, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issue are: (1) whether appellant has met his burden of proof to establish intermittent disability for the period October 6, 1987 through June 13, 1994 causally related to his accepted

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.*

October 6, 1987 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration finding it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On October 8, 1987 appellant, then a 48-year-old engineering equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on October 6, 1987 he was struck in both knees and the chest and knocked down by a truck while in the performance of duty. He stopped work on October 6, 1987 and returned to work on November 9, 1987. Appellant received continuation of pay from October 7 through November 8, 1987. On November 22, 1987 OWCP accepted his claim for hemarthrosis of the right knee and contusion of the left knee. Appellant was terminated for cause by the employing establishment on November 24, 1987.

On June 22, 1988 appellant's attending physician, Dr. Sterling R. Williamson, a Board-certified orthopedic surgeon, discharged appellant from treatment due to his accepted employment injuries. He examined appellant on April 6, 1989 and noted that he had treated appellant from January 7 through August 12, 1988 due to severe underlying degenerative osteoarthritis of both knees.

On July 16, 1993 appellant requested that his claim be reopened. In a note dated July 15, 1993, Dr. Williamson opined that appellant's October 6, 1987 employment injury had not caused his tricompartmental degenerative arthritis, but that it aggravated this preexisting condition. In a September 3, 1993 note, he recommended that appellant undergo total knee replacements. On November 8, 1993 Dr. Williamson found that since the October 6, 1987 employment injury appellant had significant discomfort and disability with difficulty maintaining his employment.

In a report dated May 19, 1994, Dr. David L. Durica, a Board-certified orthopedic surgeon and second opinion physician, diagnosed bilateral severe arthritis of the knees related by aggravation to appellant's October 6, 1987 employment injury. He further found that even with joint replacement surgery appellant would be unable to return to his date-of-injury position in construction or other outside activities requiring lifting, carrying, stooping, or climbing. Dr. Durica also noted that appellant had permanent impairment to his knees bilaterally.

On May 31, 1994 OWCP expanded acceptance of appellant's claim to include aggravation of severe bilateral knee arthritis. On June 13, 1994 appellant filed a claim for compensation (Form CA-7) alleging that he was totally disabled from October 6, 1987 through June 13, 1994. OWCP sent him a letter dated June 27, 1994 requesting that he provide medical evidence in support of his claim for wage-loss compensation. On the same date the employing establishment was instructed to indicate the date that appellant had been terminated from employment along with documentation to confirm his termination. On June 27, 1994 OWCP received an itemization of the dates he claimed he had been disabled from work. On July 7, 1994 the employing establishment provided OWCP with the Form SF-50 confirming appellant's termination from employment. In a letter dated June 22, 1994, appellant asserted that his knee condition adversely impacted his ability to work. He claimed wage-loss compensation from November 8 through December 31, 1987, and intermittent periods from 1988 through 1994.

In a medical note dated September 26, 1994, Dr. Williamson provided a listing of days for which appellant had been removed from work due to his disability.

In a December 9, 1994 development letter, OWCP requested additional information regarding appellant's claimed periods of disability from work.

OWCP paid wage-loss compensation from June 26, 1994. Dr. Williamson performed right total knee replacement surgery on June 30, 1994. On July 15, 1994 OWCP accepted appellant's claim for total knee replacement and entered him on the periodic rolls. On April 27, 1995 it authorized left total knee replacement surgery. On February 3, 1997 Dr. John S. Wagner, a Board-certified orthopedic surgeon, performed appellant's left total knee replacement surgery.

On May 28, 2014 OWCP requested that appellant completed a Form EN1032 addressing his work and earnings for the previous 15 months. By decision dated July 24, 2014, it suspended his compensation benefits as he had failed to timely submit a Form EN1032. Appellant completed the requested form on July 18, 2014 and submitted it to OWCP on July 28, 2014.

On July 31, 2015 a special agent for the employing establishment completed an investigative memorandum finding that appellant was employed as a farmer during a period that he had completed a Form EN1032 and indicated that he had no employment or earnings.

On December 4, 2015 appellant entered into a plea agreement in the U.S. District Court for the Eastern District of North Carolina pleading guilty to one count of false statements to obtain FECA benefits. On June 10, 2016 the judge accepted appellant's guilty plea and sentenced him to three years' probation, restitution, and a fine.

By decision dated July 25, 2016, OWCP found that, on December 4, 2015, appellant pleaded guilty to defrauding the FECA program, specifically by making false statements to obtain federal workers' compensation benefits. It informed him that due to this fraud conviction, he forfeited entitlement to receive further benefits under FECA and that his wage-loss compensation and medical benefits were terminated effective December 4, 2015. OWCP further noted that it would pay for authorized medical treatment appellant had received prior to the date of the decision.

In a July 27, 2016 letter, OWCP informed appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$21,229.83 for the period December 4, 2015 to July 23, 2016, following his fraud conviction. It determined that he was at fault in the creation of the overpayment and therefore was not entitled to waiver of recovery of the overpayment.

On August 8, 2016 appellant, through counsel, filed a claim for a schedule award (Form CA-7) for bilateral knee conditions. Appellant also provided an August 1, 2016 narrative statement through the office of his congressman asserting that he had been fired from the employing establishment in November 1987 because he could not perform his regular duties as an engineering equipment operator. In a letter dated September 2, 2016, OWCP informed appellant's congressman that appellant was not entitled to further workers' compensation benefits, including schedule award compensation. It also noted that appellant had not submitted evidence supporting his claimed disability from work for the period from 1987 through 1994.

By decision dated September 6, 2016, OWCP finalized its preliminary overpayment determination and found that appellant had received an overpayment of compensation in the amount of \$21,229.83, that he was at fault in the creation of the overpayment and therefore precluded from waiver of recovery of the overpayment, and that the overpayment should be recovered in full within 30 days.

On September 14, 2016 appellant requested a review of the written record from the July 25, 2016 forfeiture decision by an OWCP hearing representative.

In response to the September 6, 2016 overpayment decision, on September 16, 2016 appellant requested a precoupment hearing before an OWCP hearing representative. By decision dated October 13, 2016, an OWCP hearing representative denied appellant's request for an oral hearing regarding the July 25, 2016 forfeiture decision finding that it was untimely. She further exercised her discretion by finding that the issue in the case could equally well be addressed by requesting reconsideration.

On July 2, 2018 appellant requested reconsideration of the July 25, 2016 decision which affirmed his forfeiture of benefits. He contended that he was entitled to back pay for the period 1987 through 1994 and to two schedule awards. On October 12, 2018 appellant contended that he had not knowingly or intentionally made a false statement to obtain FECA benefits. He alleged that he was unable to read or write and that his wife was writing the letter for him. Appellant indicated that he had a learning disability. He alleged that his doctor released him to light-duty work, but that he was told by the employing establishment that there was no light-duty work available for him. Appellant also asserted that he had previously requested schedule awards, but had not received such an award. He alleged that the new evidence required to warrant reconsideration was his physical and mental disability which should have been considered as a mitigating factor in his case. Appellant denied that he owned or operated the farm as it was solely owned by his wife. He alleged that he was forced to plead guilty to fraud to avoid jail. Appellant resubmitted medical evidence already of record.

By decision dated October 17, 2018, OWCP denied appellant's claim for disability compensation for the period November 6, 1987 through June 13, 1994. It found that he had not provided medical evidence addressing his specific periods of disability from October 6, 1987 through June 13, 1994. OWCP also found that appellant failed to provide information setting forth the periods that he performed private sector work from October 6, 1987 through June 13, 1994. It further found that he was not entitled to schedule award compensation following the forfeiture decision.

By decision dated October 24, 2018, OWCP denied appellant's request for reconsideration of the July 25, 2016 forfeiture decision finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴

Under FECA, the term disability means “the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”⁵ The question of whether an employee is disabled from work is an issue that must be resolved by competent medical evidence.⁶ The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.⁷

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish intermittent disability for the period October 6, 1987 through June 13, 1994 causally related to his accepted October 6, 1987 employment injury.

OWCP accepted appellant’s October 6, 1987 employment injury for hemarthrosis of the right knee and contusion of the left knee, aggravation of severe bilateral knee arthritis, and total knee replacement surgeries bilaterally with a revision of the right. Appellant received continuation of pay from October 7 through November 8, 1987. He returned to work on November 9, 1987 and stopped work on November 24, 1987 when he was terminated for cause. Appellant worked intermittently in the private sector from November 2, 1987 through June 26, 1994. OWCP authorized wage-loss compensation from June 26, 1994 through December 4, 2015.

Beginning on April 6, 1989, Dr. Williamson diagnosed severe underlying degenerative osteoarthritis of both knees, but failed to opine whether this condition was related to appellant’s October 6, 1987 employment injury. In a December 21, 1992 note, he reported that appellant’s left knee remained symptomatic and opined that the October 6, 1987 employment injury aggravated his underlying diagnosis of degenerative osteoarthritis of the knees, bilaterally. On

³ *Supra* note 1.

⁴ *See C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ 20 C.F.R. § 10.5(f).

⁶ *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *see also R.C.*, 59 ECAB 546, 551 (2008).

⁷ *Id.*; *see T.A.*, Docket No. 18-0431 (issued November 7, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁸ *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

November 8, 1993 Dr. Williamson found since the October 6, 1987 employment injury appellant had significant discomfort and disability with difficulty maintaining his employment. However, he did not address specific periods of disability for work due to appellant's bilateral knee osteoarthritis. The Board finds that Dr. Williamson's reports are not sufficiently detailed to establish appellant's disability for work for the periods claimed. Evidence that does not address appellant's accepted conditions and dates of disability, is insufficient to establish the claim.

In a second opinion report dated May 19, 1994, Dr. Durica found that appellant was unable to return to his date-of-injury position in construction or other outside activities requiring lifting, carrying, stooping, or climbing due to the employment-related aggravation of his underlying bilateral knee osteoarthritis.⁹ While he indicated that appellant had work restrictions, he did not opine that appellant was totally disabled from work due to the accepted employment injuries and did not address a specific period of disability due to his accepted employment-related conditions.¹⁰ Therefore, this report does establish disability for work during that period. The Board has held that a conclusory medical opinion without explanation as to how the accepted conditions caused disability is of limited probative value.¹¹ Without a medical explanation, supported by objective findings, explaining why appellant was disabled on specific dates due to the accepted employment injury, appellant would be self-certifying disability.¹²

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹³ Because appellant has not submitted rationalized medical opinion evidence to establish employment-related disability for the period October 6, 1987 through June 13, 1994 as a result of his accepted bilateral knee conditions, the Board finds that he has not met his burden of proof to establish his claim for disability compensation.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT - ISSUE 2

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹⁴ 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

⁹ Appellant has admitted to working in the private sector from January through May 1994.

¹⁰ *T.L.*, *supra* note 8; *see also* *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹¹ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *R.T.*, Docket No. 15-0907 (issued August 18, 2015).

¹² *C.V.*, Docket No. 18-1106 (issued March 20, 2019); *K.A.*, Docket No. 17-1718 (issued February 12, 2018); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

¹³ *T.L.*, *supra* note 8; *Fereidoon Kharabi*, *id.*

¹⁴ 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).

decision for which review is sought.¹⁵ 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).¹⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁷

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.¹⁸ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁹

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.²⁰

OWCP 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.²¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²²

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁷ *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).

¹⁸ 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).

¹⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 16 at Chapter 2.1602.5 (February 2016).

²⁰ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

²¹ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 16 at Chapter 2.1602.5(a) (February 2016).

²² *S.C.*, Docket No. 18-0126 (issued May 14, 2019); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

ANALYSIS -- ISSUE 2

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

OWCP's regulations and procedures²³ establish a one-year time limitation for requesting reconsideration, which begins on the date of the last OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁴

The most recent merit decision on the forfeiture issue was OWCP's July 25, 2016 decision which found that appellant's FECA benefits had been terminated due to his fraud conviction. As his request for reconsideration was not received by OWCP until July 2, 2018, more than one year after the July 25, 2016 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 terminating his compensation benefits.

The Board finds that the arguments raised by appellant in support of his request for reconsideration do not raise a substantial question as to the correctness of OWCP's July 25, 2016 decision or shift the weight of the evidence in his favor. OWCP terminated his compensation effective December 4, 2015 as he pleaded guilty to defrauding FECA. In support of his request for reconsideration, appellant argued that his physical and mental disability should have been considered as a mitigating factor in his case. He denied that he owned or operated the farm as it was solely owned by his wife. Appellant alleged that he was forced to plead guilty to fraud to avoid jail. His contentions, however, do not show that OWCP erred in terminating his compensation under section 8148 based on his guilty plea. There is no evidence that the December 4, 2015 guilty plea was ever reversed, vacated, or set aside. Consequently, appellant's arguments are insufficient to establish clear evidence of error by OWCP.²⁵

The Board therefore finds that appellant failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish intermittent disability for the period October 6, 1987 through June 13, 1994, causally related to his accepted October 6, 1987 employment injury. The Board also finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

²³ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

²⁴ *Supra* note 16 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²⁵ *C.I.*, Docket No. 15-0301 (issued April 2, 2015); *G.H.*, Docket No. 58 ECAB 183 (2006).

ORDER

IT IS HEREBY ORDERED THAT the October 24 and 17, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 2, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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