

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

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<b>I.A., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1910</b>
	)	<b>Issued: September 29, 2020</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER/FACILITY, Carol Stream, IL, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 11, 2019 appellant filed a timely appeal from a July 8, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 11, 2018, 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.<sup>2</sup>

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

<sup>2</sup> The Board notes that, following the issuance of the July 8, 2019 decision, OWCP received additional evidence. 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.*

## 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 February 10, 2018 appellant, then a 62-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she developed "occupational illnesses" as a result of factors of her federal employment which included moving and lifting heavy boxes. She noted that she first became aware of her condition on June 30, 2015 and realized its relationship to her federal employment on December 23, 2016.

OWCP subsequently received a February 7, 2018 statement from appellant claiming that moving and lifting heavy boxes at work had taken a toll on her right knee and caused pain due to overuse.

In a December 18, 2017 medical report, Dr. Ankur Chhadia, an attending Board-certified orthopedic surgeon, treated appellant for right knee pain and noted a history that appellant had worked at the employing establishment for 23 years and during the past 3 years her job duties included moving and lifting heavy boxes which had taken a toll on her right knee and caused pain due to overuse. He conducted a physical examination, reviewed x-rays, and noted an impression of early right knee osteoarthritis, possible left main trunk. Dr. Chhadia advised that appellant could perform full-duty work.

In a December 21, 2017 right knee magnetic resonance imaging (MRI) scan report, Dr. Gregory Goldstein, a diagnostic radiologist, provided impressions of small effusion, discoid lateral meniscus, and intact menisci and ligaments.

OWCP, in an April 4, 2018 development letter, informed appellant that the evidence submitted was insufficient to establish her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion to. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received an April 25, 2018 letter in which Dr. Chhadia noted that the onset of appellant's symptoms began in June 2015. Dr. Chhadia also noted her various work duties, which included twisting, standing, walking, squatting, and bending. He diagnosed right knee osteoarthritis with early mild aggravation and right knee discoid lateral meniscus. Dr. Chhadia opined, "to a reasonable degree of medical certainty," that the mechanism of loading of appellant's occupational functions, the time course related to these factors, and her history and objective findings contributed and temporarily aggravated her right knee early arthritis.

By decision dated June 11, 2018, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the alleged factors of his federal employment. As such, it concluded that the requirements had not been met to establish an injury as defined by FECA.

On June 20, 2018 appellant requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received a letter dated May 17, 2018, wherein Dr. Chhadia noted his review of diagnostic test results and reported appellant's right knee symptoms. Dr. Chhadia opined that her severe right knee conditions were related to her work duties and aggravated by lifting tubs and trays weighing between 5 and 70 pounds, bending, sitting approximately six hours per day, five days per week, and standing and walking around in a circle for approximately 30 to 45 minutes while dispatching.

On September 11, 2018 OWCP scheduled a telephonic hearing for October 19, 2018 and provided appellant with the time, telephone number, and required passcode. Appellant did not appear for the scheduled telephonic hearing.

By decision dated October 29, 2018, OWCP found that appellant had failed to appear at the oral hearing before an OWCP hearing representative and, thus, had abandoned her request. It indicated that she had received written notice of the hearing scheduled for October 19, 2018 30 days in advance, but she failed to appear or contact the Branch of Hearings and Review either prior to or subsequent to the scheduled hearing to explain her absence.

On March 29, 2019 appellant requested reconsideration. In an accompanying letter, she stated, "I am requesting a [r]econsideration in regards to my knee injury case." Appellant submitted copies of the previously submitted April 25 and May 17, 2018 letters of Dr. Chhadia and December 21, 2017 MRI scan report of Dr. Goldstein and contended that this evidence was sufficient to establish that her diagnosed right knee conditions were work related. Appellant noted that she appeared at the scheduled hearing, but missed it by one hour.

Appellant also submitted her April 27, 2018 response to OWCP's development questionnaire noting that her work duties involved lifting boxes weighing up to 70 pounds eight hours per day, five days per week. She indicated that she had no hobbies or volunteer activities outside her federal employment.

OWCP, by letter dated June 5, 2019, informed appellant that she could not request reconsideration of its October 29, 2018 hearing abandonment decision. It noted that the appeal rights accompanying that decision only allowed her to appeal to the Board within 180 days of the decision date and, "That timeframe has expired."

In a letter received by OWCP, on June 17, 2019, appellant stated, "I ... request a review and consideration of my recently submitted reconsideration request." She contended that she was not given detailed instructions on how to appeal her case. Appellant also contended that she did not attend the scheduled oral hearing because she did not know when and where it was held.

By decision dated July 8, 2019, OWCP denied appellant's request for reconsideration, 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>3</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>4</sup> The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.<sup>5</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>6</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>7</sup>

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.<sup>8</sup> OWCP's regulations and 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(a), if the claimant's request demonstrates clear evidence of error on the part of OWCP.<sup>9</sup>

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>10</sup>

The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>11</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>12</sup> It is not enough merely to establish that

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<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

<sup>6</sup> *Id.* at Chapter 2.1602.4(b) (February 2016).

<sup>7</sup> *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

<sup>8</sup> *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

<sup>9</sup> *Id.* at § 10.607(b); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

<sup>10</sup> *G.G.*, *supra* note 8.

<sup>11</sup> *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 7.

<sup>12</sup> *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>14</sup> In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>15</sup> The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>16</sup>

### ANALYSIS

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

The last merit decision was OWCP's June 11, 2018 decision, which denied appellant's occupational disease claim. The Board finds that the March 29, 2019 request is a timely reconsideration request of OWCP's June 11, 2018 merit decision denying her occupational disease claim for an alleged knee injury. Appellant not only requested reconsideration of her hearing abandonment issue, but she also requested "reconsideration" of her "knee injury case." As appellant's request for reconsideration was received by OWCP on March 29, 2019 within one year of the June 11, 2018 merit decision, it was timely filed. Therefore, OWCP should have applied the standard applicable to a timely reconsideration request as set forth in 20 C.F.R. § 10.606(b)(3) rather than the more stringent clear evidence of error standard for an untimely request for reconsideration set forth in 20 C.F.R. § 10.607(a). Because it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of the newly submitted evidence under the proper standard of review for a timely reconsideration request.<sup>17</sup>

Thus, the Board finds that the case shall be remanded for proper adjudication and application of the appropriate standard of review, to be followed by an appropriate decision.<sup>18</sup>

### CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

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<sup>13</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

<sup>14</sup> *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

<sup>15</sup> *A.F.*, 59 ECAB 714 (2008), *D.G.*, 59 ECAB 455 (2008).

<sup>16</sup> *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

<sup>17</sup> *A.K.*, Docket No. 20-0003 (issued June 2, 2020); *J.H.*, Docket No. 18-1367 (issued July 17, 2019); *E.S.*, Docket No. 17-0698 (issued July 14, 2017).

<sup>18</sup> *A.K.*, *id.*; *J.H.*, *id.*; *W.R.*, Docket No. 16-0098 (issued May 26, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 8, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 29, 2020  
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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