United States Department of Labor
Employees' Compensation Appeals Board

B.P., Appellant	)	
and	)	**Docket No. 20-0178**
	)	**Issued: August 23, 2021**
U.S. POSTAL SERVICE, BUFFALO POST OFFICE, Buffalo, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 31, 2019 appellant filed a timely appeal from a May 10, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from OWCP's last merit decision, dated May 1, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of her claim.

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.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 16, 2017 appellant, then, 63-year-old letter carrier, filed a notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of disability as a result of an April 30, 2011 left knee employment injury.[2] She claimed that on approximately September 6, 2017, while walking to her vehicle, her left knee unexpectedly buckled, and she twisted it when she tried to regain balance while in the performance of duty. Appellant indicated that her left knee has been unstable with cartilage loss following her original injury and subsequent surgery, causing weakness and for it to frequently buckle. On the reverse side of the claim form the employing establishment indicated that appellant did not stop work and had been accommodated with modified job duties following her original injury.[3]

A September 27, 2017 left knee magnetic resonance imaging (MRI) scan demonstrated a tricompartmental degenerative change with full-thickness cartilage defects, complex tearing of the posterior horn and the medial meniscus, sequela of prior high-grade anterior cruciate ligament (ACL) injury, small-to-moderate popliteal cyst, and small joint effusion with synovial hypertrophy.

In an August 15, 2017 work capacity evaluation (Form OWCP-5c), Dr. Mark Anders, a Board-certified orthopedic surgeon, advised that appellant had permanent work restrictions resulting from her previously accepted work injury under OWCP File No. xxxxxx095, consisting of no repetitive use of stairs, reaching above the shoulder, climbing, as well as no pushing, pulling, or lifting more than 20 pounds.

In an October 3, 2017 medical report, Dr. Anders noted that the September 28, 2017 MRI scan demonstrated some degree of tricompartmental osteoarthritis as well as a degenerative meniscus tear. He recommended a new x-ray and left knee arthroscopy with partial medial meniscectomy. In a Form OWCP-5c of even date, Dr. Anders modified appellant's permanent work restrictions to include no bending/stooping, as well as no climbing into a mail vehicle, driving, winter walking while delivering mail, or street walking while delivering mail with a 20-pound bag. He also limited appellant's walking to inside only.

In a letter dated October 19, 2017, a health and resource management specialist for the employing establishment provided OWCP a copy of a modified city carrier position offered to appellant on September 25, 2017, based on the work restrictions provided by Dr. Anders in his August 15, 2017 report. She requested that it determine whether appellant could perform the duties of the offered position.[4]

[2] OWCP previously accepted appellant's claim for a left knee meniscus tear and strain resulting from the April 30, 2011 employment incident under OWCP File No. xxxxxx095.

[3] A March 1, 2018 employing establishment notification of personnel action (PS Form 50) indicated that appellant retired, effective December 31, 2017.

[4] In an October 19, 2017 report of work status (Form CA-3), the employing establishment informed OWCP that appellant had accepted its new offer of modified assignment on October 16, 2017.

In a response dated December 18, 2017, OWCP informed the employing establishment that the September 25, 2017 offer of the modified city carrier position was not suitable for appellant, finding that it exceeded work restrictions provided by Dr. Anders in his October 3, 2017 work capacity evaluation.

In a December 19, 2017 development letter, OWCP provided a definition of a recurrence of disability. It advised appellant of the factual and medical evidence necessary to establish her claim, provided a questionnaire for her completion, and afforded her 30 days to submit additional evidence.

In a December 15, 2015 medical report, Dr. Anders noted that appellant presented with arthritic symptoms, but was managing with her work restrictions. He indicated that she experienced a mild-to-moderate disability with regard to her bilateral knee osteoarthritis. Dr. Anders opined that appellant had 50 percent temporary impairment.

An October 3, 2017 left knee x-ray report revealed moderate symmetric osteoarthritis of both knees with medial joint space narrowing.

In an October 16, 2017 medical report, Dr. Thomas Bevilacqua, a Board-certified diagnostic radiologist, noted April 30, 2011 as the date of incident and diagnosed osteoarthritis.

In a January 16, 2018 narrative response to OWCP's development questionnaire, appellant described her modified job duties following her original April 30, 2011 employment injury, which included casing and handling mail. She explained that she struggled with her work duties because it temporarily required her to perform street deliveries, which included climbing in and out of her mail vehicle at least 14 times a day. Appellant indicated that Dr. Anders modified her work restrictions after reviewing the September 27, 2017 left knee MRI scan, which revealed a torn meniscus. She explained that she was then limited to working inside and worked with restrictions until she retired on December 31, 2017. Appellant contended that she still had residuals from her original employment injury.

In a January 17, 2018 medical report, Dr. Anders noted that appellant's 2011 employment-related injury resulted in both meniscal and articular damages. He diagnosed a recurrent meniscal tear and progressive degenerative osteoarthritis. Dr. Anders opined, although he could not say with certainty, her current injury was "definitely more likely than not" attributed to and consequent to her 2011 employment injury.

On January 18, 2018 appellant completed OWCP's questionnaire, noting that her disability occurred by simply walking and that there was no intervening cause except for her work activities. She asserted that pain and instability of her left knee never went away following the April 30, 2011 employment injury. Appellant contended that her current condition was caused by the 2011 employment injury, which was made worse after her original meniscus surgery causing her left knee to buckle, twist, and tear.

On February 22, 2018 OWCP notified appellant that her recurrence claim had been administratively converted to an occupational disease under the current claim, File No. xxxxxx739. It found that, based on her "description of the circumstances that prompted the filing of the Form

CA-2a, [appellant was] really claiming a new occupational disease attributed to repetitive work/exposure over the course of more than one work shift."

In a March 22, 2018 development letter, OWCP informed appellant of the deficiencies in her claim. It advised her of the factual and medical evidence necessary to establish her claim and provided a factual questionnaire for completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information concerning appellant's claim. It noted that in the absence of a full reply from the employing establishment, it may accept appellant's allegations as factual. OWCP afforded both parties 30 days to submit the requested information.

In a March 30, 2018 letter, appellant's postmaster, A.E., indicated that appellant had informed her that her left knee buckled and twisted when she was walking to her vehicle. She explained that appellant's modified work duties included casing, sorting, and pulling down mail for about one hour a day. A.E. noted that appellant was accommodated with a stool to avoid standing on her knee for a long period and was able to take a break if needed. She further noted that additional help was available upon appellant's request. A.E. indicated that appellant was unable to perform any of the street activities due to the injury of her knee.

In an April 18, 2018 response to OWCP's March 22, 2018 questionnaire, appellant estimated that her injury occurred on or around September 6, 2017. She explained that her left knee buckled so frequently and unpredictably that she did not write down actual dates. Appellant indicated that her left knee started to buckle in 2015, when she started using a brace. She related that when her knee buckled, it might be sore for a day or two before the pain would go away, but on or around September 6, 2017, the pain did not subside. Appellant explained that she was not working at the time of the September 6, 2017 incident, but was walking to her personal vehicle on her own free time when her left knee spontaneously buckled without any intervening cause. She indicated that she saw Dr. Anders on October 3, 2017, who increased her work restrictions and advised her to avoid further damaging the left knee.

In a separate letter of even date, appellant contended that OWCP made a mistake, converting her recurrence case to a new occupational disease claim. She noted that the employing establishment had initially given her a Form CA-2a. Appellant argued that she was not released from treatment for the accepted April 30, 2011 employment injury under OWCP File No. xxxxxx095. She explained that she was experiencing symptoms of an articular damage on a daily basis and that there was no way for her to keep track of every time her knee buckled. Appellant noted that she wore a knee brace for stability in 2015. She contended that this buckling had been going on since 2011.

By decision dated May 1, 2018, OWCP denied appellant's occupational disease claim finding that the medical evidence submitted was insufficient to establish causal relationship between her condition and the accepted factors of her federal employment.

On May 7, 2019 appellant requested reconsideration. She argued that her case should have been developed as a recurrence claim, not a new occupational disease claim. Appellant contended that her current injury was a consequential injury of the previously accepted April 30, 2011 employment injury under OWCP File No. xxxxxx095.

By decision dated May 10, 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.[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] 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.[7] Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).[8] 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 (5 U.S.C. § 8128(a)).[9]

OWCP may not deny a request for reconsideration solely because the application was not timely 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.[10] OWCP 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.[11]

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.[12] The Board notes that clear evidence of error is intended to represent a difficult standard.[13] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to

[5] 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).

[6] 20 C.F.R. § 10.607(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

[8] *Id*. at Chapter 2.1602.4(b) (February 2016).

[9] *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

[10] *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

[11] *Id*. at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

[12] *G.G.*, *supra* note 10.

[13] *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 9.

demonstrate clear evidence of error.[14] It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.[18]

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The last merit decision of record was OWCP's May 1, 2018 decision. As appellant's request for reconsideration was received by OWCP on May 7, 2019, more than one year after the May 1, 2018 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.[19]

The Board finds that the evidence submitted in support of appellant's untimely request for reconsideration raises a substantial question as to the correctness of OWCP's May 1, 2018 merit decision and is sufficient to demonstrate clear evidence of error.[20]

Appellant filed a notice of recurrence after working in a modified-duty capacity following the accepted April 30, 2011 left knee employment injury under OWCP File No. xxxxxx095. In a February 22, 2018 development letter, OWCP informed her that her recurrence claim had been administratively converted to an occupational disease claim. It found that, based on her description of the circumstances, appellant was claiming a new occupational disease attributed to repetitive work/exposure over the course of more than one work shift. OWCP provided no further explanation.

Appellant has consistently maintained that OWCP should have developed the claim as one for a recurrence under OWCP File No. xxxxxx095. In her April 18, 2018 response to the development letter, she asserted that that OWCP made a mistake converting her recurrence case to a new occupational disease claim. Appellant noted that the employing establishment had initially given her a Form CA-2a. She further argued that she was not yet released from treatment

[14] *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

[15] *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

[16] *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

[17] *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

[18] *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

[19] *Supra* note 7; *See also* Debra McDavid, 57 ECAB 149 (2005).

[20] *See S.M.*, Docket No. 18-1499 (issued February 5, 2020) (OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's request for reconsideration shows clear evidence of error on the part of the OWCP).

for the accepted April 30, 2011 employment injury under OWCP File No. xxxxxx095. However, in its May 1, 2018 decision OWCP did not reference or discuss appellant's contention of the unilateral conversion from a recurrence to a new occupational disease claim.

Federal (FECA) Procedure Manual provides that, while a submission of an incorrect form is a technical error, it is improper to deny a case because a claimant failed to submit the correct form. Rather, OWCP should convert the incorrect claim form to the correct type and notify the claimant and the employing establishment that the claim has been converted and explain the reasons for the conversion.[21]

As OWCP did not reference or discuss appellant's contentions, nor explained the reasons for its conversion the Board therefore finds that she has raised a substantial question as to the correctness of the May 1, 2018 merit decision and, thus, has demonstrated clear evidence of error.[22]

The Board will reverse OWCP's May 10, 2019 decision and remand the case for an appropriate decision on the merits of appellant's claim.

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error in OWCP's May 10, 2018 merit decision and, thus, OWCP improperly denied her request for reconsideration of the merits of her claim.

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.800.3(c)(2) (June 2011).

[22] *B.C.*, Docket No. 20-0465 (issued November 19, 2020)

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2019 decision of the Office of Workers' Compensation Programs is reversed and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 23, 2021
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