

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

_____)	
P.A., Appellant)	
)	
and)	Docket No. 20-0061
)	Issued: January 29, 2021
U.S. POSTAL SERVICE, PRIORITY MAIL)	
POSTAL PROCESSING CENTER, Phoenix, AZ,)	
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
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On October 7, 2019 appellant filed a timely appeal from a September 26, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decisions, dated August 9, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that OWCP received additional evidence following the September 26, 2019 decision. 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 June 8, 2015 appellant, then a 52-year-old clerk/postal processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she was putting away a heavy package when her right leg snapped while in the performance of duty. OWCP initially accepted the claim for right knee and leg sprain. Subsequently, it expanded acceptance of the claim to include the additional condition of temporary aggravation of right knee unilateral primary osteoarthritis. OWCP paid intermittent wage loss on the supplemental rolls as of July 21, 2015. On September 6, 2016 appellant underwent right knee arthroscopy with tricompartmental chondroplasty. On October 10, 2016 she returned to modified duty. On March 21, 2017 appellant underwent right total knee arthroplasty. She returned to work full time with restrictions on July 14, 2017.

On July 15, 2017 appellant accepted a full-time modified job offer which indicated that her tour of duty would be from 7:00 a.m. to 3:50 p.m.

By decision dated January 25, 2018, OWCP granted appellant a schedule award for 31 percent permanent impairment of the right lower extremity. The period of the award ran from October 6, 2017 to June 22, 2019.

In a March 16, 2018 report, Dr. Michael Steingart, an osteopath specializing in orthopedic surgery and sports medicine, provided a second opinion examination regarding appellant's work capacity. He determined that she was capable of working eight hours per day with sedentary work restrictions.

In a May 4, 2018 report, Dr. Sherwood Duhon, a Board-certified orthopedic surgeon, examined appellant. He noted that appellant wanted to work eight hours for four days per week, with one day off for rest. Dr. Duhon provided updated work restrictions indicating that she should perform sedentary work eight hours per day, four days per week.

On May 15, 2018 appellant accepted an assignment change. The days she worked were reduced from five to four days per week. Appellant's tour of duty was listed as from 8:50 p.m. to 5:00 a.m.

On June 7, 2018 appellant filed wage-loss compensation claims (Form CA-7) seeking compensation for leave without pay (LWOP) for the periods April 28 to May 11, 2018 and May 12 to 25, 2018, including night differential and Sunday premium. On a June 4, 2018 time analysis (Form CA-7a) she claimed four hours of LWOP due to an FCE appointment and for May 6, 8, 13, and 20, 2018, she claimed eight hours of LWOP each day and indicated that her physician had changed her work restrictions.

In a development letter dated June 12, 2018, OWCP advised appellant that it had received her claim for compensation for the period April 28, 2018 and continuing. It requested that she

submit medical evidence to establish that she was required to reduce her workdays from five to four days per week. OWCP afforded appellant 30 days to submit the necessary evidence.

In a June 18, 2018 statement, appellant alleged that she was entitled to night differential because on September 16, 2019, the employing establishment had transferred her to work nights from 8:30 p.m. to 5:00 a.m.

In a July 5, 2018 statement, appellant indicated that Dr. Duhon had explained to her that the reason for reducing her work hours was for her to rest. However, Dr. Duhon's office declined to change his notes, which indicated that she desired to work four days per week.

By two separate decisions, also dated August 9, 2018, OWCP addressed appellant's claims for compensation for the periods April 28 to May 11, 2018 and May 12 to 25, 2018.³

In one decision it informed her that her payment for the period April 28 to May 11, 2018 was issued on August 9, 2018 and she should receive payment within two weeks. Regarding the period May 12 to 25, 2018, OWCP explained that the claim was denied as the medical evidence of record did not establish that appellant was disabled during this time period. Regarding the claim for night differential, it found that the fact that the employing establishing accommodated her request did not create entitlement to night differential.

In a separate decision dated August 9, 2018, OWCP denied appellant's claims for compensation for the same periods April 28 to May 11, 2018, and May 12 to 25, 2018. It explained, in part, that the claims were denied because she received a schedule award for the period October 6, 2017 to June 22, 2019. OWCP noted that when the schedule award ended, appellant could resubmit her claim for May 6 and 7, 2018. However, it also denied the claim from May 12 to 25, 2018 finding that the medical evidence of record did not establish that she was disabled during this time period. OWCP also denied appellant's claim for loss of night differential, finding that her July 15, 2017 job offer was 7:00 a.m. to 3:30 p.m. and she was not earning night differential. It explained that her new modified position was an accommodation to her request to be reduced to four days per week. OWCP found that the fact that the employing establishment accommodated appellant's request did not create entitlement to a night differential.

On August 14, 2019 OWCP received appellant's request for reconsideration. Appellant argued that she did not have a choice when she was moved to nights on September 10, 2017. She noted that on August 6, 2018 she was transferred back to Tour 2, and her hours were changed to 10:00 a.m. until 6:30 p.m., with Monday, Tuesday, and Wednesday off.

OWCP received a letter dated September 10, 2017, from the employing establishment's facility manager which indicated that, effective September 16, 2017, appellant's tour of duty would be from 8:50 p.m. to 5:00 a.m.

OWCP subsequently received October 13 and 15, 2015 laboratory tests; March 29, 2017 x-rays reports; CA-1032 forms; a January 24, 2018 medical limitation notification to supervisors; a copy of Dr. Steinhart's March 16, 2018 work restrictions; a May 2, 2018 FCE; a May 15, 2018

³ In a separate decision dated August 9, 2018, OWCP denied appellant's request to change physicians.

work status change; October 22, 2018 x-rays of the right knee; an October 22, 2018 request for a bone scan and hinged knee wrap; November 20 and 21, 2018 office notes from a physician assistant; October 23 and November 15, 2018 diagnostic tests; a December 17, 2018 bone imaging scan; a pay stub request for donated leave; an undated letter pertaining to appellant's grievance related to being moved from a tour; and copies of previously submitted claims for compensation.

OWCP also received March 2 and October 22, 2018 reports from Dr. Duhon, who repeated his previous findings and opinions. Dr. Duhon also completed duty status reports of the same date.

In an October 23, 2018 report, Dr. John Thompson, an osteopath specializing in orthopedic surgery, diagnosed pain in the right knee, presence of right artificial knee joint, arthrofibrosis, and right knee effusion. He also submitted October 29, 2018 notes that repeated his diagnoses. In a March 26, 2019 report, Dr. Thompson noted that appellant had reached maximum medical improvement. He indicated that she had full range of motion and stability of the knee.

By decision dated September 26, 2019, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that her date of recurrence pay rate (which did not include night differential) was higher than her date-of-injury pay rate therefore her date of recurrence pay rate was used. OWCP concluded that appellant had failed to provide any succinct explanation as to why the prior decision was improperly decided.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions.⁵ OWCP's regulations establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision.⁶ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁷ Timeliness is determined by the document receipt date, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

⁴ 5 U.S.C. § 8128(a); *see B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ *T.T.*, Docket No. 19-1624 (issued October 28, 2020); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); *Alberta Dukes*, 56 ECAB 247 (2005).

⁷ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁹ *A.M.*, Docket No. 20-0143 (issued October 28 2020); *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

When a reconsideration request is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's final merit decision was in error.¹⁰ Its 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, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹¹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹²

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹³ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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.¹⁸ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁹

¹⁰ *L.N.*, Docket No. 20-0742 (issued October 26, 2020); *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹² *V.G.*, *supra* note 6; *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *W.H.*, Docket No. 20-0395 (issued October 23, 2020); *S.T.*, *supra* note 9; *C.V.*, *supra* note 10; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ *S.T.*, *supra* note 9; *see E.P.*, *supra* note 12; *Pasquale C. D Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 6; *C.V.*, *supra* note 10; *Leon J. Modrowski*, *supra* note 10; *Jesus D. Sanchez*, *supra* note 10.

¹⁶ *W.H.*, *supra* note 13; *V.G.*, *supra* note 6; *see E.P.*, *supra* note 12; *Leona N. Travis*, *supra* note 14.

¹⁷ *L.B.*, *supra* note 14; *V.G.*, *supra* note 5; *see E.P.*, *supra* note 11; *Nelson T. Thompson*, *supra* note 11.

¹⁸ *D.G.*, *supra* note 10; *Leon D. Faidley, Jr.*, *supra* note 8.

¹⁹ *C.V.*, *supra* note 9; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

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

OWCP properly determined that appellant's request for reconsideration was untimely filed. In this case, the most recent merit decisions were dated August 9, 2018. OWCP issued two separate decisions pertaining to appellant's claims for LWOP and loss of night shift differential. OWCP received appellant's request for reconsideration on August 14, 2019, which was beyond the one-year time limit as to all OWCP decisions. Since the reconsideration request was untimely, appellant has the burden of proof to demonstrate clear evidence of error by OWCP in denying her claims for compensation.²⁰

The Board further finds that the evidence raises a substantial question as to the correctness of OWCP's August 9, 2018 decisions and is sufficient to demonstrate clear evidence of error.²¹

The Board notes that OWCP issued two conflicting decisions on August 9, 2018 regarding appellant's entitlement to periods of wage-loss compensation.

By decision dated August 9, 2018, OWCP informed appellant that her payment for the period April 28 to May 11, 2018 was issued on August 9, 2018 and she should receive payment within two weeks. Regarding the period May 12 to 25, 2018, it explained that the claim was denied, based on the medical evidence of record. Regarding the claim for night differential, OWCP found that the fact that the employing establishment accommodated appellant's request did not create entitlement to a night differential.

However, in the second decision dated August 9, 2018, OWCP also denied appellant's claims for compensation for the periods April 28 to May 11, 2018 and May 12 to 25, 2018. It explained, in part, that the claims were denied because she received a schedule award for the period October 6, 2017 to June 22, 2019. OWCP noted that, when the schedule award ended, appellant could resubmit her claim for May 6 and 7, 2018. Regarding the period May 12 to 25, 2018, it found that the medical evidence of record did not establish her disability claim.

The Board finds that OWCP committed error when it issued two decisions on the same date with conflicting findings concerning the same periods of disability. In this case, the conflicting decisions on the same issue raise a substantial question as to the correctness of the August 9, 2018 merit decisions. The Board finds that OWCP abused its discretion in failing to reopen appellant's claim for further merit review. As such, the Board will reverse OWCP's September 26, 2019 decision and remand the case for a corrected decision on the issues addressed in the August 9, 2018 merit decisions, with proper appeal rights.

²⁰ *Supra* note 7. See *B.C.*, Docket No. 20-0465 (issued November 19, 2020); see also *Debra McDavid*, 57 ECAB 149 (2005).

²¹ 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 OWCP).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2019 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.²²

Issued: January 29, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²² Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.