

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

E.H., Appellant)	
)	
and)	Docket No. 19-0365
)	Issued: March 17, 2021
DEPARTMENT OF THE NAVY, MARINE)	
CORPS STATION, Camp Pendleton, CA,)	
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 26, 2018 appellant filed a timely appeal from an October 15, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 31, 2014, 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.

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.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 13, 2013 appellant, then a 67-year-old industrial mechanic, filed a traumatic injury claim (Form CA-1) alleging that on November 8, 2012 he twisted his right knee when he stepped down off a platform after inspecting a new well while in the performance of duty. He did not stop work. No evidence was submitted with appellant's claim.

In a development letter dated June 18, 2013, OWCP advised appellant that the evidence of record was insufficient to establish that she actually experienced the incident alleged to have caused the injury as a result of his work duties, and that he had not submitted any medical evidence. It requested that she respond to a questionnaire, and submit additional medical evidence. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP received medical evidence, including an occupational health permit dated November 9, 2012 by Dr. James A. Caviness, an employing establishment physician Board-certified in occupational medicine. Dr. Caviness noted a history of the alleged November 8, 2012 employment incident and noted complaints of right knee and right shoulder pain and advised that appellant could return to limited-duty work with restrictions for seven days.

OWCP also received a right knee x-ray report dated February 12, 2013 by Dr. Robert G. Connolly, II, a Board-certified diagnostic radiologist. Dr. Connolly found degenerative changes in all three compartments of the knee. He also found lateral subluxation of the patella, suprapatellar joint effusion, enthesophyte formation at the quadriceps tendon insertion on the patella, corticated bony density in the region of the tibial tuberosity with soft tissue swelling involving the distal patella and tendon, and spurring of the tibial spines.

In a chronological record of medical care (Standard Form-600) dated February 13 and 14, 2013, Dr. Earl E. Miller, a Board-certified family practitioner, provided assessments of systemic hypertension, chronic right knee joint pain, and right shoulder impingement.

By decision dated July 23, 2013, OWCP accepted that the November 8, 2012 employment incident occurred as alleged, but denied appellant's traumatic injury claim, finding that the medical evidence of record did not contain a diagnosed medical condition in connection with the accepted employment incident. It noted that "pain" is a symptom and not a medical diagnosis.

Appellant subsequently requested reconsideration and submitted reports dated July 16 and November 18, 2013 and April 14, 2014 from Dr. Bradley L. Baum, an attending Board-certified orthopedic surgeon. Dr. Baum provided an impression of probable long history of an anterior cruciate ligament (ACL) tear of the right knee in the late 1970s. He opined that this condition was exacerbated by the accepted November 8, 2012 employment incident. Dr. Baum also provided an impression of probable acute medial meniscus tear and opined that this condition was caused by

² Docket No. 18-1669 (issued December 19, 2018).

the accepted work incident. He requested authorization for a right knee magnetic resonance imaging (MRI) scan study. By decisions dated November 6, 2013 and March 11 and July 31, 2014, OWCP reviewed the merits of the claim, but denied modification. It found that the medical evidence submitted failed to provide a definitive diagnosis of a right knee condition or a rationalized medical opinion explaining the causal relationship between the knee condition and the accepted November 8, 2012 employment incident.

On February 23, 2015 appellant again requested reconsideration. In an undated letter, he contended that OWCP's prior decisions were deficient as they failed to mention an individual who had witnessed the accepted November 8, 2012 employment incident. Appellant also disagreed with OWCP's finding that the weight of the medical evidence of record established that his right knee was unremarkable. He claimed that he had continuing pain and discomfort since the November 8, 2012 employment incident. Appellant noted that he would submit additional medical evidence, however, additional evidence was not received.

By decision dated March 13, 2015, OWCP denied appellant's February 23, 2015 request for reconsideration of the merits of his claim, finding that the evidence submitted was irrelevant and/or immaterial to the medical basis on which his claim was denied.³

In an undated statement and letter received by OWCP on June 12, 2018, appellant requested reconsideration. He contended that his physician found that he probably had a right knee medial meniscus tear based on x-rays and that OWCP denied the physician's request for authorization for a necessary MRI scan. Appellant believed that his claim would have been approved if his physician had used a word other than "probably" and reported that he had sustained a tear caused by his employment. He also claimed that he was treated unfairly because he went to a medical facility that had no experience with on-the-job injuries. Appellant related that if he had known that he could have seen his family physician, who would have provided a proper right knee diagnosis, then he would have done so and his claim would have been accepted.

Appellant submitted an additional report dated November 2, 2012 from Dr. Caviness who again noted a history of the accepted November 8, 2012 employment incident. He conducted an examination and provided an assessment of joint pain localized in the right knee. Dr. Caviness reiterated his prior opinion that appellant could return to limited-duty work with restrictions for seven days.

Appellant also submitted additional health records (Standard Form-600) dated February 15, 2013 and May 8 through 28, 2013 from Dr. Miller who performed a physical examination, reviewed diagnostic test results, and provided an assessment of chronic lower back pain. Dr. Miller also reiterated his prior assessment of chronic right knee joint pain. He released appellant without limitations.

³ On September 4, 2018 appellant filed an appeal with the Board of the March 13, 2015 OWCP decision. By order dated December 19, 2018, the Board dismissed appellant's appeal, finding that his appeal to the Board was untimely filed. *Order Dismissing Appeal*, Docket No. 18-1669 (issued December 19, 2018).

Appellant underwent diagnostic testing on April 8, 2013. A right shoulder x-ray performed by Dr. Harold I. Nadel, a Board-certified diagnostic radiologist, provided an impression of mild degenerative changes in the acromioclavicular (AC) joint and superior lateral humeral head.

Appellant underwent further diagnostic testing performed by Dr. Connolly. On February 12, 2013 Dr. Connolly reported that a right shoulder x-ray revealed AC arthrosis, subtle periosteal reaction along the superior distal third of the right clavicle which may represent post-traumatic change, and irregularity of the superior bony glenoid. He also reported that there was no dislocation of the glenohumeral joint or definite acute fracture. Dr. Connolly related that a right shoulder MRI scan should be considered. On July 18, 2014 he found that a right knee x-ray showed tri-compartment osteoarthritis. Dr. Connolly further found no fracture, dislocation, or significant joint effusion. There were remote stress changes in the proximal posterior right tibia. Also, on July 18, 2014 Dr. Connolly reported that a left knee x-ray demonstrated remote stress changes involving the proximal tibia and fibula, and degenerative changes of the patellofemoral joint. There was no joint effusion. Appellant resubmitted Dr. Connolly's February 12, 2013 right knee x-ray report.

By decision dated October 15, 2018, OWCP denied appellant's request for further merit review of his claim, finding that his request 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.⁴ 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.⁵ 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).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited

⁴ 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).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *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).

review to determine whether it demonstrates clear evidence of error.⁸ If an application demonstrates clear evidence of error, it will reopen the case for merit review.⁹

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.¹⁰

OWCP's 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.¹¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

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

OWCP's regulations¹³ and procedures¹⁴ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵

⁸ See 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).

⁹ *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 6 at Chapter 2.1602.5 (February 2016).

¹⁰ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹² *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹³ 20 C.F.R. § 10.607(a); see *J.W.*, *supra* note 10; *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁴ *Supra* note 6 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

The most recent merit decision was OWCP's July 31, 2014 decision which found that the evidence of record was insufficient to establish a firm medical diagnosis causally related to the accepted November 8, 2012 employment incident. As his request for reconsideration was not received by OWCP until June 12, 2018, more than one year after the July 31, 2014 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 having denied his traumatic injury claim.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. As stated, OWCP denied his traumatic injury claim as the medical evidence of record failed to establish a firm medical diagnosis causally related to the accepted November 8, 2012 employment incident.

In his untimely request for reconsideration, appellant contended that his physician, presumably Dr. Baum, found that he "probably" had a right knee medial meniscus tear based on MRI scan findings. OWCP denied appellant's claim, finding that Dr. Baum failed to provide a firm medical diagnosis in connection with the accepted November 8, 2012 employment incident. Appellant's lay opinion on the medical evidence is irrelevant as the Board has held that lay individuals are not competent to render a medical opinion.¹⁶ His further contention that he was treated unfairly because he was evaluated at a medical facility that had no experience with employment-related injuries and that his claim would have been accepted if he had instead sought treatment from his physician who would have provided a proper right knee diagnosis is also irrelevant as the underlying issue is medical in nature. Thus, it does not establish that he had a firm right knee medical diagnosis due to the accepted employment incident.¹⁷ The Board finds, therefore, that the arguments appellant submitted did not raise a substantial question concerning the correctness of OWCP's July 31, 2014 merit decision.

The medical reports of Dr. Caviness and Dr. Miller submitted by appellant with his June 12, 2018 reconsideration request are also insufficient to demonstrate clear evidence of error with respect to OWCP's July 31, 2014 merit decision. This evidence, which merely addressed right knee and lower back pain, is insufficient to shift the weight of the medical evidence.

Additionally, the diagnostic testing reports of Dr. Nadel and Dr. Connolly also are insufficient to establish that OWCP erred in its denial of appellant's claim.¹⁸ Diagnostic test reports do not raise a substantial question as to the correctness of OWCP's July 31, 2014 merit decision or demonstrate clear evidence of error. These reports therefore do not demonstrate clear evidence of error and would not require a review of a case.¹⁹ Although appellant resubmitted the February 12, 2013 diagnostic test report of Dr. Connolly on reconsideration, he did not sufficiently explain how largely duplicative or cumulative evidence raised a substantial question as to the

¹⁶ Z.S., Docket No. 16-1745 (issued May 18, 2017).

¹⁷ *Id.*

¹⁸ See *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *G.B.*, Docket No. 13-1260 (issued December 2, 2013); see also *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

¹⁹ See *D.G.*, *id.*; *M.C.*, Docket No. 16-1135 (issued September 11, 2017); *G.B.*, *id.*

correctness of OWCP's decision.²⁰ For these reasons, the Board finds that the reports of Dr. Nadel and Dr. Connolly are insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's decision denying his request for reconsideration.

Appellant also submitted Dr. Connolly's February 12, 2013 right knee x-ray report, which was previously of record. This evidence, however, does not manifest on its face that OWCP committed an error in its July 31, 2014 decision.²¹

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.²² As stated above, 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.²³

The Board finds that the evidence submitted in support of the untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in its July 31, 2014 decision. Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

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

²⁰ See *G.B.*, Docket No. 18-1629 (issued April 15, 2019); *P.B.*, Docket No. 18-0265 (issued September 5, 2018); *D.E.*, 59 ECAB 438 (2008).

²¹ See *S.M.*, Docket No. 17-0385 (issued June 26, 2018).

²² See *supra* note 11; *S.C.*, Docket No. 18-0126 (issued May 14, 2019).

²³ *Id.*; see also *J.S.*, Docket No. 16-1240 (issued December 1, 2016); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016).

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 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