

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

_____)	
L.M., Appellant)	
)	
and)	Docket No. 20-0203
)	Issued: March 10, 2021
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Denver, CO, Employer)	
_____)	

Appearances:
Bernard Humbles, for the appellant¹
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 November 4, 2019 appellant, through his representative, filed a timely appeal from a May 24, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated January 16, 2018, to the filing

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

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 January 31, 2017 appellant, then a 66-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on January 30, 2017 he experienced a swollen and painful right knee when his knee gave out and caused him to fall to the floor while he was positioning beds in the ambulatory surgery ward while in the performance of duty.⁴ He stopped work on the filing date of his claim and submitted medical evidence in support of his claim.

After further development, OWCP, by decision dated May 4, 2017, denied appellant's traumatic injury claim, finding that the alleged January 30, 2017 incident did not occur within the performance of duty.

On May 17, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received additional medical evidence. In a March 6, 2017 attending physician's report (Form CA-20), Dr. Allan L. Bucknell, a Board-certified orthopedic surgeon, noted a history of injury that on January 30, 2017 appellant hit his knee and fell injuring his right shoulder at work. He diagnosed aggravated osteoarthritis and rotator cuff tear of the right shoulder. Dr. Bucknell advised that the diagnosed conditions were caused or aggravated by the described employment activity.

A March 8, 2017 right shoulder magnetic resonance imaging (MRI) scan report by Dr. Troy L. Miller, a diagnostic radiologist, and Dr. Richard J. Oh, a Board-certified diagnostic radiologist, provided an impression of massive rotator cuff tear involving most of the supraspinatus tendon with the small posterior segment still intact. There was also retraction of the tendon to the level of the superior humeral head. Additionally, there was no significant muscle atrophy.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 24, 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.*

⁴ Appellant has a prior claim under OWCP File No. xxxxxx910, for a September 12, 2016 traumatic injury. OWCP accepted the claim for chondromalacia and tear of the articular cartilage of the right knee.

Dr. Miller and Dr. Oh further provided an impression of advanced hypertrophic degenerative joint disease of the acromioclavicular joint.

Dr. Lorenzo Silvestri, a Board-certified orthopedic surgeon, noted in an April 3, 2017 Form CA-20 report, a history of injury that on January 30, 2017 appellant fell at work. He diagnosed right rotator cuff tear. Dr. Silvestri advised that the diagnosed condition was caused or aggravated by the described employment activity.

During the telephonic hearing, held on November 16, 2017, appellant described the work duties he was performing at the time of injury on September 12, 2016 and January 30, 2017, the development of his right knee and right shoulder conditions, and history of his medical treatment.

OWCP thereafter continued to receive medical evidence, including an October 24, 2016 right knee MRI scan report by Dr. Nathan D. Hensley, a Board-certified diagnostic radiologist. Dr. Hensley provided an impression of osteoarthritis, severe in the medial compartment where there was full-thickness chondral thinning and marked diffuse degeneration of the posterior horn of the medial meniscus. There was also a small full-thickness chondral defect along the posterior weight-bearing portion of the lateral femoral condyle and mild patellofemoral chondromalacia. Additionally, Dr. Hensley provided an impression of sprain/partial tear of the anterior cruciate ligament (ACL) versus appearance related to mucoid degeneration. He recommended clinical correlation with regard to instability. There was an irregular and a buckled appearance of the posterior cruciate ligament (PCL) without disruption. Dr. Hensley also noted impressions of moderate-to-large joint effusion and popliteal cyst, remote medial collateral ligament (MCL) injury, and popliteus tendinosis.

Dr. Larisa Ravdel, a physician specializing in family and general medicine, reported, in a December 22, 2017 letter, that appellant sustained a work-related right knee injury on September 12, 2016 and a right shoulder injury on January 30, 2017. She noted that he continued to have right knee problems.

OWCP received correspondence from the employing establishment, including a September 26, 2017 letter from Karissa Stewart, a nurse manager, who described appellant's employment duties as a housekeeper. A partial undated letter from Amanda Martinez, a deputy service chief and emergency operation center manager, indicated that appellant resigned from his housekeeper position because he was unable to return to full-duty work.

By decision dated January 16, 2018, an OWCP hearing representative modified the May 4, 2017 decision, finding that the January 30, 2017 employment incident occurred while appellant was in the performance of duty. The claim remained denied, however, as the medical evidence of record was insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted employment incident. Additionally, the hearing representative noted that, since appellant's prior work-related injury had been cross-referenced in the factual and medical evidence in the instant case, she directed OWCP to administratively combine the current claim under OWCP File No. xxxxxx361 with OWCP File No. xxxxxx910.

On June 18, 2018 appellant again contended that he sustained an injury as a result of his housekeeper duties and that accompanying documents supported his claim.

Undated affidavits and affidavits dated February 9, 2018 from appellant's coworkers acknowledged that, through their conversations with appellant after his injury on September 12, 2016 and January 30, 2017, he showed right knee symptoms while performing his housekeeper duties.

Progress notes from the employing establishment medical center dated September 12 and 14, 2016 indicated appellant's diagnoses of right gluteal contusion and musculoskeletal strain.

In a January 30, 2017 right knee x-ray report, Dr. Alan Xu, a Board-certified diagnostic radiologist, provided an impression of no acute osseous abnormality. He also provided impressions of mild degenerative changes and suggestion of at least small joint effusion.

An additional report dated March 8, 2017 from Dr. Miller noted that an MRI scan of appellant's right knee revealed prominent irregularity and thickening of the PCL, compatible with partial thickness tearing. There was also marked thickening and edema of the intact ACL, compatible with strain and partial thickness tearing. There was prominence reactive marrow edema within the tibial spine adjacent to the ACL insertion and prominent reactive marrow edema within the distal femur at the level of the condylar notch. Dr. Miller further noted an impression of small-to-moderate-sized knee joint effusion and associated synovitis. Additionally, he provided an impression of complex degenerative tearing of the peripherally extruded body and posterior horn of the medial meniscus. Lastly, Dr. Miller provided an impression of advanced medial compartment chondromalacia with large areas of full-thickness cartilage loss on both sides of the joint space and foci of subchondral marrow edema on both sides of the medial compartment joint space.

An April 3, 2017 right shoulder x-ray report from Dr. Francis I. Donahue, a diagnostic radiologist, noted an impression of degenerative and post-traumatic changes as described.

On March 18, 2019 appellant requested reconsideration.

OWCP thereafter received duplicate copies of Dr. Hensley's October 24, 2016 right knee MRI scan report, Dr. Bucknell's March 6, 2017 Form CA-20 report, Dr. Oh's March 8, 2017 right shoulder MRI scan report, Dr. Silvestri's April 3, 2017 Form CA-20 report, Dr. Ravdel's December 22, 2017 report, and Ms. Stewart's September 26, 2017 letter.

By decision dated May 24, 2019, OWCP denied appellant's reconsideration request, 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. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁶ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁹ Its procedures provide that it 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.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which 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 merely to 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 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

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 2.1602.4(b) (February 2016).

⁸ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ 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).

¹⁰ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also *id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

¹¹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

the correctness of OWCP's decision. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

ANALYSIS

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.

OWCP's regulations¹⁴ and procedures¹⁵ 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.¹⁶ The most recent merit decision was an OWCP hearing representative's January 16, 2018 decision which found that appellant had established that the January 30, 2017 employment incident occurred in the performance of duty, as alleged, but denied his traumatic injury claim because the medical evidence was insufficient to establish a causal relationship between the accepted employment incident and his diagnosed medical conditions. As his request for reconsideration was not received by OWCP until March 18, 2019, more than one year after the January 16, 2018 decision, the Board finds that it was untimely filed. Because his request was untimely filed, appellant must demonstrate clear evidence of error on the part of OWCP in having denied his occupational disease claim.

In support of his untimely request for reconsideration, appellant, through his representative, resubmitted medical reports from Drs. Hensley, Bucknell, Oh, Miller, Silvestri, and Ravdel, and correspondence from Ms. Stewart, which were previously considered by OWCP, as well as new progress notes and reports from the employing establishment medical center and Drs. Xu, Miller, and Donahue that failed to address the causal relationship between appellant's diagnosed right gluteal, musculoskeletal, right knee, and right shoulder conditions and the January 30, 2017 employment incident. Appellant did not sufficiently explain how this evidence raised a substantial question as to the correctness of OWCP's January 16, 2018 merit decision.¹⁷

The Board, thus, finds that appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying his traumatic injury claim.¹⁸

¹³ *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

¹⁴ 20 C.F.R. § 10.607(a); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁵ *Supra* note 7 at Chapter 2.1602.4 (February 2016); *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

¹⁷ *See J.S.*, Docket No. 19-1203 (issued January 22, 2020); *see also B.C.*, Docket No. 18-1496 (issued May 22, 2019).

¹⁸ *S.C.*, Docket No. 19-1424 (issued September 15, 2020); *U.C.*, *supra* note 13.

Thus, the Board finds that his untimely request for reconsideration failed to demonstrate clear evidence of error.¹⁹

On appeal appellant's representative contends that appellant submitted sufficient medical evidence to establish that his right shoulder injury and resultant June 1, 2018 right shoulder surgery and resignation from the employing establishment were caused by the accepted January 30, 2017 employment incident. As explained above, the Board finds that the evidence submitted with the untimely reconsideration request is insufficient to meet appellant's burden of proof.

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.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 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

¹⁹ *Id.*