

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

_____)	
D.M., Appellant)	
)	
and)	Docket No. 20-1378
)	Issued: October 25, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
New Orleans, LA, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 July 10, 2020 appellant, through counsel, filed a timely appeal from a June 23, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from the last merit decision, dated January 20, 2015, to the filing of this

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.

² The Board notes that following the June 23, 2020 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.*

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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

This case has previously been before the Board on a different issue.⁵ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 9, 2001 appellant, then a 40-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he turned to pick up a bundle of mail and twisted his left knee while in the performance of duty. On May 4, 2001 OWCP accepted his claim for left knee strain. Appellant underwent an arthroscopic medial meniscectomy of his left knee on July 6, 2001. He returned to light-duty work on August 10, 2001. By decision dated May 6, 2003, OWCP granted appellant a schedule award for nine percent permanent impairment of his left lower extremity.

Appellant accepted a light-duty job on August 11, 2010 as a modified city carrier with limited standing, walking, grasping, and lifting above the shoulders. He filed claims for compensation (Form CA-7) for disability from work for the period August 11, 2010 through August 12, 2011.

OWCP subsequently expanded its acceptance of the claim to include sprain of the left medial collateral ligament and tear of the medial meniscus of the left knee. On April 25, 2012 it paid appellant wage-loss compensation on the periodic rolls, effective January 28, 2012.

On June 10, 2013 appellant returned to work four hours a day as a modified city carrier.

By decision dated August 28, 2013, OWCP reduced appellant's wage-loss compensation benefits based on his actual earnings of 20 hours a week as a limited-duty modified city carrier finding that this position fairly and reasonably represented his wage-earning capacity.

In a February 28, 2013 report, Dr. Lewis C. Jones, an orthopedic surgeon, noted appellant's employment injury and medical history. He reported that appellant's condition had worsened such

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. 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.*

⁵ Docket No. 12-1563 (issued November 28, 2012).

that he exhibited significant osteoarthritis in his left knee. Dr. Jones also noted that appellant was morbidly obese and recommended repeated injections.

On September 11, 2013 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of total disability on September 9, 2013 causally related to his April 9, 2001 employment injury. He asserted that his knees continued to swell after his return to work.

In a September 12, 2013 development letter, OWCP advised appellant of the deficiencies of his recurrence claim. It requested additional factual and medical evidence from him and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

OWCP subsequently received an August 8, 2013 note from Dr. Jones who reported that appellant was experiencing left knee pain and that he was required to walk at work for four hours a day. Dr. Jones noted that appellant was experiencing soreness with popping and occasional sharp shooting pains. On September 10, 2013 he opined that appellant was permanently disabled from work, due to degenerative joint disease (DJD) of the left knee. Dr. Jones completed a narrative report on September 17, 2013 and described appellant's history of injury in April 2001 as well as the resulting surgery. He opined that appellant had developed progressive arthritis of the knee and that he was treated with injections. Dr. Jones reported that appellant was standing or walking less than four hours a day at work. He found that appellant's condition was complicated by his left lower extremity radiculopathy, a 2003 back surgery, and morbid obesity. Dr. Jones recommended a left total knee arthroplasty and found that appellant was totally disabled from work due to left leg pain. In a separate September 17, 2013 note, he reported that appellant needed to elevate his leg at work. Dr. Jones opined that, if appellant could elevate his leg at work during a 30-minute break, then "maybe" he could continue to work up to 4 hours a day. He also noted that appellant had problems with diabetes and ulcers in his leg.

In a September 26, 2013 response to OWCP's development questionnaire, appellant alleged that within a few days of returning to work on June 10, 2013 his left knee and leg began to swell causing severe pain. He also noted that he experienced knee popping when arising, standing, or walking while working. Appellant asserted that his required work duties of climbing stairs, walking, and standing had aggravated his previous injuries.

By decision dated October 29, 2013, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish that he was totally disabled from work due to a material change in his accepted employment injury. On November 4, 2013 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a February 3, 2014 note, Dr. Jones indicated that appellant had preexisting knee arthritis in the mid 1990's. He opined that appellant could have developed arthritis in the left knee which could have aggravated appellant's preexisting arthritis and sped up the deterioration process. Dr. Jones further noted that appellant's morbid obesity attributed to the progression of the arthritis in his left knee.

A hearing was held on May 8, 2014. By decision dated July 23, 2014, OWCP's hearing representative affirmed the October 29, 2013 decision. She found that appellant had not established a recurrence of total disability on or after September 10, 2013 causally related to his

accepted April 9, 2001 employment injury as he alleged that additional work factors caused or contributed to his current condition.

In a September 16, 2014 note, Dr. Jones found that appellant had disabling pain in his left knee and could not walk, stand, or sit as he needed to elevate his knee. He reviewed appellant's x-rays and found severe arthritis in the left knee with medial collapse bone-on-bone apposition, articular spurs, and sclerotic changes. Dr. Jones recommended appellant undergo a left total knee replacement.

On October 22, 2014 appellant, through counsel, requested reconsideration of the July 23, 2014 decision and submitted additional evidence. In an October 2, 2014 note, Dr. Jones noted appellant's work injury in 2001, resulting arthroscopic surgery, and diagnosed severe arthritis in the left knee. He reported that appellant had narrowing of the medial joint as demonstrated by x-rays beginning in 2002 or 2003 which had progressed. Dr. Jones further indicated that appellant was morbidly obese which added to the deterioration of his knee. He also noted that appellant had mild right knee arthritis, but that his left knee arthritis was worse which he felt was due to appellant's original work injury of meniscal tear.

On October 16, 2014 Dr. Jones reviewed appellant's history of injury and medical treatment. He opined that although it was possible that appellant had preexisting arthritis of the left knee, the progression of this disease was causally related to his employment injury. Dr. Jones again recommended a left total knee replacement.

By decision dated January 20, 2015, OWCP denied modification of its prior decision.

On June 4, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for a second opinion examination with Dr. Douglas C. Brown, an orthopedic surgeon.

In a July 5, 2019 note, Dr. Val Irion, a Board-certified orthopedic surgeon, reported examining appellant's left knee. He noted appellant's history of injury and treatment with Dr. Jones. On physical examination Dr. Irion found crepitus in the left knee, venous stasis changes in the left ankle, and tenderness to palpation about the joint line. He reported sensory changes in appellant's foot consistent with neuropathy. Dr. Irion reviewed appellant's x-rays and found moderate-to-severe degenerative joint disease. He recommended a left total knee arthroplasty.

In a June 25, 2019 report, Dr. Brown described appellant's history of injury and medical treatment. He noted that appellant had degenerative arthritis of his left knee from previous military injuries. Dr. Brown reported that appellant presented in a motorized wheelchair, but was able to get out of the chair and stand briefly. He examined appellant's left knee x-rays and found posterior compartment loose bodies as well as bone-on-bone tibiofemoral articulation. Dr. Brown found that appellant continued to experience work residuals as his left knee had sustained progressive arthritic changes aggravated by the work-related meniscal tear. He diagnosed chronic long-term left knee osteoarthritis with intraarticular osteochondromatosis, loose bodies, and severe degenerative arthritis. Dr. Brown recommended a left total knee replacement. He found that appellant was not capable of returning to his date-of-injury position as a city carrier. Dr. Brown completed a work capacity evaluation (Form OWCP-5c) and found that appellant could work four hours a day with restrictions. He opined that appellant could sit for 4 hours, walk for 30 minutes,

and stand for 30 minutes. Dr. Brown restricted twisting to two hours a day, pushing and pulling to two hours each up to 25 pounds, lifting to one hour and 10 pounds.

On August 7, 2019 Dr. Kevin Kuhn, a Board-certified orthopedic surgeon, serving as district medical adviser (DMA) reviewed appellant's history of injury and opined that the proposed left total knee replacement was not employment related. He found that there was no evidence of causal relationship between the accepted April 9, 2001 employment injury and the requested surgery. Dr. Kuhn noted that appellant's claim had not been accepted for osteoarthritis and therefore, the need for total knee replacement due to this condition was not employment related. He further found that appellant did not meet the criteria for a left total knee replacement due to his body mass index and the lack of evidence from the left knee arthroscopy that there was severe osteoarthritis at the time of this surgery.

In an October 10, 2019 note, Dr. Irion opined that appellant's accepted injury included left knee medial meniscus tear and partial medial meniscectomy which had led to osteoarthritis over time. He noted that because the meniscus was resected at the time of surgery, appellant had developed arthritic changes within the knee secondary to this resection. Dr. Irion requested that the acceptance of appellant's claim be expanded to include osteoarthritis of the left knee.

On November 21, 2019 appellant, through counsel, requested reconsideration of the January 20, 2015 merit decision. Counsel contended that Dr. Brown was sufficient to support appellant's recurrence claim.

By decision dated June 23, 2020, 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.⁶ OWCP's regulations⁷ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one-year also accompanies any subsequent merit decision on the issues.⁸ Timeliness is determined by the document receipt date, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁰

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's final merit decision was

⁶ 5 U.S.C. § 8128(a); *L.H.*, Docket No. 19-1174 (issued December 23, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁷ 20 C.F.R. § 10.607(a).

⁸ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁰ *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).

in error.¹¹ 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.¹² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁶ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

¹¹ *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).

¹² *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹³ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *S.T.*, *supra* note 10; *C.V.*, *supra* note 11; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ *S.T.*, *supra* note 10; *E.P.*, *supra* note 13; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 13; *C.V.*, *supra* note 11; *Leon J. Modrowski*, *supra* note 11; *Jesus D. Sanchez*, *supra* note 11.

¹⁷ *V.G.*, *supra* note 13; *E.P.*, *supra* note 13; *Leona N. Travis*, *supra* note 15.

¹⁸ *L.B.*, *supra* note 16.

¹⁹ *D.G.*, *supra* note 12; *Leon D. Faidley, Jr.*, *supra* note 10.

²⁰ *C.V.*, *supra* note 11; *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 OWCP properly determined that appellant's request for reconsideration was untimely filed.²¹

The most recent merit decision was OWCP's January 20, 2015 decision which found that the evidence of record was insufficient to establish a recurrence of total disability on or after September 9, 2013. As appellant's request for reconsideration was not received by OWCP until November 21, 2019, more than one year after the January 20, 2015 merit decision, it was untimely filed.²² Consequently, he must demonstrate clear evidence of error by OWCP in denying the claim.

The Board further finds, however, that the medical evidence of record raises a substantial question as to the correctness of OWCP's January 20, 2015 decision and is sufficient to demonstrate clear evidence of error.²³

The underlying issue in this case is whether appellant has established a recurrence of total disability on September 9, 2013 causally related to his April 9, 2001 employment injury. On June 4, 2019, four years after the last merit decision dated January 20, 2015, OWCP *sua sponte* referred appellant to a second opinion physician, Dr. Brown, obtaining additional relevant medical opinion evidence.

In his June 25, 2019 report, Dr. Brown opined that appellant was partially disabled from work, that he continued to experience work residuals as his left knee had sustained progressive arthritic changes aggravated by the employment-related meniscal tear, and that he was incapable of returning to his date-of-injury position. Dr. Brown completed a Form OWCP-5c, provided work restrictions, and also recommended that appellant undergo a total left knee replacement. His report addressed the issue of appellant's recurrence of total disability. As this second opinion report raises a substantial question as to the correctness of OWCP's January 20, 2015 decision,²⁴ The Board finds that OWCP abused its discretion in denying appellant's untimely request for reconsideration.²⁵

The Board thus finds that OWCP improperly denied appellant's request for reconsideration as the record demonstrates clear evidence of error in this case. The Board will reverse OWCP's June 23, 2020 decision and remand the case for an appropriate decision on the merits of his claim.

²¹ *G.R.*, Docket No. 19-1886 (issued February 22, 2021).

²² 20 C.F.R. § 10.607(b); *C.S.*, Docket No. 20-1075 (issued December 31, 2020); *Debra McDavid*, 57 ECAB 149 (2005).

²³ *G.R.*, *supra* note 21; *P.A.*, Docket No. 20-0061 (issued January 29, 2021); *W.H.*, Docket No. 20-0395 (issued October 23, 2020); *V.M.*, Docket No. 18-1184 (issued July 10, 2019).

²⁴ *B.C.*, Docket No. 20-0465 (issued November 19, 2020); *see, A.B.*, Docket No. 10-1070 (issued March 8, 2011).

²⁵ *V.M.*, *supra* note 23.

CONCLUSION

The Board finds that appellant has demonstrated clear evidence of error in OWCP's January 20, 2015 merit decision and, thus, OWCP improperly denied her request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2020 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.

Issued: October 25, 2021
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