

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

_____)	
L.E., Appellant)	
)	
and)	Docket No. 20-1269
)	Issued: February 3, 2022
DEPARTMENT OF VETERANS AFFAIRS, VA)	
MEDICAL CENTER, New Orleans, LA,)	
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 June 11, 2020 appellant filed a timely appeal from a December 16, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, October 23, 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 to review the merits of this claim.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence to OWCP following the December 16, 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 November 25, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has been previously before the Board on a different issue.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 6, 1998 appellant, then a 44-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that on that day she sustained injuries to her neck, back, and both knees while in the performance of duty. In an attached statement, she reported that she fell on the floor when transferring a patient from his wheelchair to his bed. Appellant stopped work on May 7, 1998. On June 18, 1998 OWCP accepted that she sustained a right knee sprain. It subsequently expanded its acceptance of the claim to include a right knee medial meniscus tear and traumatic arthritis of the right knee. The employing establishment terminated appellant's employment, effective June 12, 1998, during her one-year probationary period. OWCP paid her wage-loss compensation on the daily and periodic rolls.

On September 2, 1998 Dr. M. Essam Elmorshidy, an orthopedic surgeon, performed authorized arthroscopic repair of a right medial meniscus tear with debridement of severe chondromalacia of the medial femoral condyle and patella.

Appellant returned to full-time limited-duty work on May 4, 1999 at a private hospital.

On June 8, 2000 Dr. Alain F. Cracco, a Board-certified orthopedic surgeon, performed an authorized arthroscopic chondroplasty of the right medial femoral condyle and patellofemoral joint.

On January 16, 2001 appellant returned to part-time modified-duty work as a call center specialist at the employing establishment.

OWCP received reports dated from March 24, 2008 through January 29, 2009 by Dr. M. Jonathan York, a Board-certified orthopedic surgeon. On examination Dr. York observed restricted range of motion of both knees, moderate-to-severe crepitus in the left knee, patellofemoral and lateral compartment arthritis of the left knee, and a moderately severe left knee patellofemoral arthrosis. From April through June 2009, appellant was followed by Dr. Rami I. Calis, a podiatrist, who diagnosed bilateral ankle degenerative joint disease and a history of a left foot and ankle sprain.

In a July 21, 2010 report, Dr. Stephen W. Smith, a Board-certified orthopedic surgeon, provided reports dated July 21, 2010 through January 14, 2013, diagnosing severe degenerative arthritis of the right knee unresponsive to conservative treatment. On July 9 2013 he performed

³ Docket No. 05-0590 (issued September 12, 2005).

OWCP-authorized right knee total arthroplasty. On October 8, 2013 Dr. Smith performed an OWCP-authorized closed manipulation of the right knee to address postsurgical adhesive capsulitis. He submitted postsurgical progress notes. Appellant remained off work.

On July 3, 2014 OWCP obtained a second opinion on appellant's continuing condition and work capacity by Dr. Eric S. Furie, a Board-certified orthopedic surgeon. On examination Dr. Furie noted limited range of motion of both knees and a stable right knee implant. He opined that appellant's right knee condition had attained maximum medical improvement (MMI). Dr. Furie returned appellant to full-time sedentary work.

In reports dated from January 27, 2014 through August 22, 2018, Dr. Smith diagnosed severe tricompartmental degenerative arthritis of the left knee requiring a total left knee replacement. He opined, in a June 17, 2015 report, that appellant's left knee had "degenerated secondary to compensating for her severe degenerative arthritis and right knee replacement." Dr. Smith reiterated, in an August 22, 2018 report, that the proposed total left knee arthroplasty was necessitated by the accepted injury.

In a September 4, 2018 development letter, OWCP advised appellant of the additional evidence needed to establish that the requested total left knee arthroplasty was causally related to the accepted employment injury. It afforded her 30 days to submit additional evidence.

In response, appellant provided an August 22, 2018 addendum report from Dr. Smith noting that she was totally disabled for work and could not perform light-duty work.

By decision dated October 23, 2018, OWCP denied the requested total left knee arthroplasty.

OWCP received a December 7, 2018 report by Dr. Smith noting that appellant was status-post right total hip replacement and right total knee replacement. Dr. Smith opined that both procedures were causally related to the accepted injury.

On September 10, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received an October 14, 2019 report by Dr. Smith, who obtained x-rays demonstrating severe patellofemoral degenerative arthritis of the left knee and a stable right knee replacement. Dr. Smith diagnosed lumbar spinal stenosis with leg weakness and balance problems, and severe patellofemoral compartment degenerative arthritis of the left knee.

By decision dated October 23, 2019, OWCP denied appellant's hearing request. It found that the request was untimely filed as it was postmarked more than 30 days after its October 23, 2018 decision. After exercising its discretion, OWCP further found that the issue in the case could equally well be addressed through the reconsideration process.

On November 25, 2019 appellant requested reconsideration of the October 23, 2018 decision.

By decision dated December 16, 2019, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. OWCP indicated that it had considered her "request under 20 C.F.R. § 10.607(b)" to determine whether it "presented clear evidence that [OWCP's] last merit decision was incorrect." It concluded that it "did not receive clear evidence that your case should be expanded to include a left knee injury due to your May 6, 1998 work injury, and there was no clear medical evidence to support that you need a left knee arthroplasty due to your original work injury."

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 (*i.e.*, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that its most recent merit decision was in error.⁸ OWCP's 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.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ 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

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 2020).

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).

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 (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.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

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 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

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 demonstrates 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.¹³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant's November 25, 2019 request for reconsideration was untimely filed.

OWCP's regulations¹⁵ and procedures¹⁶ 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.¹⁷ The most recent merit decision was OWCP's October 23, 2018 decision. As appellant's request for reconsideration was received on November 25, 2019, more than one year after the October 23, 2018 merit decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in its October 23, 2018 decision.¹⁸

¹² *M.D.*, Docket No. 20-0868 (issued April 28, 2021); *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹³ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹⁴ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁵ 20 C.F.R. § 10.607(a); *see J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁶ *Supra* note 6 at Chapter 2.1602.4 (February 2020); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ 20 C.F.R. § 10.607(b); *see A.M.*, Docket No. 20-0143 (issued October 28, 2020); *Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ *Id.* at § 10.607(b); *see M.W.*, Docket No. 17-0892 (issued May 21, 2018); *see S.M.*, Docket No. 16-0270 (issued April 26, 2016).

The Board further finds, however, that the case is not in posture for decision as to whether appellant's November 25, 2019 reconsideration request demonstrated clear evidence of error.

OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.¹⁹ Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.²⁰ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.²¹ As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²²

In denying appellant's untimely reconsideration request, OWCP failed to analyze whether it was sufficient to demonstrate clear evidence of error. The December 16, 2019 decision simply noted that OWCP considered her "request under 20 C.F.R. § 10.607(b)" to determine whether it "presented clear evidence that [OWCP's] last merit decision was incorrect." It concluded that it "did not receive clear evidence that your case should be expanded to include a left knee injury due to your May 6, 1998 work injury, and there was no clear medical evidence to support that you need a left knee arthroplasty due to your original work injury."

However, OWCP provided no discussion relative to the medical evidence submitted following the October 23, 2018 merit decision.²³

The Board finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether she had demonstrated clear evidence that OWCP's last merit decision was incorrect.²⁴ The Board will therefore set aside OWCP's December 16, 2019 decision and remand the case for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

¹⁹ *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607.

²⁰ 5 U.S.C. § 8124(a).

²¹ 20 C.F.R. § 10.126.

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²³ *See M.D.*, *supra* note 12; *see also Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

²⁴ 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (February 2020).

CONCLUSION

The Board finds that OWCP properly determined that appellant's November 25, 2019 request for reconsideration was untimely filed. However, the Board further finds that the case is not in posture for decision with regard to whether the untimely reconsideration request demonstrates clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 3, 2022
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