

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

G.B., Appellant	)	
	)	
and	)	<b>Docket No. 21-0800</b>
	)	<b>Issued: January 11, 2024</b>
U.S. POSTAL SERVICE, WEXFORD POST	)	
OFFICE, Wexford, PA, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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 April 29, 2021 appellant, through counsel, filed a timely appeal from an April 21, 2021 nonmerit decision of the Office of Workers' Compensation Programs. As more than 180 days has elapsed from the last merit decision dated September 27, 2019 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

**ISSUE**

The issue is whether OWCP properly denied appellant's January 22, 2021 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>1</sup> 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 an 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.

## **FACTUAL HISTORY**

On April 9, 2019 appellant, then a 52-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee injury on July 24, 2019 when delivering a parcel to a resident's front porch while in the performance of duty. He provided that precise address on his route. On the reverse side of the claim form his supervisor, S.K., indicated by checking a box marked "Yes" that he was injured in the performance of duty. Appellant stopped work on July 24, 2019 and returned to modified duty on August 5, 2019. OWCP assigned File No. xxxxxx638.<sup>2</sup>

In a letter dated July 25, 2019, L.S., an operations director for Concentra Medical Centers, indicated that appellant had inquired about a work-related injury. She noted that she advised him that he needed to contact workers' compensation.

In a statement dated July 26, 2019, appellant indicated that on July 24, 2019 he injured his left knee while taking a package to a resident's porch area. He explained that he felt a piercing twinge and pop in his left knee, which worsened as he completed his route. Appellant noted that he reported the incident to the supervisor that was on shift.

In a letter also dated July 26, 2019, S.K. controverted the claim, alleging that appellant's claim was untimely, that he did not describe a specific event, and that he was not sure whether he sustained a new injury or a reoccurrence of a previous injury. In a separate accident report of even date, Postmaster J.K. indicated that appellant reported that on July 24, 2019 he felt a sharp twinge of pain while delivering a parcel to the porch of a residence.

In a medical report dated July 26, 2019, Dr. John Stuart, an occupational medicine specialist, noted that appellant presented for complaints of left knee pain which appellant attributed to an incident on July 24, 2019 when he was taking packages to a house and stepped awkwardly on gravel and felt a twinge and pop in his left anterior medial knee. He detailed a prior history of a work-related left knee strain on May 17, 2018 and related treatment, including a magnetic resonance imaging (MRI) scan on June 23, 2018 that showed chondromalacia in all compartments with effusion. On physical examination, Dr. Stuart documented joint pain, limping, and tenderness to palpation of the left knee. He diagnosed left knee strain and an exacerbation of a preexisting condition. Dr. Stuart released appellant to return to work with restrictions of sitting 80 percent of the workday with no squatting, kneeling, or climbing stairs.

In a medical report dated July 29, 2019, Dr. Darrin Paulovich, an occupational medicine specialist, related a history of appellant injuring his left knee due to walking awkwardly on gravel while delivering a parcel on July 24, 2019. He performed a physical examination, which revealed tenderness to palpation over the medial joint line, but was otherwise normal. Dr. Paulovich diagnosed a left knee strain and released appellant to return to work sitting 90 percent of the workday with no squatting, kneeling, or climbing stairs.

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<sup>2</sup> OWCP previously accepted a January 5, 2015 traumatic injury claim for a left knee and lower leg contusion, left knee and leg sprain, and left wrist sprain under OWCP File No. xxxxxx473 and accepted a May 17, 2018 traumatic injury claim for a left knee strain under OWCP File No. xxxxxx327. OWCP has administratively combined OWCP File Nos. xxxxxx473, xxxxxx327, and xxxxxx638, with OWCP File No. xxxxxx473 serving as the master file.

Physical therapy records dated between July 29 and August 5, 2019 signed by Eric Lehman, a physical therapist, included a diagnosis of unspecified strain of the left lower extremity and noted that appellant showed some improvement in range of motion, strength, and function, but continued to experience pain and a sensation of locking and giving-way in the left knee.

In a follow-up note dated August 5, 2019, Dr. Paulovich reiterated the history and mechanism of injury of the July 24, 2019 incident and diagnosed a left knee strain. He opined that appellant could return to work sitting 75 percent of the workday with no squatting, kneeling, or climbing stairs.

In a report dated August 9, 2019, Dr. Stuart noted that appellant reported left knee soreness, which was improving. He performed a physical examination and diagnosed a left knee strain. Dr. Stuart opined that appellant may require MRI scan studies of the left knee if appellant's symptoms did not improve by his next visit. He released appellant to return to work with restrictions of sitting 60 percent of the time with no squatting, kneeling, or climbing stairs.

Additional physical therapy notes dated August 7 through 15, 2019 continued to document appellant's ongoing complaints of pain and instability.

In an August 22, 2019 development letter, OWCP informed appellant that, when his claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time for work and it had now reopened his claim for consideration of the merits. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion to provide further details regarding the circumstances of his claimed injury. OWCP afforded appellant 30 days to respond.

OWCP continued to receive evidence. In an August 19, 2019 medical report, Dr. Stuart noted that appellant related complaints of ongoing left anterior/medial knee pain, which was worse with stair climbing, and a popping sensation which he attributed to the claimed July 24, 2019 incident. He diagnosed a strain of the left knee and recommended an MRI scan. Dr. Stuart maintained appellant's restrictions of sitting 60 percent of the workday, with no squatting, kneeling, or climbing stairs.

Appellant submitted additional physical therapy reports dated August 14 through September 6, 2019. A note dated September 6, 2019 indicated that he had fallen on his lower back recently, but was not having any new left knee symptoms.

By decision dated September 27, 2019, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the incident occurred as alleged. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence, including a September 27, 2019 medical note by Dr. Stuart, who noted that appellant complained of left knee soreness which he attributed to the July 24, 2019 employment incident, and that the left knee MRI scan had not been approved. Dr. Stuart continued to diagnose a left knee strain and recommended an MRI scan. He released appellant to return to work restrictions of sitting 50 percent of the workday with no squatting, kneeling, or climbing stairs.

On January 22, 2021 appellant, through counsel, requested reconsideration of OWCP's September 27, 2019 decision and resubmitted Dr. Paulovich's August 5, 2019 report.

By decision dated April 21, 2021, 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.<sup>3</sup> 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.<sup>4</sup> Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).<sup>5</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>10</sup> 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

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<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> *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 5 at Chapter 2.1602.5 (February 2016).

<sup>9</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>10</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

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.<sup>11</sup>

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.<sup>12</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The last merit decision of record was OWCP's September 27, 2019 decision. As appellant's request for reconsideration was received by OWCP on January 22, 2021, more than one year after the September 27, 2019 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim.<sup>14</sup>

The Board further finds that the evidence submitted in support of appellant's untimely request for reconsideration raises a substantial question as to the correctness of OWCP's September 27, 2019 merit decision and is sufficient to demonstrate clear evidence of error.<sup>15</sup>

In its September 27, 2019 decision, OWCP found that the factual evidence was insufficient to establish that the July 24, 2019 employment incident occurred as alleged, noting that the record was unclear as to how appellant's injury actually occurred. On reconsideration, appellant argued that the evidence of fact of injury was ignored at the time of the denial. The Board finds, the incident was clearly described on his Form CA-1, to his medical providers, and in his July 26, 2019 statement. He explained that he was taking packages to a house and felt a twinge and pop in his left anterior medial knee. Further appellant resubmitted an August 5, 2019 note from Dr. Paulovich previously of record, which documented this history. Appellant, therefore, submitted evidence which demonstrates that OWCP erred in its September 27, 2019 merit decision.

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<sup>11</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>12</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5a (September 2020).

<sup>13</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>14</sup> *Supra* note 5; *see also B.P.*, Docket No. 20-0179 (issued August 23, 2021); *F.L.*, Docket No. 21-0304 (issued July 13, 2021).

<sup>15</sup> *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).

As such, OWCP abused its discretion in failing to reopen his claim for further merit review.<sup>16</sup> The Board will reverse OWCP's September 27, 2019 decision and remand the case for an appropriate decision on the merits of appellant's claim.

**CONCLUSION**

The Board finds that appellant has demonstrated clear evidence of error in OWCP's September 27, 2019 merit decision and, thus, OWCP improperly denied his request for reconsideration of the merits of his claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 21, 2021 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: January 11, 2024  
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

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<sup>16</sup> See, e.g., *A.B.*, Docket No. 10-1070 (issued March 8, 2011).