

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

C.C., Appellant)	
)	
and)	Docket No. 21-0896
)	Issued: December 2, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, Houston, TX, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On May 3, 2021 appellant filed a timely appeal from a March 8, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated July 16, 2004 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 Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 26, 2002 appellant, then a 56-year-old deportation assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured both knees when she heard someone shout that "someone had a gun" and dropped to the floor on her knees while in the performance of duty. She did not stop work. OWCP accepted appellant's claim for bilateral knee contusions.

In order to determine her current condition, OWCP referred appellant, along with a statement of accepted facts (SOAF) and series of questions, for a second opinion examination and evaluation with Dr. David J. Vanderweide, a Board-certified orthopedic surgeon. In a report dated April 27, 2004, Dr. Vanderweide detailed physical examination findings, noting that appellant reported no locking, catching, giving way, or swelling of the right knee. He observed that appellant had mild residual discomfort of the accepted September 26, 2002 contusion to the left knee, but had no residual right knee symptoms of the accepted right knee contusion.

In a May 11, 2004 report, Dr. Thaddeus W. Hume, a Board-certified orthopedic surgeon, discussed the September 26, 2002 employment injury and noted that appellant was subsequently diagnosed with left knee arthritis. He recommended conservative treatment.

In a notice dated June 1, 2004, OWCP proposed to terminate appellant's medical benefits for treatment of her accepted right knee condition. It advised appellant that the weight of the medical opinion evidence rested with the opinion of Dr. Vanderweide, which demonstrated that her accepted condition of right knee contusion had resolved. OWCP advised appellant that she would continue to receive medical benefits for her accepted left knee condition and afforded her 30 days to submit evidence challenging the proposed termination action.

In a letter dated June 28, 2004, received by OWCP on July 6, 2004, appellant contested the proposed termination of medical benefits for her right knee. She requested that she be allowed to undergo additional diagnostic testing before OWCP terminated her benefits.

Appellant submitted a July 12, 2004 report from Dr. Hume who noted that appellant continued to complain of intermittent pain in her left knee, but that her overall condition had shown some improvement. She reported that she continued to be bothered with intermittent pain in her right knee with certain levels of activity like moving from a prolonged sitting position to a standing position. Dr. Hume advised that examination of the right knee revealed no significant swelling or instability, although there was some mild-to-moderate crepitus. The Apley's and McMurray's tests for the right knee were negative. Dr. Hume noted, "[i]n terms of problems related to both knees as a result of [appellant's] injury, I suspect that she did have some preexisting arthritis prior to her fall that may have been aggravated."

² Docket No. 08-2226 (issued May 13, 2009).

By decision dated July 16, 2004, OWCP terminated appellant's medical benefits for treatment of her accepted right knee condition, effective that date. It continued to pay medical treatment benefits for her left knee condition.

On June 8, 2008 appellant requested reconsideration of the July 16, 2004 decision. She submitted medical evidence, including reports of Dr. Hume dated October 11, 2004 through February 8, 2008.

By decision dated July 3, 2008, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board and, by decision dated May 13, 2009,³ the Board affirmed OWCP's July 3, 2008 decision, finding that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

Appellant submitted additional evidence after OWCP issued its July 3, 2008 decision. In an undated letter, she asserted that she continued to have pain and swelling in her right knee. In a December 19, 2020 statement, appellant argued that OWCP improperly terminated medical benefits for her right knee because Dr. Hume continued to treat her right knee symptoms, which had persisted since her September 26, 2020 employment injury.

On March 3, 2021 appellant requested reconsideration. She argued that a report from Dr. Hume submitted in July 2004, as well as other medical evidence of record, demonstrated that she continued to have residuals of the accepted September 26, 2002 employment injury to her knees. Appellant further argued that she had continuing symptoms in both knees, which she related to the September 26, 2002 employment injury and; therefore, OWCP improperly terminated medical benefits for the treatment of her right knee condition.

In support of her reconsideration request, appellant submitted an April 8, 2005 narrative report, wherein Dr. Hume noted that examination of appellant's right knee revealed some crepitus, but that the Apley's and McMurray's tests for the knee were negative. In an August 25, 2014 report, Dr. Hume noted that appellant was under his care for injuries sustained to her left knee while on the job. He advised that, upon physical examination, appellant exhibited moderate crepitus in the left knee.

OWCP continued to receive narrative medical reports from Dr. Hume, dated December 21, 2006 through February 25, 2021, who provided physical examination findings of the knees, reviewed diagnostic testing, recommended conservative medical treatment, and diagnosed arthritis and degenerative conditions of the knees. Dr. Hume advised that there was no indication for surgery.

In a number of the submitted narrative reports, including those dated: February 8, 2008; May 17 and November 15, 2012; May 17 and August 22, 2013; February 21 and August 25, 2014; August 18, 2015; February 18 and August 19, 2016; September 25, October 31 and December 20, 2017; November 2, 2018; and February 25, 2020, Dr. Hume indicated that appellant sustained a

³ *Id.*

left knee injury on September 26, 2002 and had, as a result, developed progressive joint disease and post-traumatic arthritis of the left knee.

In an August 8, 2008 report, Dr. Hume indicated that appellant continued to complain of intermittent pain in her left knee, as well as pain and swelling in her left calf. He indicated that, upon physical examination, he observed some fullness in appellant's left popliteal space consistent with a probable Baker's cyst due to her arthritis. Dr. Hume advised that he had adjusted appellant's medications and that he would continue treating appellant with conservative measures. In April 16 and 21, 2009 reports, he noted that appellant complained of increased right knee pain and difficulty walking. Dr. Hume indicated that appellant had progressive degenerative disease in her left knee and placed more weight on her right side. He opined that it was probable that her right knee condition was a result of the persistent pain in her left knee.

Appellant also submitted handwritten treatment notes from Dr. Hume, dated August 8, 2008 through November 17, 2011. The notes primarily detailed appellant's knee symptoms, including pain, swelling, and popping sensation. Appellant also submitted range of motion and muscle strength test results from December 3, 2009 through November 17, 2011.

By decision dated March 8, 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.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 request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁸ If a request for

⁴ 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.607(a).

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

reconsideration demonstrates clear evidence of error, OWCP 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.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² 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.¹³ 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.¹⁴

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁵ The claimant must present evidence which on its face shows that OWCP made an error.¹⁶ 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.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸

ANALYSIS

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

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 (September 2020).

¹⁰ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹² *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁴ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

¹⁵ *See supra* note 9 at Chapter 2.1602.5(a) (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁶ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

¹⁷ *Id.*

¹⁸ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

The last merit decision was OWCP's July 16, 2004 decision. As appellant's request for reconsideration was not received by OWCP until March 3, 2021, more than one year after issuance of its July 16, 2004 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its July 16, 2004 decision.

In support of her untimely reconsideration request, appellant submitted several statements in which she argued that she had continuing right knee symptoms and that the medical evidence of record demonstrated that she still had residuals of the September 26, 2002 employment injury in her right knee, which necessitated continued medical treatment. The Board notes, however, appellant did not explain how this argument raised a substantial question as to the correctness of OWCP's July 16, 2004 decision.¹⁹

Appellant also submitted narrative medical reports from Dr. Hume, dated August 25, 2004 through February 25, 2021, who provided physical examination findings of the knees, reviewed diagnostic testing, recommended conservative medical treatment, and diagnosed arthritis and degenerative conditions of the knees. Dr. Hume advised that there was no indication for surgery. In a number of the submitted narrative reports, including those dated February 8, 2008; May 17 and November 15, 2012; May 17 and August 22, 2013; February 21 and August 25, 2014; August 18, 2015; February 18 and August 19, 2016; September 25, October 31 and December 20, 2017; November 2, 2018; and February 25, 2020, he indicated that appellant sustained a left knee injury on September 26, 2002 and had, as a result, developed progressive joint disease and post-traumatic arthritis of the left knee. In an August 8, 2008 report, Dr. Hume advised that appellant had a Baker's cyst in her left knee due to her arthritis and, in April 16 and 21, 2009 reports, he opined that it was probable that the right knee condition was a result of appellant favoring her left knee.

The Board notes, however, that OWCP has only accepted that appellant sustained bilateral knee contusions on September 26, 2002, and it has not accepted that she sustained arthritis or a degenerative condition of either knee due to that injury or another work-related cause. None of Dr. Hume's reports related appellant's right knee condition after July 16, 2004 to the accepted September 26, 2002 employment injury and Dr. Hume mere unsupported statements regarding a work-related arthritic/degenerative left knee condition or a consequential injury to the right knee would not raise a substantial question as to the correctness of OWCP's July 16, 2004 decision, which terminated medical benefits for treatment of appellant's accepted right knee condition, a right knee contusion.²⁰

Appellant submitted handwritten treatment notes from Dr. Hume, dated October 30, 2008 through November 17, 2011. The notes primarily detailed appellant's bilateral knee symptoms, including pain, swelling, and popping sensation. Appellant also submitted range of motion and muscle strength test results from December 3, 2009 through November 17, 2011. None of these documents contain an opinion on the cause of appellant's right knee symptoms and; therefore, they

¹⁹ See *supra* notes 12 and 14. The Board notes that OWCP has not terminated medical benefits for treatment of appellant's left knee condition.

²⁰ *Id.*

would not on their face show that OWCP erred when it terminated appellant's medical benefits for treatment of her right knee.²¹

As noted, clear evidence of error is intended to represent a difficult standard.²² Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.²³

The Board finds that the evidence submitted on reconsideration does not demonstrate on its face that OWCP committed error in its July 16, 2004 decision when it terminated medical benefits for treatment of her right knee.²⁴ Therefore, OWCP properly denied appellant's untimely request for reconsideration.

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.

²¹ *See supra* notes 15.

²² *See supra* note 19.

²³ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

²⁴ *See S.F.*, Docket No. 09-0270 (issued August 26, 2009).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board