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SAMUEL J. JOYNER, Appellant)	
)	
and)	Docket No. 04-327
)	Issued: June 3, 2004
U.S. POSTAL SERVICE, POST OFFICE,)	
Jacksonville, FL, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

On November 19, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 17, 2003, which denied reconsideration request as untimely and did not establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated June 13, 2002 and the filing of the appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office accepted appellant's claim for left knee medial meniscus tear, left knee femoral condyle and patella fracture with a loose body arising from an October 4, 1993 employment injury. Based on January 27, 1997 work restrictions by Dr. Hiram A. Carrasquillo,

a Board-certified orthopedic surgeon, the employing establishment offered appellant the job of modified casual clerk on April 1, 1997. Appellant accepted the job offer and began work on July 5, 1997. By decision dated September 5, 1997, the Office adjusted appellant's compensation to reflect his wage-earning capacity in the modified clerk position based on actual weekly wages of \$428.68. On November 12, 1997 the Office granted a schedule award for 15 percent loss of use of the left leg.

On October 20, 1998 appellant filed a claim for a recurrence of disability, commencing October 19, 1998 which he attributed to the October 4, 1993 employment injury. By decision dated December 22, 1998, the Office denied the claim. By decision dated March 19, 1999, the Office denied appellant's request for reconsideration. By decision dated October 18, 2001, the Office granted an increased schedule award for 22 percent impairment of the left leg.

On April 9, 2002 appellant filed a claim for a recurrence of disability, commencing April 10, 2000, due to the October 4, 1993 employment injury. Appellant explained that he was no longer working for the employing establishment because the modified clerk position ended on April 1, 1998.¹ Appellant stated that he was not rehired and when the job became available again in March 2001, he was unable to accept the position because he had just had surgery and moved from Florida. Appellant stated that he was currently participating in a federal work-study program with the Department of Veterans Affairs.

On March 19, 2001 appellant underwent an arthroscopy of the left knee with major synovectomy, microfracture of the medial femoral condyle and trochlea and removal of multiple loose bodies of the left knee.

In a progress note dated July 25, 2001, Dr. Frank F. Phillips, an attending Board-certified orthopedic surgeon, indicated that appellant had been out seven weeks and complained of knee popping when arising from a seated position but found that appellant was doing well and had reached maximum medical improvement. He stated that appellant had post-traumatic arthritis and a chondral defect of the medial femoral condyle that involved approximately 40 percent of the weight bearing surface. Dr. Phillips stated that appellant had a 20 percent impairment to his left knee. On April 10, 2001 he released appellant to return to work on April 23, 2001 and stated that it was okay for him to climb stairs.

In progress notes dated February 15 to April 11, 2002, Dr. Phillips indicated that appellant received three Synvisc injections. Dr. Phillips stated that appellant had full flexion and full extension and there was no crepitus with motion. He stated that appellant was back to his previous injury status, leaving him the same as on examination of July 25, 2001, with 20 percent impairment of his knee.

By letter dated May 23, 2002, the Office informed appellant that additional medical evidence was required.

¹ Appellant meant April 1, 1998.

By decision dated June 13, 2002, the Office denied the recurrence of disability claim, finding that the evidence of record failed to establish total disability in April 2000 or thereafter, except for the period March 15 to April 23, 2001 when he underwent surgery.

In an undated letter received by the Office on July 18, 2003, appellant requested reconsideration of the June 13, 2003 decision. Appellant explained during the prior two years and six months he had completed a four-year degree program in business management and prelaw studies. Appellant stated that as a participant in the work-study program he “was considered employed but at the federal minimum wage rate of \$5.15 an hour.” Appellant did not believe he was employable during the period of study and noted the program only allowed employees with a severe handicap to participate in the program. Appellant stated that, prior to working for the employing establishment, he had 10 percent service related disability to the left back and after sustaining his knee injury at work, he qualified for a Department of Veterans Affairs work-study program.

Appellant submitted medical reports dated from June 19, 2002 through May 29, 2003. Dr. Phillips noted ongoing difficulty with appellant’s knees and periods of disability. On October 2, 2002 Dr. Phillips stated that appellant recently got out of a car and developed pain in his left knee, which caused swelling. Dr. Phillips stated that there was no interim change in the medical history since appellant’s last visit on June 19, 2002 and found that an x-ray taken that day showed progression of appellant’s arthritis. Dr. Phillips stated that appellant was symptomatic and experienced an arthritic flare. He gave appellant an injection.

In a report dated January 27, 2003, Dr. Phillips noted that appellant had post-traumatic degenerative changes in the left knee and sought treatment for pain in his right knee, which was beginning to show degenerative changes. He stated that appellant’s right knee pain was due to overloading the knee from the result of his left knee arthritis. On March 25, 2003 Dr. Phillips diagnosed chondral fragmentation and chondromalacia. He indicated that appellant was totally disabled from February 22, 2003 to the present. On May 29, 2003 Dr. Phillips performed surgery for an autologous chondrocyte implantation of trochlea in the medial femoral condyle of the left knee.

By decision dated September 17, 2003, the Office denied appellant’s request for reconsideration, finding that the request was untimely. The Office also found that appellant failed to present clear evidence of error.

LEGAL PRECEDENT

The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.³ The Office will consider an untimely application for reconsideration only if the

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a). *See also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 548 (1990).

application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.⁸

ANALYSIS

In this case, the evidence appellant submitted with his untimely request for reconsideration does not establish clear error by the Office in the June 13, 2002 decision denying his claim for a recurrence of total disability commencing April 2000. The medical evidence from Dr. Phillips generally referred to appellant's disability after his March 19, 2001 surgery and assessed a 20 percent impairment to the left knee. In progress notes the physician gave appellant Synvisc injections. In his reports dated from June 19, 2002 through May 29, 2003, Dr. Phillips documented ongoing treatment of appellant's knees, noting pain in the right knee. Dr. Phillips performed additional surgery on appellant's left knee on May 29, 2003. The evidence, however, does not address the relevant issue of whether appellant was totally disabled as of April 10, 2000, due to the October 4, 1993 employment injury. The evidence is not relevant to showing clear evidence of error in the Office's June 13, 2002 decision.⁹

CONCLUSION

The Board finds that the Office properly denied appellant's July 18, 2003 request for reconsideration as untimely and failing to establish clear evidence of error.

⁴ 20 C.F.R. § 10.607(b); see *Thankamma Mathews*, 44 ECAB 765 (1983); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *Pete F. Dorso*, 52 ECAB 424, 427 (2001).

⁶ *Id.*; *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ See *Jesus D. Sanchez*, *supra* note 4.

⁸ *George C. Vernon*, 54 ECAB ____ (Docket No. 02-1954, issued January 6, 2003).

⁹ See *Barry C. Peterson*, 52 ECAB 120, 135 (2000).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2003 decision from the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member