

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

D.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dawson, GA, Employer**

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**Docket No. 06-1286
Issued: January 3, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2006 appellant filed a timely appeal of a February 14, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration as untimely and failing to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 10, 2001 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.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a January 14, 2003 decision, the Board found that the Office properly refused to reopen appellant's claim for further

merit review of her claim under 5 U.S.C. § 8128(a).¹ The law and the facts of the previous Board decision are incorporated herein by reference. Relevant facts are noted.

The Office accepted that on August 24, 1994 appellant, then a 43-year-old letter carrier, sustained a work-related temporary aggravation of a right medial meniscus tear and authorized total knee replacement surgery which was performed on July 28, 1995. On May 2, 1995 appellant was involved in a motor vehicle accident while going home from medical treatment for her employment-related injury and the Office accepted that she sustained cervical and lumbar spine strains. She retired from the employing establishment effective February 19, 1997. By decision dated December 23, 1999, the Office terminated appellant's medical benefits for her May 2, 1995 employment-related lumbar and cervical spine conditions and found that she had not sustained a consequential left knee injury. In a decision issued on February 23, 2000, the Office terminated appellant's wage-loss benefits effective February 26, 2000 on the grounds that she failed to accept an offer of suitable work. The Office found that she continued to be entitled to medical benefits for her August 24, 1994 employment-related right knee injury. By decision dated January 10, 2001, an Office hearing representative affirmed the Office's December 23, 1999 and February 23, 2000 decisions. In decisions dated July 24, 2001 and February 25, 2002, the Office denied appellant's March 15, 2000 and January 2, 2002 requests for reconsideration, respectively, on the grounds that they were immaterial, cumulative and duplicative in nature and, thus, insufficient to warrant further merit review.

By decision dated June 2, 2004, the Office denied appellant's April 7, 2004 request for reconsideration of the Office hearing representative's January 10, 2001 decision as untimely and failing to establish clear evidence of error.

On June 14, 2005 appellant submitted an August 2, 2000 medical report of Dr. Arepally V. Rao, a Board-certified physiatrist, which stated that appellant had constant symptoms related to her right knee, neck and shoulder. Dr. Rao stated that appellant's back problems were due to the May 2, 1995 employment injury. He further stated that she had left knee symptoms related to the employment-related right knee injury. Dr. Rao opined that appellant was totally disabled for work.

In letters dated January 6 and November 28, 2005, appellant again requested reconsideration of the hearing representative's January 10, 2001 decision. She submitted correspondence dated September 11, 2000 from the employing establishment requesting that the Office affirm the December 23, 1999 decision. On July 21, 1995 the Office authorized the request of Dr. John I. Waldrop, an attending Board-certified orthopedic surgeon, to perform right total knee replacement surgery. On July 16, 2004 and November 12, 2003 appellant's union representative requested a review of the case file and that the Office consider evidence submitted by her. In an April 20, 1995 medical report, Dr. Waldrop stated that appellant could return to limited-duty work on April 22, 1995 with physical restrictions. A September 29, 1999 report from Dr. Robert W. Moore, Jr., a Board-certified orthopedic surgeon, stated that appellant sustained chronic cervical and lumbar strains. He noted objective evidence that substantiated appellant's continuing residuals of her August 24, 1994 and May 2, 1995 employment injuries.

¹ Docket No. 02-1436 (issued January 14, 2003).

Dr. Moore further noted that she underwent an x-ray examination in 1996, prior to her employment injuries, which did not reveal any abnormalities. His x-ray examination revealed medial joint disease and similar arthritic changes in her hip. Dr. Moore opined that appellant's left knee problems were more related to arthritis than any injury. Progress notes indicated that appellant's left hip, right knee, arthritic elbow, neck and shoulders were treated on intermittent dates from June 28, 1996 to February 5, 1998. A June 1, 1994 x-ray of appellant's right and left knees and left ankle was performed by Dr. Sava M. Roberts, a Board-certified radiologist, which revealed intact osseous structures and no evidence of joint disease or opaque foreign bodies in the soft tissues.

An August 6, 1996 x-ray of appellant's right knee was performed by Dr. Kyong S. Chai, a Board-certified radiologist, which demonstrated a pattern of arthroplasty with metallic prosthesis replacing femoral/tibial condyles and some degenerative arthritic change involving the articular surface of the patella. His x-ray of the lumbar spine on the same date revealed mild early spondylosis. In an August 1, 1996 discharge report, appellant's physical therapist, indicated that she was independent with all mobility and transfers, she was getting good results from arch supports and her balance was good. An unsigned report with an illegible date provided a history of appellant's August 24, 1994 employment injury. It noted several conditions and treatment related to appellant's right and left knees, shoulders, feet and wrists. It further noted that she was totally impaired beginning February 5, 1998, that she had restrictions beginning July 2, 1996 and that she was unable to work. A magnetic resonance imaging (MRI) scan of appellant's left knee was performed on February 10, 1999 by Dr. Clifford E. Church, a Board-certified radiologist, which demonstrated findings consistent with varicose veins, some hypertrophic degenerative changes about the knee and some increased signal in the posterior horn of the medial meniscus which may be secondary to meniscal degeneration. Dr. Waldrop's July 6, 1995 report provided medical rationale explaining why the August 24, 1994 employment injury or resultant surgery caused, aggravated, precipitated or accelerated the diagnosis of right medial compartment gonarthrosis. He stated that preexisting arthritic conditions caused uneven weight distribution and these conditions could be accelerated by torn cartilage and surgery. A March 25, 2003 letter from Dr. Robert S. Pilcher, a Board-certified orthopedic surgeon, provided a history of appellant's right and left knee problems. He opined that overuse of the left knee in taking care of the right knee, which had much of the same course with regard to scope and replacements, was the cause of appellant's left knee problems. Dr. Pilcher indicated that appellant found it difficult to work due to her bilateral knee problems.

By decision dated February 14, 2006, the Office found that appellant's request for reconsideration was dated November 28, 2005, more than one year after the January 10, 2001 decision and was untimely. The Office found that appellant did not submit sufficient evidence to establish clear evidence of error in the prior decisions terminating her medical and wage-loss benefits and rejecting her claim for a consequential left knee injury.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ Pursuant to this section, if a request for reconsideration is submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date. Otherwise, the date of the letter itself should be used.⁵

Section 10.607(a) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by the Office 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 the Office.¹¹

To show 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 *prima facie* shift the weight of the evidence in favor of

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

⁶ 20 C.F.R. § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

the claimant and raise a substantial question as to the correctness of the Office decision.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

ANALYSIS

The Board finds that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁴

The most recent merit decision in this case was issued by an Office hearing representative on January 10, 2001, which terminated appellant's medical benefits related to her accepted May 2, 1995 employment-related cervical and lumbar spine injuries as she no longer had any residuals of these employment injuries and her wage-loss benefits for refusing an offer of suitable work, and found that she did not sustain a consequential left knee injury causally related to her accepted August 24, 1994 employment-related right knee injury. As her January 6 and November 28, 2005 letters requesting reconsideration were both made more than one year following the hearing representative's January 10, 2001 merit decision, the Board finds that they were untimely filed.

The issues for purposes of establishing clear evidence of error in this case, are whether appellant submitted evidence establishing that there was an error in the hearing representative's termination of her medical benefits for her May 2, 1995 employment-related cervical and lumbar spine injuries and wage-loss benefits for refusing an offer of suitable work and denial of her claim for a consequential left knee injury causally related to her August 24, 1994 employment injury. The Board notes that the issues are medical in nature.

Appellant submitted correspondence from the employing establishment requesting that the Office affirm the December 23, 1999 decision, the Office authorizing right knee surgery and her union representative requesting that the Office review evidence submitted in support of her claim and that the Office mail a copy of the case file for review. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. It is not medical in nature and, accordingly, does not address the threshold issues of whether the Office properly terminated appellant's medical and wage-loss benefits and denied her claim for a consequential left knee injury. In this regard, the correspondence does not establish clear evidence of error as it is merely a request for Office action regarding the review of evidence, approval of medical treatment and paperwork.

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ *Larry L. Litton*, 44 ECAB 243 (1992).

The reports of Drs. Rao and Moore noted that appellant had continuing residuals of the May 2, 1995 employment injury. Dr. Rao opined that appellant was totally disabled for work. An unsigned report with an illegible date noted several conditions and treatment related to appellant's right and left knees, shoulders, feet and wrists. It stated that she was totally impaired beginning February 5, 1998, that she had restrictions beginning July 2, 1996 and that she was unable to work. Dr. Waldrop's July 6, 1995 report stated that the August 24, 1994 employment injury and resultant surgery caused, aggravated, precipitated or accelerated appellant's right medial compartment gonarthrosis condition because preexisting arthritic conditions cause uneven weight distribution and such conditions could be accelerated by torn cartilage and surgery. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. Although this evidence addressed appellant's continuing employment-related residuals and disability, she did not explain how it clearly establishes that the Office erroneously terminated her medical and wage-loss benefits and denied her claim for a consequential left knee injury. Therefore, the reports of Drs. Rao and Moore do not establish clear evidence of error. Regarding the unsigned report, the Board finds that it cannot be considered as probative medical evidence to determine whether it would shift the weight in appellant's favor as the author is not known as a physician.¹⁵

Dr. Waldrop's April 20, 1995 report stated that appellant could return to limited-duty work on April 22, 1995. Dr. Roberts' x-ray report stated that appellant's right and left knees and left ankle were normal. The reports of Drs. Waldrop and Roberts are insufficient to shift the weight of the evidence in favor of appellant's claim as they found that she had no disability or residuals of her accepted employment injuries.

Progress notes addressed appellant's symptoms related to her left hip, right knee, arthritic elbow, neck and shoulders, Dr. Chai's x-rays reports found arthroplasty and degenerative arthritic changes in appellant's right knee and mild early spondylosis in her lumbar spine and Dr. Church's MRI scan revealed varicose veins, degenerative changes in the left knee and an increased signal in the posterior horn of the medial meniscus. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. It does not address whether appellant had any continuing residuals or disability causally related to her accepted employment injuries, whether such residuals and disability precluded her from accepting an offer of suitable work or whether she sustained a consequential left knee injury due to her employment-related right knee condition.

The discharge report from appellant's physical therapist does not constitute probative medical evidence inasmuch as a physical therapist is not considered a "physician" under the Act.¹⁶

Dr. Pilcher's letter stated that overuse of the left knee during treatment of the right knee caused appellant's left knee problems and that her bilateral knee problems made it difficult for her to obtain work. Although Dr. Pilcher addressed the causal relationship between appellant's left knee injury and the accepted August 24, 1994 employment-related right knee injury, his

¹⁵ See generally, *Merton J. Sills*, 39 ECAB 572 (1988).

¹⁶ 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000).

letter is insufficient to shift the weight of the evidence in favor of appellant's claim. As noted, it is not sufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. Later medical evidence independently supporting causal relationship such as Dr. Pilcher's March 25, 2003 letter has no bearing on the probative value of the medical evidence that was before the Office hearing representative at the time of his January 16, 2001 merit decision.¹⁷ Further, appellant did not explain how this evidence clearly establishes that the Office clearly erred in its prior decisions. As such, Dr. Pilcher's letter does not establish clear evidence of error.

For these reasons, appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that appellant's January 6 and November 28, 2005 requests for reconsideration were untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *Dean D. Beets*, 43 ECAB 1153, 1158 (1992).