

The issue is whether the Office properly refused to reopen appellant's case for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On September 26, 2002 appellant, a 56-year-old deportation assistant, injured both knees when she dropped to the floor after hearing someone hollering that “someone had a gun.” She filed a claim for benefits, which the Office accepted for bilateral knee contusion.

In order to determine her current condition, the Office referred appellant to Dr. David J. Vanderweide, a specialist in orthopedic surgery, for a second opinion examination. In a report dated April 27, 2004, Dr. Vanderweide stated that appellant had mild residual discomfort of the contusion to the left knee, with no residual right knee symptoms.

In a notice of proposed termination dated June 1, 2004, the Office, based on Dr. Vanderweide’s second opinion, found that the weight of the medical evidence demonstrated that appellant’s accepted right knee condition of right knee contusion had resolved.

By letter dated June 28, 2004, received by the Office on July 6, 2004, appellant contested the proposed termination of compensation for her right knee. She stated that she had not undergone examination for her right knee since September 2002 and requested that she be allowed to undergo x-ray or magnetic resonance imaging (MRI) scan testing before the Office terminated her benefits.

In a report dated July 12, 2004, received by the Office on July 16, 2004, Dr. Thaddeus W. Hume, Board-certified in orthopedic surgery, stated:

“This is an updated report on [appellant] who was last seen and examined on July 12, 2004. The patient continues to complain of intermittent pain in her left knee. Overall she is showing some improvement. [Appellant] also relates at this time that she has continued to be bothered with intermittent pain in her right knee with certain levels of activity like getting from pronged sitting to a standing position. She denies any locking.

“Examination of the right knee reveals no significant swelling. [Appellant] had some mild to moderate crepitus. There was no instability. Apley’s test was negative. McMurray’s test was negative. Examination of the left knee reveals some moderate crepitus persist. The knee was otherwise unremarkable. X-rays of the right knee, including weight-bearing film, shows moderate narrowing of the medial compartment consistent with moderate osteoarthritis. Also noted were small osteophytes and irregularity of the undersurface of the patella consistent with patellofemoral disease.

“The patient has been advised to continue to modify her lifestyle accordingly in terms of exercise and weight loss and activity levels.... She will be reevaluated in three months. In 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.”

By decision dated July 16, 2004, the Office terminated appellant’s compensation benefits for treatment of her accepted right knee condition. It indicated that it had not received any

additional evidence from appellant. The Office continued to pay compensation benefits for her left knee condition.

By letter dated June 8, 2008, appellant requested reconsideration.

By decision dated July 3, 2008, the Office denied appellant's request for reconsideration without a merit review, finding appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that appellant was required to present evidence which showed that it made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle an employee to a review of an Office decision as a matter of right.² This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.³ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁴

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁵ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ 20 C.F.R. § 10.607(b).

⁴ See cases cited *supra* note 2.

⁵ *Rex L. Weaver*, 44 ECAB 535 (1993).

year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.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 manifested on its face that the Office committed an error.⁸ Evidence which 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 the claimant and raise a substantial question as to the correctness of the Office's 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 it abused its discretion in denying merit review in the face of such evidence.¹³

ANALYSIS

The Board has duly reviewed the case record and finds that the Office properly denied review of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). Appellant requested reconsideration of the Office's July 16, 2004 decision terminating compensation for her accepted right knee condition on June 8, 2008. In its July 3, 2008 nonmerit decision, the Office properly found that appellant failed to file a timely application for review of the July 16, 2004 decision, the last merit decision in this case, and that her June 8, 2008 request for reconsideration failed to show clear evidence of error.

In appellant's June 8, 2008 letter requesting reconsideration, she states that she is "requesting reconsideration for continued service for my right knee." She goes on to point out that both of her knees have swelling, and that the pain is getting worse, and she makes general reference to recent medical visits and reports. Appellant then asks for permission to change

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

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

⁹ See *Jesus D. Sanchez*, *supra* note 2.

¹⁰ See *Leona N. Travis*, *supra* note 8.

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

¹² *Leon D. Faidley, Jr.*, *supra* note 2.

¹³ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

physicians. The Board notes that, in her request for reconsideration, appellant makes no reference to the July 16, 2004 termination decision and does not argue about or raise any error that may have been made, nor has she submitted any new evidence to suggest error in the July 16, 2004 decision.¹⁴ As required by the Office's regulations, "the application must establish on its face that such decision was erroneous."¹⁵ As appellant has not provided argument or evidence of error, the Board finds that the Office properly denied reconsideration in this case.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2008 decision of the Office of Workers' Compensation Programs is affirmed

Issued: May 13, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁴ The record shows that, subsequent to the 2004 termination, the Office has apparently been paying compensation for only the left knee since the 2004 termination. To the extent that appellant's "reconsideration" letter is really a claim for recurrence for the right leg due to an alleged worsening of her condition, she should clarify this and pursue it with the Office in a clear request for recurrence of disability.

¹⁵ 20 C.F.R. § 10.606(b). See *Leona N. Travis*, *supra* note 8.