

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

---

**TANYA R. TAPP, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Kansas City, MO, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 04-248  
Issued: March 18, 2004**

*Appearances:*  
*Tanya R. Tapp, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member

**JURISDICTION**

On November 7, 2003 appellant filed a timely appeal from an October 27, 2003 decision of the Office of Workers' Compensation Programs, which found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error. Because more than one year elapsed between the Office's last merit decision issued on September 13, 2002<sup>1</sup> and the filing of this appeal on November 7, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d).

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

---

<sup>1</sup> On March 24, 2003 the Office issued appellant a schedule award for a seven percent permanent impairment of her right leg, but appellant has not indicated that she wishes to appeal this decision of the Office.

### **FACTUAL HISTORY**

On August 11, 2000 appellant, then a 30-year-old letter carrier, filed a claim for a traumatic injury sustained on June 7, 2000 when she felt sharp pain in her knee while coming downstairs while delivering mail. By letter dated August 25, 2000, the Office advised that it had accepted her claim for right knee strain. The Office later accepted that appellant also sustained a partial tear of the anterior cruciate ligament of her right knee and authorized surgery that was performed on January 17, 2001.

By letter dated November 27, 2000, appellant claimed that walking in a modified manner due to her knee injury had resulted in trochanteric bursitis and sacroiliac joint dysfunction. Appellant submitted medical evidence in support of this claim. By letter dated February 6, 2001, the Office advised appellant that the evidence did not support a conclusion that her right sacroiliac joint dysfunction and right greater trochanteric bursitis developed as a consequence of her June 7, 2000 right knee injury. The Office advised appellant that she needed to submit a medical report providing “a definite, unequivocal opinion that explains how the condition arose from, or is related to, the mechanism of injury (work accident).”

Appellant submitted additional medical evidence. In an August 26, 2000 report, Dr. Eden Wheeler, a Board-certified physiatrist, stated that appellant’s knee condition resulted in altered gait mechanics, which contributed to her back and hip diagnoses of trochanteric bursitis and sacroiliac joint dysfunction. In an April 3, 2001 report, Dr. Daniel M. Downs, a Board-certified orthopedic surgeon, attributed appellant’s sacroiliac joint and hip problems to her antalgic gait pattern. In July 31, 2001 reports, Dr. Downs stated that appellant’s hip, sacroiliac joint and back pain were a direct result of her June 7, 2000 knee injury and were temporarily aggravated by the gait pattern caused by her knee injury.

By decision dated September 13, 2002, the Office found that the evidence did not support that her right sacroiliac joint dysfunction and right greater trochanteric bursitis were causally related to her June 7, 2000 employment injury.

By letter dated October 3, 2003, appellant requested reconsideration and submitted a September 3, 2003 report from Dr. Downs. In this report Dr. Downs set forth a history that appellant, after her knee injury, experienced “joint and buttock pain that occurred as a result of her gait changes with her walking and carrier activity.” After noting that other physicians, as well as himself, had indicated the back and hip problems were related to “her postal work activity,” Dr. Downs stated, “It is apparent both from the standpoint of what is medically reasonable that [appellant’s] right knee injury lead with the gait changes and the activities was the direct causal relationship between the right knee injury from her postal work and the lower back sacroiliac joint, inflammation and pain that continues to persist is all work related with her postal activities.”

By decision dated October 27, 2003, the Office found that appellant’s October 3, 2003 request for reconsideration was not timely filed and did not present clear evidence of error.

## **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“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, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that “An application for reconsideration must be sent within one year of the date of the [Office] decision, for which review is sought.” The Board has found that the imposition of this one year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>2</sup>

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.<sup>3</sup> 20 C.F.R. § 607(b) provides: “[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>4</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>5</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>6</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>7</sup> This entails a limited review by the Office of how the evidence

---

<sup>2</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>4</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>5</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>6</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>7</sup> *See Leona N. Travis*, *supra* note 5.

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.<sup>8</sup> 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 decision.<sup>9</sup> The Office's procedure manual states:

"The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence, which on its face shows that the Office 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 and would not require a review of the case...."<sup>10</sup>

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.<sup>11</sup>

### ANALYSIS

In the present case, the most recent merit decision by the Office on appellant's claim for a consequential injury was issued on September 13, 2002. Appellant had one year from the date of this decision to request reconsideration and did not do so until October 3, 2003. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

Appellant's October 3, 2003 request for reconsideration did not demonstrate clear evidence of error. The September 3, 2003 report from Dr. Downs, like his previous reports, supports a causal relation between appellant's knee condition and her back and hip conditions, but, also like his previous reports, does not contain rationale sufficient to demonstrate that the Office's decision was erroneous and to shift the weight of the evidence in favor of appellant.<sup>12</sup> In this report Dr. Downs also appears to rely on an inaccurate history that appellant performed extensive walking as a letter carrier subsequent to her knee injury. Even if the September 3, 2003 report from Dr. Downs, would have required further development of the evidence if submitted timely, such a showing would not demonstrate clear evidence of error.

---

<sup>8</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>9</sup> *Leon D. Faidley Jr.*, *supra* note 2.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (June 2002).

<sup>11</sup> *Gregory Griffin*, *supra* note 3.

<sup>12</sup> Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

**CONCLUSION**

Appellant's October 3, 2003 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member