

FACTUAL HISTORY

This case has previously been before the Board.² In an April 22, 2008 decision, the Board affirmed decisions of the Office, which granted appellant a schedule award for 20 percent impairment of her right arm and found an overpayment of compensation in the amount of \$5,115.24, for which it denied waiver. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

The record reflects that, in May 2001, Dr. Samuel J. Chmell, appellant's attending Board-certified orthopedic surgeon, had recommended that the Office approve arthroscopic surgery of her right knee. The Office developed the issue of causal relation and need for right knee surgery by referring appellant to Dr. Julie M. Wehner, a Board-certified orthopedic surgeon, for a second opinion. On October 3, 2001 Dr. Wehner reviewed diagnostic tests of both knees and advised that arthroscopic surgery of the right knee would not benefit appellant. The Office found a conflict in medical opinion between Dr. Chmell and Dr. Wehner as to the need for surgery and referred her to Dr. John J. Dwyer, a Board-certified orthopedic surgeon, for an impartial medical examination. In a March 11, 2002 report, Dr. Dwyer listed findings on examination of appellant's right knee and reviewed a May 9, 2001 magnetic resonance imaging (MRI) scan of the knee. He advised that the findings were not clinically significant and that her complaints were not related to the soft tissue injuries sustained in the December 5, 2000 fall at work. Dr. Dwyer found that the accepted injury did not give rise to the need for the proposed right knee surgery.

In an April 3, 2002 decision, the Office denied appellant's request for right knee arthroscopic surgery. It found that the weight of medical evidence was represented by the report of Dr. Dwyer, the impartial medical specialist.

Appellant requested a review of the written record and submitted the April 15, 2002 report of Dr. Joseph G. Thometz, a Board-certified orthopedic surgeon, who diagnosed bilateral knee contusions that remained symptomatic with an effusion of the right knee. Dr. Thometz recommended arthroscopic surgery. On April 25, 2002 appellant was treated by Dr. Charles T. Chen, a Board-certified orthopedic surgeon, who also advised that right knee arthroscopic surgery was a reasonable treatment option. Dr. Chen noted that he did not believe that appellant's condition was aggravated by the work injury.

In an October 30, 2002 decision, an Office hearing representative affirmed the April 3, 2002 decision. He found that the weight of medical opinion was represented by the impartial opinion of Dr. Dwyer.

On December 3, 2002 appellant requested reconsideration. She submitted the May 25 and November 26, 2002 report of Dr. Chmell, who diagnosed traumatic aggravation of degenerative arthritis to both knees with internal derangement of the right knee. Dr. Chmell reiterated his recommendation for surgery and advised that appellant's right knee condition continued to deteriorate.

² Docket No. 07-1164 (issued April 22, 2008). Appellant sustained injuries on December 5, 2000. The Office accepted contusions of the right elbow, scalp and left knee and a fractured right elbow.

In a February 25, 2003 decision, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant further merit review.

On May 7, 2003 appellant requested reconsideration and submitted additional medical evidence.

In a March 4, 2004 decision, the Office reviewed the merits of appellant's claim but denied modification of its prior decisions. The weight of medical opinion as to the need for right knee surgery was accorded to Dr. Dwyer.

On March 21, 2005 appellant requested reconsideration. She submitted additional treatment records from Dr. Chmell dated February 21 to October 24, 2005. Dr. Chmell noted appellant's continued complaint of right knee pain with associated swelling. He diagnosed traumatic derangement of the right knee and recommended arthroscopic surgery with debridement and a partial medial meniscectomy.

In a November 25, 2005 decision, the Office denied appellant's request for reconsideration on the grounds that her letter did not raise a substantive legal question or included new and relevant evidence and was insufficient to warrant further review of the merits.

In letters dated January 16 and February 13, 2007, February 10, 2008 and May 31, 2009, appellant requested reconsideration.³ She submitted emergency room records from December 5, 2000, additional treatment records from Dr. Thometz dated April 15, 2002 and Dr. Chen dated from April 25, 2002 and a right knee x-ray of October 21, 2003, all previously of record. Appellant submitted copies of additional diagnostic tests including x-rays and scans obtained August 31, 2006 to February 19, 2009. Dr. Chmell repeated the diagnoses of traumatic arthritis with internal derangement to both knees, traumatic arthritis of the right elbow and internal derangement of the left ankle with tendinitis. He noted that appellant walked with a prominent limp, used a cane and had effusion of the right knee with tenderness over the medial femoral condyle. A February 19, 2009 MRI scan of the right knee revealed a tear of the medial meniscus, degenerative changes of the patella and femoral condyles, small joint effusion and multiloculated ganglion cyst. Dr. Chmell diagnosed worsening traumatic arthritis of the right knee with a torn meniscus and recommended arthroscopic surgery.

In a May 27, 2009 decision, the Office denied appellant's reconsideration request finding that it was not timely filed and did not establish clear evidence of error in the denial of her request for right knee surgery.

³ Appellant filed a July 17, 2006 revised Form CA-1, requesting that her claim be accepted for other physical conditions.

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.”⁴

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 the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁵ However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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 the Office's decision.⁷ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office in the denial of the claim.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹¹

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, *supra* note 5.

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

In its May 27, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision on her claim concerning her request for right knee surgery was issued on March 4, 2004. Appellant's requests for reconsideration dated on and after January 16, 2007 were more than one year after March 4, 2004. Therefore, her reconsideration requests were not timely filed.¹²

The Board finds that appellant did not submit sufficient evidence with her requests to establish clear evidence of error in the Office's decisions denying her request for authorization of right knee surgery. Appellant submitted various treatment records and diagnostic studies obtained by Dr. Thometz, Dr. Chen and Dr. Chmell dated from December 5, 2000 to October 21, 2003. However, the Office had previously considered this evidence prior to issuing the March 4, 2004 merit decision. By resubmitting these documents to the record, appellant did not submit evidence sufficient to manifest on its face that the Office had erred in denying surgery as was requested. In denying her request, the Office had relied upon the opinion of an impartial medical specialist. The resubmission of the documents already of record does not raise a substantial question as to the correctness of the Office's decision.

Appellant submitted additional diagnostic studies dated August 31, 2006 to February 19, 2009. However, these reports do not provide any opinion on the underlying issue in this case, whether the requested arthroscopic surgery of the right knee was employment related. This evidence is not sufficient to raise a substantial question as to the correctness of the Office's decision or to establish clear error in the denial of surgery authorization.

Appellant submitted multiple treatment records from Dr. Chmell dated October 23, 2006 to December 13, 2008. Dr. Chmell reiterated his diagnosis of traumatic arthritis to both knees with internal derangement and the need that she undergo right knee arthroscopic surgery. This evidence does not raise a substantial question as to the correctness of the Office's decision. Dr. Chmell merely reiterated his prior opinion that appellant undergo surgery to the right knee, a matter that was developed by the Office and for which Dr. Dwyer provided an impartial medical opinion. His additional reports do not provide any additional explanation or expand on his prior opinion relating the need for surgery to her accepted injury. Dr. Chmell noted findings on examination and recommended arthroscopic surgery for the right knee. The Board notes that Dr. Chmell was previously on one side of a medical conflict that was resolved by Dr. Dwyer regarding the need for surgery.¹³ The Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The submission of 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, does not establish clear error in the Office's denial of

¹² The Board notes that the Office treated appellant's revised CA-1 claim form received July 17, 2006 as a reconsideration request.

¹³ See *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992) (report of a physician who was on one side of a medical conflict that was resolved by an impartial specialist is generally insufficient to create a new conflict).

surgery.¹⁴ This evidence does not raise a substantial question as to the correctness of the Office's decisions.

The Board finds that the medical evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's decision to deny authorization for right knee surgery. Appellant has not provided argument or evidence of such probative value as to shift the weight of the medical evidence in her favor.

On appeal, appellant alleges that she filed her reconsideration request in a timely manner; however, as noted, there is no evidence that a reconsideration request was received by the Office within one year of March 4, 2004. As to the weight of the medical evidence, she alleged that a physician confused her with another patient. The Board's review of the medical evidence does not establish this contention as factually established. As noted, appellant has not provided evidence or argument of sufficient value to shift the weight of the evidence in her favor or to raise a substantial question as to the correctness of the Office's decision.

CONCLUSION

The Board finds that appellant's request for reconsideration dated July 17, 2006 was untimely filed and did not demonstrate clear evidence of error.¹⁵

¹⁴ *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008).

¹⁵ The Board notes that, on July 27, 2009, the Office denied modification of decision's denying appellant's claim for an increased schedule award. Appellant did not appeal this decision to the Board.

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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