U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRENCE M. GORE and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Dallas, Tex.

Docket No. 96-365; Submitted on the Record;
Issued February 19, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, appellant filed a claim alleging that he sustained a right knee injury causally related to factors of his federal employment. The claim was denied by the Office in a decision dated November 17, 1989. An Office hearing representative affirmed the denial by decision dated July 25, 1990. Appellant requested reconsideration of his claim, and by decisions dated December 3, 1991 and January 16, 1992, the Office reviewed the claim on its merits and denied modification.

In a letter dated May 1, 1992, appellant again requested reconsideration of his claim. By decision dated July 10, 1992, the Office found that appellant had not submitted evidence sufficient to warrant a review of the merits of the claim. In a letter dated July 8, 1993, appellant requested reconsideration of his claim. By decision dated August 12, 1993, the Office determined that the request was untimely and failed to show clear evidence of error. Appellant filed an appeal to the Board; the case record transmitted to the Board, however, was incomplete, and the case was remanded for proper assemblage of the case record.[1] By decision dated August 2, 1995, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error. In a decision dated October 30, 1995, the Office determined that appellant's September 11, 1995 request for reconsideration was untimely and failed to show clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As

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[1] Docket No. 94-464 (issued June 26, 1995).

[2] *Oel Noel Lovell*, 42 ECAB 537(1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

appellant filed his appeal with the Board on November 6, 1995, the only decisions properly before the Board are the October 30 and August 2, 1995 Office decisions denying appellant's applications for review.

The Board has reviewed the record and finds that the Office properly found appellant's requests for reconsideration were untimely and failed to show clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] 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.[7] 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).[8]

In the present case, appellant correctly notes that his May 1, 1992 request for reconsideration was filed within one year of the January 16, 1992 Office decision. It is not, however, the May 1, 1992 reconsideration request which is at issue here. The Office denied the May 1, 1992 reconsideration request in a decision dated July 10, 1992. It is well established that only decisions on the merits of the claim provide a one-year time period for requesting reconsideration.[9] The July 10, 1992 decision was not a merit decision, and appellant was advised in the appeal rights accompanying that decision that appellant had one year from January 16, 1992 to request reconsideration. Since the July 8, 1993 reconsideration request is more than one year after the January 16, 1992 merit decision, it is properly considered untimely. Moreover, because there has been no decision on the merits issued after January 16, 1992, the September 11, 1995 request for reconsideration is also untimely.

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[3] 5 U.S.C. § 8128(a).

[4] *Leon D. Faidley, Jr.,* 41 ECAB 104 (1989).

[5] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[6] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *See Leon D. Faidley*, *Jr.*, *supra* note 4.

[9] *See Robbin Bills*, 45 ECAB 784 (1994).

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[10] In accordance with this holding the Office has stated in its Procedure Manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] 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.[18]

The issue, therefore, is whether appellant has submitted evidence of such probative value that it establishes clear evidence of error. With his July 8, 1993 reconsideration request appellant submitted an April 12, 1993 report from Dr. Donald C. Faust, an orthopedic surgeon, who provided results on examination. Dr. Faust does not provide a complete history or an opinion on causal relationship between a right knee condition and federal employment. Appellant subsequently submitted a September 28, 1993 report from Dr. Michael E. Brunet, an orthopedic surgeon, in support of causal relationship between a right knee condition and appellant's federal employment. Dr. Brunet stated:

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[10] *Leonard E. Redway*, 28 ECAB 242 (1977).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[12] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[13] *See Leona N. Travis*, 43 ECAB 227 (1991).

[14] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[15] *See Leona N. Travis*, *supra* note 13.

[16] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[17] *Leon D. Faidley, Jr.*, *supra* note 4.

[18] *Gregory Griffin,* 41 ECAB 458 (1990).

> "Generally speaking when someone has chondromalacia of the patella that is secondary to both trauma and a predisposition of maltracking any repetitive stress markedly accentuates the process. From a structural standpoint I don't think it really did any significant damage *per se* but if this is a prolonged number of years then would have a cumulative effect.
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> "The second question is how a lot of walking, stooping, bending, carrying, etc. in your job correlates with the actual cause of your condition. In trying to address this I think this was a component in your overall symptoms and findings and probably you were compensating mechanically for this without much in the way of trouble and then had an accident which did some damage and actually required medical treatment.
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> "In trying to put all this together what it says to me is that the combination of the accident and the factors in your employment were both significant leading up to what your symptoms and findings are at present. I don't know that you can weigh one more heavier than the other but the cumulative effect is such that now in effect you have chondromalacia of the patella an maltracking with a chronic synovitis."

Although this report would support appellant's underlying claim of an employment-related right knee condition, the issue is whether the report is of such probative value that it meets the clear evidence of error standard. Dr. Brunet does not provide a complete factual and medical background showing familiarity with the relevant medical and employment history. He refers to an "accident" without providing further explanation. Moreover, Dr. Brunet does not fully explain the nature and extent of the contribution of specific employment factors to a right knee condition. The "clear evidence of error" standard is a difficult standard to meet, and the Board finds that the medical evidence is not sufficient to establish clear evidence of error in this case.

The decisions of the Office of Workers' Compensation Programs dated October 30 and August 2, 1995 are affirmed.

Dated, Washington, D.C.
February 19, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member