

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of MICHAEL ESCANDON and DEPARTMENT OF VETERAN AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Fresno, Calif.

*Docket No. 97-1266; Submitted on the Record;  
Issued February 24, 1999*

---

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year limitation set forth in 20 C.F.R. § 10.138(b), and that the application failed to present clear evidence of error.

On September 8, 1993 appellant, then a 49-year-old textile care worker, filed a notice of traumatic injury, alleging that he injured his knee when he rammed it into his desk while attempting to slide his chair into it on September 7, 1993. Appellant stopped working on September 8, 1993 and returned on September 9, 1993. The Office accepted the claim for a left knee contusion.

On September 4, 1994 appellant filed a notice of recurrence of disability alleging that on July 3, 1994 he suffered a recurrence of disability. Appellant alleged that he suffered pain around his left patella radiating down to his foot. Appellant stopped working on July 4, 1994 and returned on September 5, 1994.

In support of his claim for a recurrence of disability, appellant submitted a July 3, 1994 report from Dr. Madeline Gong, a Board-certified internist, diagnosing an ankle sprain. Appellant also submitted a July 6, 1994 report from Dr. Michael D. Burns, a podiatrist, indicating that appellant suffered from a sudden edema with relative lack of pain on the left foot of unclear etiology. Dr. Burns repeated this information in a report dated July 7, 1994.

Appellant also submitted a July 14, 1994 opinion from Dr. Steven T. Thaxter, a Board-certified orthopedic surgeon. He diagnosed atypical left leg pain without obvious etiology. Dr. Thaxter treated appellant for left leg edema on July 26, 1994. On August 1, 1994 he again treated appellant for knee pain.

On September 8, 1994 Dr. Donn Cobb, appellant's treating physician and a specialist in public health and general preventive medicine, diagnosed a left knee strain and patellar chondromalacia. He repeated this diagnosis on September 11, 1994. On October 7, 1994 Dr. Cobb diagnosed only chondromalacia patella. On October 13, 1994 Dr. Cobb diagnosed left knee pain and patellar ligament sprain. On October 27 and November 29, 1994 Dr. Cobb diagnosed chondromalacia patella. On December 15, 1994 Dr. Cobb reviewed the history of appellant's accepted knee injury. His examination revealed mild swelling and some crepitus on palpation of the knee. Dr. Cobb stated that he diagnosed left knee strain and probably patellar chondromalacia or prepatellar bursitis.

By decision dated January 5, 1995, the Office found that appellant failed to establish a recurrence of disability. The Office noted that the physicians of record failed to address whether appellant's condition was related to his accepted injury.

On January 18, 1995 Dr. Cobb reviewed the history of appellant's September 1993 injury. He indicated that his final diagnosis was patellar chondromalacia directly related to a strain while at work. Dr. Cobb repeated his diagnosis of chondromalacia patella on February 15 and March 5, 1995. On July 13 and July 27, 1995 Dr. Cobb indicated that appellant's chondromalacia patellar was a direct result of the injury he sustained on July 7, 1993. Dr. Cobb diagnosed chondromalacia patella left on August 20, 1995.

Appellant subsequently requested an oral hearing which was held on July 26, 1995.

By decision dated October 12, 1995, the Office hearing representative affirmed the Office's January 5, 1995 decision denying benefits. The hearing representative determined that the record was devoid of rationalized medical opinion relating appellant's present condition to his accepted injury.

Appellant subsequently submitted a November 6, 1995 report from Dr. Cobb diagnosing chondromalacia patella. Appellant also resubmitted Dr. Cobb's December 15, 1994 report. Appellant also submitted a November 21, 1995 report from Dr. Cobb in which he diagnosed chondromalacia left knee, cumulative trauma.

On November 29, 1995 appellant requested reconsideration.

By decision dated December 1, 1995, the Office ordered that the application for review be denied because the evidence submitted in its support was repetitious in nature and insufficient to warrant review of its prior decision.

On November 13, 1996 appellant again requested reconsideration. In support appellant submitted medical evidence from Dr. Troy H. Smith, a Board-certified orthopedic surgeon. He recorded the histories of knee injuries occurring in July 1992, on September 7, 1993, and in July 1994. Dr. Smith stated that there was no question that appellant had post-traumatic chondromalacia secondary to the work-related injury. He stated, "[W]ith his pain being anterior to the knee localized to the patellar area occurring with kneeling and squatting and with getting some relief from the patellar stabilizer, I feel this is very indicative of post-traumatic chondromalacia involving the patellar. He has limited flexion of his left knee, one-half inch

quadriceps atrophy, and pain on examination of the left patellar....” Finally, Dr. Smith stated that, “[A]s the patient had three separate injuries to his left knee while on the job, I certainly feel this is a very good indication that this is a workers’ compensation problem....”

By decision dated January 23, 1997, the Office denied review of its prior decision on the grounds that the application for review was not timely filed and did not demonstrate 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.<sup>1</sup> As appellant filed his appeal on February 7, 1997, the only decision properly before the Board is the Office’s January 23, 1997 decision denying appellant’s request for reconsideration.

The Board has duly considered the case record and concludes that the Office properly refused to reopen appellant’s claim for further reconsideration of the merits in its January 23, 1997 decision under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b) and that the application failed to present clear evidence of error.

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 and states in relevant part:

“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 previously 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. § 10.138(b)(2) provides that the Office will not review, “... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.” 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>

---

<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>2</sup> *Mamie L. Morgan*, 47 ECAB 281 (1996).

Appellant requested reconsideration on November 13, 1996. The most recent decision on the merits prior to appellant's request was the Office's October 12, 1995 decision.<sup>3</sup> The one-year limitation period, therefore, began to run on October 13, 1995 and appellant's November 13, 1996 request for reconsideration was clearly untimely.<sup>4</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>5</sup> Office procedures state that the Office 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.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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

---

<sup>3</sup> In a statement of appeals rights accompanying the October 12, 1995 decision, the Office informed appellant of the following:

"RECONSIDERATION: If you have additional evidence which you believe is pertinent, you may request, in writing, that the Office reconsider this decision. Such a request must be made *within one year of the date of the decision*, clearly state the grounds upon which reconsideration is being requested and be accompanied by relevant evidence not previously submitted, such as medical reports or affidavits, or a legal argument not previously made." (Emphasis added.)

<sup>4</sup> *Larry J. Lilton*, 44 ECAB 243 (1992). With regard to when the one-year limitation period begins to run, the Office's Procedure Manual provides:

"The one-year [limitation] period for requesting reconsideration begins on the date of the original [Office] decision...."

<sup>5</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(b) (May 1991), 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 of a miscalculation in a schedule award). Evidence such as detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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...."

a substantial question as to the correctness of the Office's decision. 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>7</sup>

The Board finds that the evidence submitted in support of appellant's untimely November 13, 1996 request for reconsideration fails to establish clear evidence of error. The only new evidence submitted subsequent to the Office's prior decision which addressed whether appellant suffered from employment-related knee condition was provided by Dr. Smith. He recorded the histories of alleged knee injuries occurring in July 1992, on September 7, 1993 and in July 1994. Dr. Smith indicated that appellant injured his knee on September 7, 1993 when a cart which he pulled struck him against the knee. He also indicated that appellant suffered trauma on the knee in July 1994 when he sat down and had an onset of swelling and pain. Dr. Smith opined that there was no question that appellant had post-traumatic chondromalacia secondary to the work-related injury. He stated:

“[W]ith his pain being anterior to the knee localized to the patellar area occurring with kneeling and squatting and with getting some relief from the patellar stabilizer, I feel this is very indicative of post-traumatic chondromalacia involving the patellar. He has limited flexion of his left knee, one-half inch quadriceps atrophy, and pain on examination of the left patellar....” Finally, Dr. Smith stated that, “[A]s the patient had three separate injuries to his left knee while on the job, I certainly feel this is a very good indication that this is a workers' compensation problem....”

Dr. Smith's opinion, however, is not based on a proper factual background. Contrary to his assertion that appellant was injured on September 7, 1993 when a cart struck him in the knee, appellant indicated that this injury occurred when “[M]y knee banged against the bottom of the desk opening.” Moreover, in his notice of recurrence of disability appellant did not indicate that he injured his knee on July 4, 1994 by sitting down as noted by Dr. Smith, but that “[T]he pain around my left patella has been continuous since the original injury.” Consequently, because Dr. Smith's opinion is based on an inaccurate history of appellant's injuries, his opinion that appellant's current knee condition is related to these alleged injuries is entitled to little weight.<sup>8</sup>

Accordingly, the evidence submitted in support of and prior to appellant's untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's decision rejecting appellant's claim. As appellant's untimely request for reconsideration failed to demonstrate clear evidence of error, the Board finds that the Office properly denied appellant's request for reconsideration.

---

<sup>7</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>8</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

The decision of the Office of Workers' Compensation Programs dated January 23, 1997 is affirmed.

Dated, Washington, D.C.  
February 24, 1999

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member