

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL E. WHITESIDE and U.S. POSTAL SERVICE,
POST OFFICE, Indianapolis, IN

*Docket No. 99-1681; Submitted on the Record;
Issued July 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and that the application failed to present clear evidence of error.

On June 22, 1996 appellant, then a 33-year-old mail carrier, injured his knee as the result of being chased by a dog while in performance of duty. The record indicates that he ran to avoid an attack by a Rotweiler, jumped on a car and struck a windshield with his right knee. Appellant was under the care of Dr. Arthur Lorber, a Board-certified orthopedist. He aspirated appellant's knee on June 24, 1996 and prescribed a series of steroid injections. Appellant was off work from June 22 to June 25, 1996, when he returned to limited duty.

A magnetic resonance imaging scan was performed on July 2, 1996 and revealed a chronic degenerative tear involving the posterior aspect of the posterior horn of the medial meniscus, osteoarthritis involving the medial joint, complex degenerative tear involving the middle third of the lateral meniscus, chondromalacia and findings consistent with residuals of an old severe sprain and complete disruption of the anterior cruciate ligament with post-traumatic atrophy.

In a decision dated August 12, 1996, the Office denied compensation on the grounds that appellant failed to establish that his knee condition was causally related to the June 22, 1996 employment incident.

On September 26, 1996 the employing establishment notified appellant that his limited-duty position was to be cancelled on October 3, 1996 based on the denial of his workers' compensation claim.

Appellant requested reconsideration and submitted additional medical evidence

He was subsequently terminated from his position as a mail carrier based on a charge that he was unable to perform the duties of the job from a medical standpoint effective March 31, 1997.¹

In a decision dated April 30, 1997, the Office accepted the claim for a temporary aggravation of preexisting progressive arthritis.

In a CA-20 attending physician's report dated May 22, 1997, Dr. Lorber diagnosed a history of knee strain superimposed on a preexisting degenerative condition. He indicated that appellant underwent a knee effusion and steroid injections. Dr. Lorber advised that appellant's knee strain was a temporary aggravation arising from the employment incident of June 22, 1996. He opined that appellant would never be able to return to his regular job and should remain on light duty.

By letter dated June 16, 1997, the Office requested information from Dr. Lorber as to the nature and extent of appellant's disability.

In a report dated June 25, 1997, Dr. Lorber stated that appellant's work-related temporary aggravation had ceased as of the August 5, 1996, the date of the physician's last evaluation of appellant. He indicated that appellant was under permanent work restrictions due to his preexisting degenerative arthritis disorder.

In a decision dated July 11, 1997, the Office terminated appellant's compensation effective August 5, 1997.

In a letter dated July 14, 1998, appellant requested reconsideration and submitted a personal statement, a CA-17 from Dr. Lorber dated August 5, 1996, a report by Dr. Lorber with a facsimile receipt date of July 14, 1998, a duty status report dated August 5, 1996 by Dr. Lorber, a work restriction slip dated September 10, 1996 and an employing establishment request for a light-duty position completed by Dr. Lorber.

In a January 7, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and the evidence submitted was insufficient to establish clear evidence of error.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that the request did not present clear evidence of error.

¹ After the employing establishment cancelled appellant's limited-duty job, appellant was advised of his right to obtain a permanent light-duty position. The employing establishment thereafter sent appellant for a fitness-for-duty examination which demonstrated that he was unable to perform the job of a mail carrier.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ 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).⁷

In this case, appellant's request for reconsideration was dated July 14, 1998 and date-stamped as received by the Office on July 17, 1998. Since the date of the request is more than one year after the Office's July 11, 1997 decision, the request was properly deemed by the Office to be untimely filed.

In accordance with Office regulations, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁹ The evidence must be positive, precise and explicit and must establish on its face that the Office decision was erroneous.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by the Office of

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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."

⁵ 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. § 10.607.

⁶ 20 C.F.R. § 10.607.

⁷ *See Leon D. Faidley, Jr.*, *supra* note 3.

⁸ 20 C.F.R. § 10.607(b).

⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ *See Jesus D. Sanchez*, *supra* note 3.

¹² *See Leona N. Travis*, *supra* note 11.

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.¹³ 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.¹⁴ 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.¹⁵

Appellant argues that he is entitled to continuing compensation beyond August 5, 1996 because his treating physician, Dr. Lorber, assigned appellant permanent restrictions related to his knee condition. Contrary to appellant's contentions, however, Dr. Lorber specifically stated that appellant's ongoing medical restrictions were causally related to appellant's advanced osteoarthritis of the knee, a condition he described as preexisting. Dr. Lorber opined that the aggravation of appellant's degenerative knee condition caused by the accepted work injury had ceased by August 5, 1996. The Board notes that the medical evidence submitted by appellant on reconsideration merely reiterates that appellant received continuing medical care and was placed on medical restrictions due to his degenerative arthritis. The Board finds that appellant's evidence is insufficient to establish clear evidence of error on behalf of the Office in terminating his compensation benefits.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated January 7, 1999 is hereby affirmed.

Dated, Washington, D.C.
July 26, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member