

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHAKEER DAVIS and DEPARTMENT OF LABOR,
FLINT HILLS JOB CORPS, Manhattan, KS

*Docket No. 00-1216; Oral Argument Held May 17, 2001
Issued July 13, 2001*

*Appearances: Henry O. Boaten, Esq., for appellant; Miriam D. Ozur, Esq., for the Director,
Office of Workers' Compensation Programs.*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On April 18, 1996 appellant, then a 17-year-old job corps student employee, filed a traumatic injury claim alleging that he sustained injuries to his left knee resulting from an altercation while playing basketball. He immediately stopped work and was terminated the following day by the employing establishment.

By decision dated March 16, 1998, the Office denied appellant's claim for compensation. The Office found that the initial evidence of file supported that appellant actually experienced the claimed incident; however, the evidence did not establish that a condition had been diagnosed in connection thereto, as no medical evidence was submitted to support the claim. Therefore, the Office found that an injury within the meaning of the Federal Employees' Compensation Act was not demonstrated.

By letter dated January 26, 2000, received by the Office on January 31, 2000, appellant, through counsel, requested reconsideration of his claim. His counsel requested that the case be reopened in light of new medical evidence submitted following the March 16, 1998 merit decision.

By decision dated February 10, 2000, the Office denied appellant's request as untimely and not demonstrating clear evidence of error. The Office found that the medical evidence submitted was devoid of a medical opinion addressing the issue of causation to the diagnosed condition and, therefore, the evidence did not demonstrate clear evidence of error on the part of the Office at the time of the decision.

The Board finds that the Office abused its discretion in denying further review of appellant's claim.

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.¹ As appellant filed his present appeal with the Board on February 18, 2000, the only decision properly before the Board is the Office's February 10, 2000 decision denying appellant's request for reconsideration.

Section 10.607 of the Code of Federal Regulations 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 Office will consider an untimely application 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.²

Appellant did not send his request for reconsideration within one year of the Office's March 16, 1998 decision denying his claim. The Office received his request on January 31, 2000, outside the one-year time limitation for making such requests. Therefore, appellant's request for reconsideration was untimely.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.³ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁴ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ 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.⁷ 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.⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.607.

³ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁴ *See Leona N. Travis*, 43 ECAB 0227 (1991).

⁵ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ *See Leona N. Travis*, *supra* note 4.

⁷ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *See Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

Office such that the Office abused its discretion in denying merit review in the face of such evidence.⁹

The underlying issue in this case is whether appellant sustained a knee injury on April 18, 1996 causally related to his federal employment. The Office accepted that the April 18, 1996 incident occurred as alleged but found that appellant failed to submit any medical evidence to establish that this incident caused an injury. With his untimely reconsideration request, appellant submitted medical documentation including emergency room reports dated April 18, 1996 which indicated that at approximately 7:30 p.m. that evening, he was involved in an altercation and was kicked behind the left knee while playing basketball. Appellant received emergency treatment at 8:55 p.m. for his injuries. He was diagnosed as having a posterior knee dislocation and flown by helicopter to a medical facility in Wichita, Kansas, for emergency fasciotomies and arterial reconstruction. Radiology reports submitted at that time confirmed that he sustained a dislocation of the femur on the tibia.

The Board finds that the medical evidence submitted following the March 16, 1998 decision clearly establishes that appellant sustained a knee injury on April 18, 1996 causally related to employment factors as alleged by appellant in his claim. Therefore, the new evidence submitted by appellant demonstrates clear error as it is of sufficient probative value to shift the weight of evidence in favor of appellant. The Office originally rejected the claim on the basis that no medical evidence was submitted in support of the claim. With the untimely request for reconsideration, medical opinion evidence was submitted which directly bears on the nature and extent of the April 18, 1996 left knee incident, and manifests on its face that appellant sustained injury to his left knee on that date. For this reason, the Office abused its discretion in failing to reopen appellant's claim for further merit review.

The decision of the Office of Workers' Compensation Programs dated February 10, 2000 is hereby reversed.

Dated, Washington, DC
July 13, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁹ *Thankamma Mathews*, 44 ECAB 765 (1993); see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).