U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARRY M. LIPSITZ and U.S. POSTAL SERVICE,
POST OFFICE, Cornelia, GA

Docket No. 03-1192; Submitted on the Record;
Issued August 22, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's November 6, 2002 request for a merit review under section 8128(a) of the Federal Employees' Compensation Act on the grounds that it was untimely filed and failed to present clear evidence of error.

The Office accepted that, on March 5, 1998, appellant, then a 40-year-old part-time flexible carrier, sustained a torn right medial meniscus requiring arthroscopic repair.[1] On August 12, 1999 appellant claimed a schedule award. By decision dated April 24, 2000, the Office awarded appellant a schedule award for a two percent permanent impairment to the right lower extremity.[2]

Appellant disagreed with this decision and in a May 11, 2000 letter requested reconsideration. He enclosed a January 17, 2000 schedule award worksheet by Dr. Salzer, an attending Board-certified orthopedic surgeon, who found active flexion of 118 out of an average 150 degrees, and a seven percent impairment due to weakness, atrophy or pain. Dr. Salzer recommended a 20 percent impairment of the right lower extremity according to the fourth

[1] On September 9, 1998 Dr. Ralph F. Salzer, an attending Board-certified orthopedic surgeon, performed a medial meniscectomy of the right knee, abrasion arthroplasty of osteophytes of the medial femoral condyle, chondroplasty of the articular cartilage of the femur and an extensive synovectomy.

[2] In a January 17, 2000 report, Dr. Salzer found a 20 percent impairment of the right lower extremity due to a loss of 23 degrees flexion out of 150 degrees, a three-quarter inch atrophy of the right thigh, and resolving pain. Dr. Salzer did not refer to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) in this report. The Office referred Dr. Salzer's report to an Office medical adviser, who in an April 18, 2000 report found that appellant had a full range of motion. The adviser determined that, according to the A.M.A., *Guides*, fourth edition, Table 64 on page 85 indicated that a partial medial meniscectomy equaled a two percent permanent impairment of the right lower extremity. The medical adviser noted that it was impermissible to use both Table 64 with Tables 36 to 38 regarding atrophy. Therefore, the medical adviser concluded that appellant sustained a two percent impairment to the right lower extremity.

edition of the A.M.A., *Guides*. The Office then referred the case to an Office medical adviser, who submitted a May 30, 2000 report noting that, according to Table 41, page 78 of the A.M.A., *Guides*, appellant had greater than a full range of right knee motion. The medical adviser stated that Dr. Salzer did not ascribe any impairment due to pain or weakness, or perform a complete schedule award evaluation.

By decision dated June 2, 2000, the Office denied modification on the grounds that the evidence submitted was insufficient to establish that appellant had greater than a two percent impairment of the right lower extremity.[3]

In a November 7, 2000 letter, Horace E. Campbell, an attorney, stated that appellant did "not agree" with the April 24 and June 2, 2000 decisions, and had "new evidence which is relevant to the criteria for disability pursuant to 5 U.S.C. § 8128 *et seq.* which will be submitted forthwith." Mr. Campbell also requested that the Office advise him as to how to obtain "Attorney Fee Contracts …."[4] On November 28, 2000 Mr. Campbell submitted appellant's authorization for him to serve as appellant's representative.

The record demonstrates that neither appellant nor his representative submitted additional correspondence or evidence from November 28, 2000 until June 29 and August 13, 2001 letters in which Mr. Campbell requested that the Office authorize a change of physicians. The Office granted this request on September 4, 2001, authorizing appellant to seek treatment from Dr. W. David Weiss, a Board-certified orthopedic surgeon.

Beginning on November 19, 2001, appellant submitted November 5, 2001, March 27, June 19 and November 5, 2002 reports from Dr. Weiss diagnosing medial arthrosis and chondromalacia of the right knee. He also submitted July 25 and July 29, 2002 reports from Dr. James M. Alday, a Board-certified orthopedic surgeon, diagnosing post-arthroscopic status, a medial meniscal tear, osteoarthritis and chondromalacia of the right knee, and atrophy of the right thigh. Dr. Alday provided an impairment rating of six percent to the "body as a whole" using the fifth edition of the A.M.A., *Guides*.

In a November 6, 2002 letter, appellant requested reconsideration, asserting that Dr. Alday's reports were sufficient to warrant modification of the prior decision.[5]

By decision dated January 22, 2003, the Office denied appellant's November 6, 2002 request for reconsideration on the grounds that it was untimely filed and failed to present clear

[3] In a June 21, 2000 telephone memorandum, the Office noted that appellant had called to request a second opinion examination. Appellant explained that his attending physician would not cooperate regarding a schedule award evaluation. In response, the Office advised appellant in a June 22, 2000 letter that the Office was "not responsible for sending [him] out for a second opinion," and that it was appellant's responsibility to submit new evidence. The Office also advised appellant to follow the appeal rights accompanying the June 2, 2000 decision.

[4] In a November 20, 2000 letter, the Office advised Mr. Campbell that it could not communicate with him regarding appellant's claim until appellant signed an authorization for Mr. Campbell to represent him.

[5] In a December 17, 2002 letter, appellant's attorney requested a case status update regarding the revised impairment rating submitted on August 12, 2002. On January 14, 2003 appellant submitted an undated, unsigned slip for a January 22, 2003 appointment at the Specialty Clinics of Georgia.

evidence of error. The Office found that appellant's November 6, 2002 request was filed more than one year following the June 2, 2000 merit decision, and was therefore untimely. The Office conducted a limited review of the evidence submitted following the June 2, 2000 decision. The Office found that the new medical evidence concerned new physical findings and offered a new impairment rating based on the fifth edition of the A.M.A., *Guides*, which was not in effect as of the June 2, 2000 decision.[6] The Office therefore found that the new evidence was unrelated to the previous decision and, therefore, did not present clear evidence of error. The Office advised appellant that, if he believed his right lower extremity impairment worsened following the April 24, 2000 schedule award, he should file a new claim for an additional award.

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.[7] As appellant filed his appeal with the Board on April 8, 2003, the only decision properly before the Board is the January 22, 2003 decision denying appellant's request for a merit review. The Office's April 24 and June 2, 2000 decisions are not before the Board on the present appeal.

The Board finds that the Office properly denied appellant's November 6, 2002 request for reconsideration.

The Office, through regulations, has imposed limitations on the exercise of its authority under 5 U.S.C. § 8128(a). The Office 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.[8] When an application for review is untimely, the Office undertakes a limited review to determine whether the application present clear evidence of error that the Office's final merit decision was in error.[9]

The Board finds that appellant failed to file a timely application for review. In this case, on April 24, 2000, the Office awarded appellant a schedule award for a two percent permanent impairment of the right lower extremity, affirmed by a June 2, 2000 decision denying modification. Following this decision, Mr. Campbell submitted a November 7, 2000 letter stating that appellant did "not agree" with the Office's April 24 and June 2, 2000 decisions, and that appellant would submit new, relevant evidence "forthwith." Mr. Campbell also submitted appellant's attorney authorization on November 28, 2000. On appeal, Mr. Campbell contends that as the November 7 and 28, 2000 letters "protested" the Office's schedule award decision, they therefore constituted timely, valid requests for reconsideration.

The Board finds, however, that Mr. Campbell's November 7 and 28, 2000 correspondence does not constitute a request for reconsideration. These letters and appellant's authorization contain no language exercising appellant's appeal rights. Mr. Campbell stated only

[6] Under FECA Bulletin 01-5 (issued January 29, 2001), any new schedule award decision issued after February 1, 2001 must be based on the fifth edition of the A.M.A., *Guides*. As of April 24, 2000, the fourth edition of the A.M.A., *Guides* was still in effect.

[7] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[8] 20 C.F.R. § 10.607(a) (2002).

[9] 20 C.F.R. § 10.607(b) (2002).

that appellant did "not agree" with the Office's decisions. There is no request for the Office to undertake any action whatsoever. Also, Mr. Campbell did not set forth any new, relevant legal argument. Mr. Campbell noted only that he would soon submit new, relevant evidence, but failed to do so within one year of the June 2, 2000 decision, delaying until November 19, 2001.[10] Thus, the Board finds that the November 7 and 28, 2000 letters do not constitute a valid request for reconsideration. As appellant's November 6, 2002 reconsideration request was outside the one-year time limit which began the day after June 2, 2000, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[11] 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[12]

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

[10] The Board notes that the June 29 and August 13, 2001 letters requesting a change of physicians do not contain any request for reconsideration.

[11] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

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

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

[16] *See Leona N. Travis*, *supra* note 14.

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

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

independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office erred in denying merit review in the face of such evidence.[19]

The Board finds that appellant's November 6, 2002 letter requesting reconsideration failed to show clear evidence of error. In the November 6, 2002 letter, appellant asserted that the July 25 and 29, 2002 reports of Dr. Alday, a Board-certified orthopedic surgeon, were sufficient to warrant modification of the prior decision. The critical issue in the case at the time the Office issued its June 2, 2000 decision was the percentage of permanent impairment to the right lower extremity. Appellant's November 6, 2002 letter, in and of itself, does not provide new, relevant, pertinent evidence on this issue, and is thus of no probative value in establishing clear evidence of error.

The Board further finds that the new medical evidence submitted does not demonstrate clear evidence of error. In his July 25 and 29, 2002 reports, Dr. Alday newly diagnosed a medial meniscal tear and osteoarthritis of the right knee, and provided an impairment rating of six percent to the "body as a whole" using the fifth edition of the A.M.A., *Guides*.[20] Thus, Dr. Alday's reports do not indicate that the April 24 and June 2, 2000 decisions were in error, but instead that appellant's condition had changed since the April 24, 2000 schedule award. Similarly, in reports from November 5, 2001 to November 5, 2002, Dr. Weiss, an attending Board-certified orthopedic surgeon, diagnosed medial arthrosis of the right knee, a diagnosis not of record as of the June 2, 2000 decision.[21] Therefore, the new medical evidence submitted does not demonstrate clear evidence of error.

Consequently, the Office's January 22, 2003 decision finding that appellant's November 6, 2002 request for reconsideration was untimely and did not establish clear evidence of error was correct.[22]

[19] *Gregory Griffin*, *supra* note 11.

[20] The Board notes that neither the Act nor its implementing federal regulations provides for a schedule award for impairment to the body as a whole. *See Terry E. Mills*, 47 ECAB 309 (1996); *James E. Mills*, 43 ECAB 215 (1991).

[21] As the Office pointed out in its January 22, 2003 decision, if appellant believed that his right lower extremity impairment had worsened following the April 24, 2000 schedule award, he should file a new claim for an additional schedule award.

[22] Following issuance of the Office's January 22, 2003 decision, appellant submitted additional medical evidence which has not been considered by the Office. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit this new evidence to the Office accompanying a valid request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated January 22, 2003 is hereby affirmed.

Dated, Washington, DC
August 22, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member