

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER TILLMAN, JR. and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA

*Docket No. 02-1770; Submitted on the Record;
Issued February 7, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and did not demonstrate any clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed the appeal with the Board on June 25, 2002 the only decision before the Board is the Office's May 14, 2002 decision, denying appellant's request for reconsideration.

On June 26, 2002 appellant, then a 35-year-old motor vehicle operator, filed a claim for a traumatic injury alleging that on February 4, 2000 while going downstairs, he sprained his left knee. Contemporaneous medical evidence shows that appellant was diagnosed as having a meniscus tear and was given work restrictions.

By letter dated September 27, 2000, the Office requested additional information from appellant including a narrative report from his attending physician containing an opinion on the relationship between his diagnosed condition and his employment.

By decision dated October 27, 2000, the Office denied the claim, stating that appellant failed to establish causation.

By letter dated April 11, 2002, appellant requested reconsideration of the decision and submitted a request for reconsideration dated September 20, 2001, which he stated he had previously submitted. The typed date at the bottom of the September 20, 2001 letter shows that, the Office received the letter by facsimile on April 15, 2002, the same date that the Office received the April 11, 2002 letter by facsimile.

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

Appellant submitted additional medical evidence consisting of physical therapy reports dated from June 11 through August 6, 2001, a magnetic resonance imaging (MRI) scan of the left knee dated April 28, 2000, medical reports and progress notes dated from February 4 through October 31, 2000 from his treating physician, Dr. John T. Harbaugh, a Board-certified family practitioner,² and Dr. Rama N. Patel, a general surgeon. Dr. Harbaugh diagnosed medial and lateral meniscus tears and chondromalacia. He opined that appellant was temporarily totally disabled and prescribed restrictions and physical therapy. Dr. Harbaugh indicated that appellant underwent arthroscopy of the left knee. Dr. Patel diagnosed a left knee sprain, prescribed medicine and a knee brace and found that appellant was temporarily totally disabled.

By decision dated May 14, 2002, the Office found that appellant's letter dated April 11, 2002, which was filed more than a year after the Office's October 27, 2000 decision was untimely. The Office presumed that the September 20, 2001 letter requesting reconsideration was also untimely because the record did not establish that it had been received by the Office prior to the April 11, 2002 reconsideration request.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely and that appellant failed to demonstrate clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.⁴ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such a decision was erroneous.⁵

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁷ Evidence which does not raise substantial questions concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be

² The name of Dr. In-Kook Chung, a Board-certified orthopedic surgeon, appears in type at the bottom of many of Dr. Harbaugh's reports but it appears that Dr. Harbaugh signed the report.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ *Willie J. Hamilton*, 52 ECAB ____ (Docket No. 00-1468, issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Willie J. Hamilton*, *supra* note 6; *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, *supra* note 5.

construed so as to produce a contrary conclusion.⁹ 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.¹⁰

Section 20 C.F.R. § 10.607 states that the application for reconsideration:

“[W]ill be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.”

In this case, the Office’s last merit decision was on October 27, 2000. Although appellant contended that his letter requesting reconsideration dated September 20, 2001 was timely, appellant did not submit evidence to support that contention. Rather, the date the Office received the September 20, 2001 letter by facsimile was April 15, 2002 which is the same date the Office received appellant’s April 11, 2002 letter requesting reconsideration. Appellant presented no evidence to show that the September 20, 2001 request for reconsideration was submitted to the Office earlier than April 15, 2002. Since appellant’s letter requesting reconsideration dated April 11, 2002 was filed more than a year after the October 27, 2000 decision, appellant’s letter requesting reconsideration was untimely filed.

None of the medical evidence appellant submitted contains a rationalized medical opinion explaining how appellant’s knee condition is causally related to the February 4, 2000 employment injury and, therefore, is not relevant to appellant establishing his claim for a traumatic injury.¹¹ The physical therapy notes dated from June 11 though August 6, 2001 do not address causation.¹² Further, a physical therapist is not a doctor within the meaning of the Federal Employees’ Compensation Act. The April 28, 2000 MRI scan does not address causation. Dr. Harbaugh’s and Dr. Patel’s reports and progress notes contain diagnoses, prescriptions of treatment and opinions on disability but they do not address causation. Appellant, therefore, has not demonstrated clear evidence of error in the Office’s decision and has failed to establish his claim.

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Willie J. Hamilton*, *supra* note 6.

¹¹ See *Calvin E. King*, 51 ECAB 394, 400 (2000).

¹² See *Jerre R. Rinehart*, 45 ECAB 518, 520 (1994).

The May 14, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 7, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member