U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD J. KELLY and DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Mannheim, Germany

Docket No. 03-159; Submitted on the Record;
Issued March 6, 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 April 29, 2002 request for reconsideration.

On March 21, 1998 appellant, then a 63-year-old grocery manager, filed a claim asserting that he sustained an injury in the performance of duty on January 15, 1997 when he unloaded two pallets of cigarette cartons and stacked them. He stated that his legs became swollen and painful. Appellant underwent bilateral total knee replacement surgery on November 3, 1997.

In a decision dated June 30, 1999, the Office denied appellant's claim for compensation. The Office found that fact of injury was not established: "Although we do accept that you moved the cartons, [your doctor] does not explain how those job duties would give rise to the severe degenerative joint disease present in both knees and he does not discuss the role of significant preexisting pathology as the reason for your symptoms." Given the absence of medical documentation of the claimed injury of January 15, 1997, the Office was unable to find that the surgeries on November 3, 1997 and thereafter were proximately caused by the claimed injury.

On April 19, 2002 appellant submitted additional medical evidence and requested that the Office reconsider his claim. On February 9, 1998 Dr. Randall W. Armstrong, a specialist in spine rehabilitation and sports medicine, reported that appellant had persistent complaints of right leg pain following his bilateral knee replacement surgery on November 3, 1997. Dr. Armstrong noted the following past medical history:

> "Not significant for prior lumbar trauma and/or hip pathology or symptomatology. This patient was quite symptomatic for four to five years in regards to his knee condition. As you know, he works in the [c]ommissary in Germany and the prolonged walking involved in his job duties contributed to his left knee degenerative joint pathology and then he subsequently developed right knee degenerative joint pathology.

> "According to the patient, his left knee condition is under a [w]orkers' [c]ompensation claim. He inquired as to whether or not his present leg symptoms will be considered part of that claim. This patient denies, however, through the course of his work to be suffering a specific injury to his low back or right hip area."

Dr. Armstrong diagnosed chronic right leg pain of unknown etiology and reported: "Please note at this point, since I have not identified the pathology responsible for his right leg pain, it is not my opinion that his present symptoms reflect a work-related injury."

In a decision dated July 24, 2002, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to present clear evidence of error in the Office's June 30, 1999 decision.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.[1] Because appellant mailed his October 11, 2002 appeal more than one year after the Office's June 30, 1999 decision, the Board has no jurisdiction to review that decision. The only decision that the Board may review is the Office's July 24, 2002 decision denying appellant's April 19, 2002 request for reconsideration.

The Board finds that the Office properly denied appellant's April 19, 2002 request for reconsideration.

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:

> "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 --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[2]

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. § 10.607 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.[3]

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[1] 20 C.F.R. § 501.3(d) (time for filing); *see id.* § 501.10(d)(2) (computation of time).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607 (1999).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[4] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[5] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[8] 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.[9] 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 a merit review in the face of such evidence.[10]

On June 30, 1999 the Office denied appellant's claim for compensation on the grounds that fact of injury was not established. The Office accepted that the described incident occurred as alleged but denied the claim because the medical evidence did not establish that the incident caused or aggravated appellant's bilateral knee degenerative joint disease or resulted in his bilateral total knee replacement surgery on November 3, 1997. This is the only decision on the merits of appellant's claim. Appellant had one year from the date of this decision to request reconsideration by the Office. As he made his April 19, 2002 request for reconsideration more than one year after the Office's June 30, 1999 decision, his request is untimely. To obtain a merit review of his claim, therefore, he must present clear evidence of error in the Office's June 30, 1999 decision.

To support his untimely request, appellant submitted the February 9, 1998 report of Dr. Armstrong. This report focused on appellant's persistent complaints of right leg pain following his bilateral knee replacement surgery on November 3, 1997. Dr. Armstrong referred only indirectly to appellant's federal employment: "As you know, he works in the [c]ommissary in Germany and the prolonged walking involved in his job duties contributed to his left knee

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

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

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

[7] *See Leona N. Travis, supra* note 5.

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

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

[10] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

degenerative joint pathology and then he subsequently developed right knee degenerative joint pathology." Although this statement supports a connection between prolonged walking in appellant's federal employment and at least his left knee degenerative joint pathology, the issue in appellant's case was whether unloading two pallets of cigarette cartons on January 15, 1997 caused or contributed to appellant's bilateral knee condition and need for surgery. Dr. Armstrong's report does not mention the incident that occurred on January 15, 1997 and does not attribute appellant's bilateral knee condition to that incident. His report is therefore immaterial to the claim that the Office denied on June 30, 1999 and does not show clear evidence of error in the Office's decision.

The July 24, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 6, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member