

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT G. ROGERS and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, St. Louis, MO

*Docket No. 03-2153; Submitted on the Record;  
Issued November 17, 2003*

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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 determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On September 11, 2001 appellant, then a 45-year-old medical supply technician, filed an occupational disease claim alleging that he sustained a right meniscus tear in the performance of duty. He attributed his alleged right knee condition to repetitive work activities such as constant walking, twisting, stooping, bending and lifting. Appellant identified April 12, 2001 as the date he first realized his condition was employment related.

Appellant submitted a copy of an April 12, 2001 treatment note from Dr. Mathew McCall, an osteopath, indicating that he had seen appellant that day for complaints of dysethesia and right ankle paresthesia ongoing for one week. Dr. McCall related appellant's opinion that his right ankle and knee pain were the result of having fallen out of a chair on March 14, 2000. He noted that appellant had a history of lumbar laminectomy, lumbar disc protrusion and spinal stenosis with lumbar arthritis dating back 10 years and right knee pain dating back to 1999. A magnetic resonance imaging (MRI) scan was referenced as showing disc herniation of the cervical and lumbar spine. He noted that he was unsure of the role of appellant's back injury to his knee complaints. Dr. McCall referred appellant for an orthopedic consult. In an August 14, 2001 treatment note, appellant was noted as having a posterior horn meniscus tear and anterior horn later meniscus tear confirmed by an MRI scan.

In a letter dated October 23, 2001, the Office advised appellant of the factual and medical evidence required to establish his claim for compensation, including a comprehensive and rationalized medical opinion addressing how his alleged right knee condition was causally related to work factors.

In a November 27, 2001 decision, the Office denied compensation on the grounds that appellant failed to establish fact of injury.

By letter dated December 26, 2001, appellant requested reconsideration and submitted additional evidence including a position statement and medical treatment notes from Dr. Gary A. Miller, a Board-certified orthopedist. On November 2, 2001 Dr. Miller reported that appellant underwent surgery to repair a medial meniscus tear. On January 15, 2002 Dr. Miller stated that it was his opinion that appellant's knee problem occurred as a result of repetitive strains induced by twisting, bending, kneeling and walking on the job. In response to appellant's evidence, the employing establishment submitted a December 10, 2001 statement from appellant's supervisor indicating that appellant had been working light duty for over one year, and was under restrictions that precluded him from bending, stooping, twisting, pushing or pulling more than one hour per day, and lifting over 10 pounds.

In a decision dated April 11, 2002, the Office denied modification of its prior decision. The Office specifically found the evidence insufficient to carry appellant's burden of proof on causal relationship since there was no rationalized medical opinion of record causally relating appellant's knee condition to work factors.<sup>1</sup>

Appellant subsequently requested reconsideration by letter dated April 28, 2003. In a decision dated June 26, 2003, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish 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.<sup>2</sup> Because appellant filed his appeal with the Board on September 5, 2003, the Board lacks jurisdiction to review the Office's last merit decision dated April 11, 2002. Consequently, the only decision properly before the Board is the Office's June 6, 2003 decision denying appellant's request for reconsideration.

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

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>5</sup> One such limitation is that the application for

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<sup>1</sup> The Office noted that the etiology of appellant's knee condition, in conjunction with his preexisting back problems, had not been discussed.

<sup>2</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>3</sup> 5 U.S.C. § 8128(a); see *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> 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 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607 (1999).

reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>6</sup>

In its June 26, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on April 11, 2002 and appellant filed his request for reconsideration more than one year later on April 28, 2003. Consequently, the Office properly determined that the request was untimely filed.

In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office.<sup>7</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.<sup>10</sup> Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> 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.<sup>13</sup>

In this case, appellant alleged on reconsideration that the employing establishment’s health unit physician mislead the Office by suggesting that his right knee condition was attributable to a fall out of a chair and not work factors. Appellant denied that he informed Dr. McCall that he had fallen out of a chair. Appellant further challenged the employing establishment’s characterization of his work activities as being limited.

The Board has duly reviewed the record and finds that appellant has not established clear evidence of error on behalf of the Office. Despite appellant’s arguments, he has not shown that the Office erred in finding that the evidence of record was insufficient to carry his burden of

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<sup>6</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>7</sup> 20 C.F.R. § 10.607(b) (1999).

<sup>8</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

proof on causation.<sup>14</sup> Appellant did not submit any evidence on reconsideration to *prima facie* shift the weight of the evidence in his favor or to raise a substantial question as to the correctness of the Office's April 11, 2002 decision.<sup>15</sup> Thus, the Board concludes that the Office did not err in denying appellant's untimely reconsideration request on the grounds that he failed to establish clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated June 26, 2003 is hereby affirmed.

Dated, Washington, DC  
November 17, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>14</sup> Even if the Board were to accept appellant's description of his work duties, the medical opinion evidence remains insufficient to carry his burden of proof since there is no rationalized medical report thoroughly addressing his right knee meniscus tear and the role of his work activities to that condition.

<sup>15</sup> In response to appellant's reconsideration request, the employing establishment submitted a May 23, 2003 report from Dr. McCall, stating that it was speculated that appellant had a degenerative right knee condition as early as 1999 based on x-ray findings, and that it was difficult to distinguish whether the degenerative condition was due to work activities or the normal activities of daily living. This report does not lend support to appellant's case.