

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE A. DAYE and U.S. POSTAL SERVICE,
POST OFFICE, Norfolk, VA

*Docket No. 03-864; Submitted on the Record;
Issued September 15, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's October 28, 2002 request for reconsideration on the grounds that the request was not timely filed and failed to establish clear evidence of error.

This case has previously been on appeal before the Board. On October 2, 1989 appellant, then a 24-year-old distribution clerk, filed an occupational disease claim for an employment-related left knee condition.¹ Appellant underwent arthroscopic surgery on November 3, 1989 to remove loose bodies from his left knee. He returned to work on November 10, 1989 in a light-duty capacity. Appellant stopped work on December 4, 1989 due to ongoing pain. On March 15, 1990 the Office accepted appellant's claim for aggravation of left knee sprain.

On March 23, 1990 appellant filed a claim for wage-loss compensation beginning October 21, 1989. In a letter dated May 30, 1990, the Office advised appellant that his claim had been accepted for "temporary aggravation loose bodies, left knee sprains." The Office further advised that the medical evidence of record failed to support disability beyond one to two days and that all disability beyond that time frame and the recent arthroscopic surgery performed on appellant's left knee did not appear to be employment related. Appellant was afforded 15 days to submit additional medical evidence in support of his claim for wage-loss compensation.

By decision dated July 12, 1990, the Office denied appellant's claim for intermittent wage-loss compensation beginning October 21, 1989. The Office found that the medical evidence failed to establish that appellant's accepted condition rendered him disabled beyond one to two days. Additionally, the Office found that appellant's November 3, 1989 arthroscopic

¹ Appellant sustained a prior left knee injury in 1985 while in military service. On November 27, 1985 appellant underwent arthroscopic surgery to repair a torn medial meniscus of the left knee.

surgery and subsequent disability were not causally related to appellant's accepted condition. In a decision dated February 11, 1991, the Board affirmed the Office's July 12, 1990 decision.²

Appellant filed a second appeal on September 17, 2001 seeking review of a June 19, 2001 decision. The appeal was docketed as Docket No. 02-2. By order dated April 18, 2002, the Board dismissed the appeal for lack of jurisdiction. The Board explained that the record did not include a final decision issued by the Office within one year prior to the filing of the September 17, 2001 appeal. The record revealed that the last decision rendered in appellant's case was the Board's February 11, 1991 decision.

On October 28, 2002 appellant requested reconsideration before the Office and submitted additional medical evidence. By decision dated January 22, 2003, the Office denied appellant's request for reconsideration on the basis that the request was untimely and appellant failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's October 28, 2002 request for reconsideration.

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.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.⁶ The last merit decision in the instant case was the Board's February 11, 1991 decision, which affirmed the Office's July 12, 1990 decision denying compensation. Appellant's request for reconsideration was dated October 28, 2002.⁷ Therefore, his reconsideration request was untimely.

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

² Docket No. 90-1758 (issued February 11, 1991). The Board's February 11, 1991 decision is incorporated herein by reference.

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

⁴ 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).

⁵ 20 C.F.R. § 10.607 (1999).

⁶ 20 C.F.R. § 10.607(a) (1999).

⁷ *See Veletta C. Coleman*, 48 ECAB 367 (1997) (a right to reconsideration within one year accompanies any merit decision).

error” on the part of the Office.⁸ 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.¹¹ Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴

In the instant case, appellant failed to establish clear evidence of error. On reconsideration, appellant submitted an October 25, 2002 radiology report. The report noted no significant compartmental narrowing, no effusion and mild proliferative changes about the distal femur at the medial surface of the joint, no apparent loose bodies or osteochondral defects and minimal proliferation at the undersurface of the left patella. This report does not address the cause of appellant’s continued left knee complaints and, therefore, it is not relevant or probative on the issue of whether appellant has any continuing employment-related condition or disability. Accordingly, the Office properly denied appellant’s October 28, 2002 request for reconsideration.

⁸ 20 C.F.R. § 10.607(b) (1999).

⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

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

Dated, Washington, DC
September 15, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member