United States Department of Labor
Employees' Compensation Appeals Board

PATRICK L. O'REILLY, Appellant	)	
and	)	**Docket No. 04-1178**
	)	**Issued: August 30, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Marshall, MN, Employer	)	

Appearances:
Douglas D. Kluver, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 29, 2004 appellant, through counsel, filed a timely appeal of an Office of Workers' Compensation Programs' nonmerit decision dated February 12, 2004, which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated May 7, 1997 to the filing of this appeal on March 29, 2004 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate any clear evidence of error. On appeal appellant's counsel argues that affidavits submitted on reconsideration provide eyewitness accounts of the August 14, 1994 accident and establish that fact of injury raises a substantial question concerning the correctness of the Office's original decision.

FACTUAL HISTORY

On December 26, 1995 appellant, then a 56-year-old substitute rural carrier, filed a claim for a traumatic injury alleging that on August 14, 1993 he caught his foot in a nylon bundle wrap and fell off the loading dock, injuring his back, right knee and foot. Appellant did not immediately stop work following the injury, but was later terminated from the employing establishment on October 30, 1993.

In a letter dated January 4, 1996, a representative of the employing establishment indicated that appellant did not report the alleged injury to any employee or supervisor while employed.

In a letter dated January 29, 1996, appellant contended that he did report the injury in writing to the postmaster on September 5, 1993; however, he was never provided with the proper paperwork. He indicated that after the injury occurred on August 14, 1993 his knee was swollen, but on August 31, 1993 the knee locked up which caused him to seek chiropractic treatment.

A September 14, 1995 report from Derryl Moon, a chiropractic, indicated that appellant was seen on August 31, 1993 with complaints of right knee pain. He diagnosed a disarticulation of the right knee and soft tissue damage. A November 29, 1995 magnetic resonance imaging (MRI) scan indicated that appellant had osteoarthritis and meniscus degeneration of the right knee. The MRI scan noted that appellant had been hit by a car and had undergone an arthroscopy and meniscectomy prior to his MRI scan. Progress reports submitted from November 28, 1977 through August 29, 1978 outlined chronic right knee pain and pain of the right tibia after a car accident in 1978.

By decision dated February 22, 1996, the Office denied the claim, finding that appellant failed to establish fact of injury. The Office noted that the evidence was either insufficient to support the fact of injury or it was conflicting regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged. The Office also found that a medical condition resulting from the alleged work incident was not supported by the evidence.

In a letter dated February 13, 1997, appellant requested a review of the written record and submitted additional evidence. In a statement dated February 20, 1997, he reported that he previously injured his knee when he was hit by a car; however, the knee was repaired by surgery and was fine until the August 14, 1993 fall. Appellant was afraid when he told his supervisor about the injury because he feared he would lose his job. He submitted a copy of an incident report addressed to the postmaster dated September 5, 1993, which he referenced in his January 29, 1997 statement that outlined the circumstances of the alleged incident. He also submitted a statement from Valerie Downing, an employee, dated February 19, 1997, which indicated that he called her at home on August 14, 1993 to inquire about the procedure on reporting an injury because he had fallen and injured his knee. Ms. Downing stated that she provided her opinion that he could jeopardize his job upon reporting an accident.

Appellant submitted progress reports from November 15, 1993 through February 6, 1995 and medical reports from Dr. Robert Olson, an attending physician and Dr. Terry Seeman, a

Board-certified orthopedic surgeon, who began treating him in December 1995. On February 6, 1996 Dr. Olson indicated that Dr. Seeman performed arthroscopic surgery and a tibia osteotomy on December 19, 1995 as a result of the claimed employment injury on August 14, 1993. On February 27, 1997 Dr. Olson stated that appellant was hit by a car many years ago which caused him minor intermittent problems until he reinjured his knee in 1993 at the employing establishment. In a CA-20 report dated February 22, 1996, Dr. Seeman noted by checking "yes" that the alleged August 1993 employment injury aggravated a preexisting right knee condition and reviewed surgeries performed in 1979 and 1995. He stated on February 19, 1997 that the August 14, 1993 fall likely caused damage along the medial side of the knee.

By decision dated May 5, 1997, the Office denied modification of the February 22, 1996 decision. The Office found that the factual and medical evidence remained insufficient to establish that an injury occurred as alleged. The Office found that Ms. Downing's statement simply offered credence to appellant's description of the injury. Further, the Office found the medical opinion insufficient to relate the diagnosed medical conditions to the implicated incident. It was noted that the medical record was devoid of any discussion regarding the contribution of nonwork-related factors, such as the 1978 car accident or other nonwork-related factors, the claim must be denied.

In a letter dated October 10, 2003, appellant, through counsel, requested reconsideration of the May 5, 1997 decision. He argued that appellant's August 1993 employment injury was previously thought to be unwitnessed due to his supervisor's nonfeasance in properly reporting the claim and he submitted evidence to support the validity of the claim.

Appellant submitted affidavits from William Boklep, dated December 2, 2002 and William Furan, dated February 19, 2003, who both reportedly worked with appellant at the time of the alleged injury on August 14, 1993. Mr. Boklep stated: "I saw [appellant] fall from the loading dock to the ground. At first I thought it was a joke until I saw him grab his leg and I knew he was hurt and had injured his leg and back." Mr. Furan stated: "On August 14, 1993 … [Mr.] Boklep reported to me that he had observed [appellant] trip on plastic bundle straps which were scattered on the floor of the mail loading platform … and that [appellant] had hurt himself." Mr. Furan further stated: "[Appellant] made an effort to report the injury but his efforts were frustrated by Postmaster Deegan.…" Appellant's counsel submitted a third affidavit from Mike Davis, another employee, to confirm the circumstances surrounding his delay in reporting the injury to the employing establishment. Mr. Davis stated that appellant's efforts to succeed at work were frustrated by management as a result of their overall hostility towards veterans.

Appellant also submitted an MRI scan dated July 23, 2003, two letters from Dr. Seeman dated August 14 and October 2, 2003 and a letter from Kim Kahn, a certified nurse consultant. The MRI scan indicated that the scan was performed "status-post fall, back pain, radicular symptoms" and revealed mild compression deformity involving T12 and moderate L4-5, mild L2-3 and mild L3-4 central spondylostenosis. In the August 14, 2003 report, Dr. Seeman stated:

> "In reviewing my medical notes, I note that [appellant] was injured in August of 1993, when he tripped and fell off a loading dock at the post office …, at which time he sustained a right tibia plateau fracture. Following this tibia plateau injury, he developed post-traumatic arthritis within this knee. [Appellant] also developed

> a history of pain in his lower back which then gradually radiated into his right leg and he has a known disc problem at L4-5 with right radicular symptoms.… It is my opinion, at this particular point in time, that his fall in August of 1993 was the initiating injury that has created the conditions that [appellant] is currently suffering from."

In the October 2, 2003 report, Dr. Seeman stated: "I recently reviewed [appellant's] medical records once again. In my judgment, his deep vein thrombosis and subsequent pulmonary embolus was a direct result of the treatment required for his knee. His right knee injury was caused by his fall at the post office."

By decision dated February 12, 2004, the Office found that appellant's October 10, 2003, reconsideration request was filed more than a year after the Office's May 5, 1997 decision and was untimely. The Office reviewed the evidence submitted and determined that it failed to establish clear evidence of error on the part of the Office in denying his claim.

LEGAL PRECEDENT

The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[1] 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.[2] 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.[3]

To show clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which does not raise substantial questions 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

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[3] 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

[5] *Willie J. Hamilton*, *supra* note 4; *Leona N. Travis*, 43 ECAB 227 (1991).

[6] *See Jesus D. Sanchez*, *supra* note 3.

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

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]

ANALYSIS

In this case, the Office's last merit decision was on May 5, 1997. Appellant requested reconsideration on October 10, 2003 more than one year after the last merit decision. His October 10, 2003 request for reconsideration was, therefore, untimely filed and subject to review under the clear evidence of error standard.

Appellant contends that the submitted witness statements establish fact of injury and that the additional medical evidence causally relates appellant's diagnosed condition to the August 14, 1993 incident. The critical issue in the case at the time the Office issued its May 5, 1997 decision was whether appellant had established that he sustained an injury in the performance of duty on August 14, 1993 as alleged.

The Board finds that, while the witness statements submitted on reconsideration are of limited probative value because they lack specificity regarding the time, place and manner of the alleged injury. The statements were prepared almost 10 years following the alleged incident and no information was provided to explain how the date and time of appellant injury were recalled. Only the statement from Mr. Boklap appears to be an eyewitness account of the injury. However, this statement is very general in nature, only relating a fall from the loading dock which initially appeared to be a joke. No specifics are related regarding the alleged fall, such as the height of the fall or how appellant landed. The other statements do not offer eyewitness accounts of the alleged incident, but only offer conclusory opinions regarding management actions not specifically related to the alleged fall. These statements, therefore, lack probative value and do not *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question as to the correctness of the May 5, 1997 decision.

Further, the July 23, 2002 MRI scan does not address causation and the nurse's report is of no probative value in establishing fact of injury, as the diagnosis of an injury is a medical determination and a nurse is not a "physician" as defined under the Act.[9] Such evidence does not establish error in the May 5, 1997 decision.

Dr. Seeman's August 14 and October 3, 2003 reports are also insufficient to establish clear evidence of error. Although he stated that the August 14, 1993 fall at work caused appellant's condition in both reports, he did not discuss appellant's previous injury to his knee and surgery from the 1978 automobile accident or any factors which could have contributed to the injury thereafter. This flaw was pointed out in the May 5, 1997 decision. The physician provided no rationale on how specific employment factors caused or worsened appellant's preexisting condition. Dr. Seeman's reports do not manifest that the Office committed an error in denying the claim. Moreover, he began treating appellant in December 1995, two years

[8] *Willie J. Hamilton, supra* note 4.

[9] *Joseph N. Fassi*, 42 ECAB 677 (1991); *see* 5 U.S.C. § 8101(2).

following the alleged incident. The Board notes that there is no medical evidence contemporaneous to the incident showing injury to the right knee causally related to the alleged employment injury. The Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence.[10]

CONCLUSION

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.

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2004 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: August 30, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[10] *See Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).