

**United States Department of Labor
Employees' Compensation Appeals Board**

MICHAEL C. WILLSON, Appellant

and

**U.S. POSTAL SERVICE, LINCOLN PARK
POST OFFICE, Lincoln Park, MI, Employer**

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**Docket No. 04-250
Issued: May 24, 2004**

Appearances:
Michael C. Willson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 5, 2003 appellant filed a timely appeal from an October 7, 2003 decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 25, 2002 and the filing of the appeal on November 5, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On November 24, 2001 appellant, then a 50-year-old letter carrier, filed an occupational disease claim alleging that on July 9, 2001 he first realized that his right knee and right hand injuries were caused by factors of his federal employment. He sustained an injury when a

handrail collapsed and he fell. Appellant noted that, after the fall, his right hand became numb and he experienced discomfort in his right knee. He indicated that he sustained a second fall on September 15, 2001 which he attributed to the July 9, 2001 fall.

Appellant's claim was accompanied by medical documents indicating that he suffered from degenerative osteoarthritis of both knees, which was greater in the right knee. Carolyn Manus, an employing establishment human resource specialist, controverted appellant's claim in a November 29, 2001 letter on the grounds that the medical evidence established that degenerative arthritis in both of appellant's knees was caused by his obesity. She submitted a list of knee and hand injuries sustained by appellant at work.¹

By letter dated December 6, 2001, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office notified appellant about the type of factual and medical evidence needed to establish his claim. A copy of this letter was sent to the employing establishment.

On December 20, 2001 the employing establishment submitted medical evidence revealing that appellant had degenerative osteoarthritis of both knees, greater in the right knee than the left knee. He was also diagnosed with moderate severe radiculopathies on the right which were greater at C7 than C6 with very chronic and early reinnervation changes, mild severe chronic C7 radiculopathy on the left, bilateral mild severe ulnar mononeuropathies at the elbow, mild severe carpal tunnel syndrome at the right wrist and mild severe underlying polyneuropathy consistent with diabetes mellitus. Appellant submitted reports from treating physicians and a physician's assistant indicating that he sustained a contusion of the right wrist and knee, an abrasion of the left knee, mild degenerative changes of the right knee, diabetes mellitus and chronic and apparently relapsed anemia iron deficiency.

By decision dated February 25, 2002, the Office found the evidence of record insufficient to establish that appellant sustained a right hand or right knee injury in the performance of duty. The Office found that the medical evidence of record failed to provide a rationalized opinion explaining how factors of appellant's federal employment caused or aggravated his current diagnosis.

The Office received medical documents indicating that appellant fell in July 2001 and experienced more pain in his right knee than in his left knee. He had moderate to advanced narrowing of the medial articular space of the right knee, minimal similar changes on the left side, significant osteoarthrosis of both knees, greater in the right than in the left and gross patellofemoral crepitus.

On May 14, 2003 appellant filed an occupational disease claim alleging that on July 9, 2001 he first became aware of his right knee condition. He alleged that on July 10, 2001 he first realized that his right knee condition was caused by factors of his employment. Appellant stated that he stood on his feet for two to two and one-half hours every morning casing mail. He

¹ The list submitted by Ms. Manus indicated that appellant sustained a right knee injury when he fell on the stairs/steps on September 15, 2001.

related that he spent 5 to 6 hours going up and down cement stairs and that wear and tear over 25 years impacted his knee condition.

Appellant submitted a detailed description of his July 9 and September 15, 2001 injuries. He also submitted medical reports from his treating physicians indicating that he had charcot joints in his feet, a degenerative change secondary to neuropathic joint as found in someone with long-standing diabetes and degenerative changes in his right knee. Ms. Manus controverted appellant's claim in a June 12, 2003 letter on the grounds that the medical evidence did not establish that his condition was work related. She submitted a revised copy of the previous list of injuries allegedly sustained by appellant at work to include the July 9, 2001 injury.

By letter dated June 25, 2003, the Office advised appellant that his May 14, 2003 occupational disease claim filing, assigned number 09-2034602, was duplicative of his November 24, 2001 claim assigned number 09-2015778. The Office advised appellant that, in establishing that his right knee complaints were related to factors of his employment, he had to pursue his appeal rights under claim number 09-2015778.²

In an undated letter received by the Office on August 6, 2003, appellant requested reconsideration of the Office's February 25, 2002 decision. He submitted an April 14, 2003 medical report of Dr. John H. Lyon, a Board-certified orthopedic surgeon, who provided a history of treatment of appellant for arthritis of the right knee beginning on July 23, 2002 and reviewed the treatment appellant received from other physicians. He stated that, according to appellant's history, the right knee was painful for the prior five or six years and was suddenly exacerbated in July 2001 with a work-related injury. Dr. Lyon provided a description of the July 2001 incident and a September 15, 2001 employment injury where appellant stepped out from a porch and twisted his knee.³ He stated that this did not create new areas of discomfort, but exacerbated appellant's symptoms. Dr. Lyon diagnosed osteoarthritis in the right knee and moderate crepitus from a symptomatic and radiographic standpoint. He opined that, based upon the history, appellant had osteoarthritic symptoms prior to the two episodes of injury at work in 2001. Dr. Lyon opined that it was also evident that appellant's knee discomfort increased as a result of these job-related events. He stated that this was consistent with an exacerbation of a preexisting condition. Dr. Lyon concluded that appellant had right knee osteoarthritis and noted that it was being treated conservatively.

By decision dated October 7, 2003, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

² The former claim attributed his right knee condition to standing and going up and down cement stairs for 25 years while the November 24, 2001 claim attributed his right knee and hand conditions to two falls at work.

³ In its February 25, 2002 decision, the Office noted that appellant sustained a traumatic injury on September 15, 2001 assigned claim number 09-20141640 that was accepted for a knee sprain.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

Section 10.607(a) of the Office's implementing regulation states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

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.¹³ 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 merit review in the face of such evidence.¹⁴

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ 20 C.F.R. § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

ANALYSIS

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁵

The last merit decision in this case was issued by the Office on February 25, 2002 denying appellant's claim for compensation on the grounds that the medical evidence of record failed to establish that he sustained a right knee or hand injury in the performance of duty. Appellant's undated letter requesting reconsideration was received by the Office on August 6, 2003. The record submitted on appeal does not contain an envelope with a postmark. Consequently, the August 6, 2003 date of receipt of appellant's undated letter establishes the date of his request.¹⁶ As his request was made more than one year after the Office's February 25, 2002 decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that he did not sustain an injury in the performance of duty. He submitted Dr. Lyon's April 14, 2003 medical report addressing his preexisting osteoarthritis of the right knee as exacerbated by a July 9, 2001 employment incident and September 15, 2001 employment injury. Dr. Lyon failed to explain how or why appellant's preexisting degenerative osteoarthritis of the right knee was exacerbated by the July 9, 2001 employment incident or September 15, 2001 employment injury. The evidence submitted does not establish that the Office's denial of the claim was erroneous. While the evidence from Dr. Lyon may allow a construction of the evidence so as to produce a contrary result, this is not sufficient to shift the weight of the medical evidence in favor of the claim. Therefore, the Board finds that his report does not raise a substantial question as to the correctness of the Office's determination that appellant did not sustain an injury in the performance of duty.

CONCLUSION

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

¹⁵ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁶ "At 20 C.F.R. § 10.607(a) it is stated that, if a request for reconsideration is submitted by mail, the application will 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. Otherwise, the date of the letter itself should be used." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 24, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member