

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

MARTIN J. HAYES, Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Royal Oak, MI, Employer**

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**Docket No. 05-601
Issued: August 15, 2005**

Appearances:
Bobbi Green, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 12, 2005 appellant filed a timely appeal from an October 13, 2004 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration as untimely and finding that he failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 24, 2003 and the filing of this appeal on January 12, 2005, 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), but has jurisdiction over the nonmerits.

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 December 24, 2002 appellant, then a 46-year-old city carrier technician, filed an occupational disease claim assigned number 09-2028557, alleging that on September 25, 2002 he

first became aware of tendinitis in his right knee. He further alleged that this condition was caused by factors of his federal employment. Appellant stated that he used his legs “for all parts of my job.” By letter dated January 16, 2003, the Office advised him about the factual and medical evidence he needed to submit to establish his claim.

In response, appellant submitted a January 17, 2003 duty status report of Dr. Frederick K. Lewerenz, an osteopathic family practitioner, which noted that he hurt his right knee while delivering mail. He noted that appellant experienced pain with restricted range of motion and noted his physical restrictions. In a February 1, 2003 report, Dr. Lewerenz stated that appellant had longstanding problems with his right knee and he often experienced exacerbations of pain and swelling. He diagnosed degenerative joint disease of both knees. Dr. Lewerenz opined that a May 10, 2002 injury and appellant’s ongoing job performance caused his chronic right patellar tendinitis and bilateral degenerative joint disease of the knees. He ruled out internal derangement of the right knee. Appellant submitted unsigned treatment notes covering intermittent dates from December 11, 2002 through February 12, 2003 regarding his right knee problems.

By decision dated February 24, 2003, the Office found the evidence of record insufficient to establish that appellant sustained an injury while in the performance of duty. The Office found that he failed to identify specific factors of his employment which contributed to his right knee condition. The Office also found that he failed to submit sufficient medical evidence which diagnosed a medical condition causally related to his alleged injury.

Following the issuance of the Office’s decision, the Office received Dr. Lewerenz’s February 14, 2003 duty status report which diagnosed patellar tendinitis, patellar pain and crepitis of the right knee and noted appellant’s physical limitations. The Office also received unsigned treatment notes dated February 21 and 28 and March 5, 2003 regarding his right knee problems. In reports dated February 14 and March 5, 2003, Dr. Lewerenz diagnosed right patellar tendinitis and noted appellant’s treatment plan. In the March 5, 2003 report, he ruled out internal derangement. In an undated duty status report, Dr. Lewerenz diagnosed a right medial meniscus tear and noted appellant’s physical restrictions. A March 14, 2003 duty status report of a physician whose signature is illegible found that he had right knee patella pain and noted his physical limitations.

Appellant submitted unsigned treatment notes covering intermittent dates from March 14 through May 28, 2003 regarding his right knee problems. He also submitted Dr. Lewerenz’s April 11, 2003 duty status report in which he diagnosed pain and restricted range of motion and noted appellant’s physical restrictions. In a July 10, 2003 report, Dr. Lewerenz noted his complaint of right knee pain and discomfort. He stated that appellant was awaiting approval for arthroscopy surgery on the right knee. Dr. Lewerenz provided a history that on May 10, 2002 appellant sustained a contusion/strain of the right knee while delivering mail. He noted that this injury was considered resolved as of June 11, 2002 and it was recommended that appellant continue to wear a knee brace and return for therapy due to his complaint of daily stiffness and pain on arising and after exertion. Dr. Lewerenz opined that his right knee condition had deteriorated and was aggravated daily by extended use. Based on a magnetic resonance imaging (MRI) scan he diagnosed chondromalacia of the right knee, right patella tendinosis and a medial

meniscus tear. Dr. Lewerenz concluded that approval for arthroscopic surgery was in appellant's best interest.

In a July 30, 2003 letter, the Office advised appellant that it had reviewed Dr. Lewerenz's July 10, 2003 report and denied authorization for knee surgery. The Office further advised to appeal the decision rendered in the claim assigned number 09-2028557.¹

By letter dated July 2, 2004, appellant, through his union representative, requested reconsideration of the Office's February 24, 2003 decision. He submitted a February 12, 2003 letter in which the Office advised Dr. Lewerenz that an MRI scan of appellant's right knee was authorized and letters dated July 2 and August 3, 2004 from his representative and the Office, regarding his case record. Appellant also submitted a treatment note dated April 9, 2003 from Dr. Laurence A. Ulrey, a Board-certified orthopedic surgeon, which revealed that he had right knee pain, early osteoarthritis and a probable medial meniscus tear based on x-ray examination. He provided a history that appellant, in May 2000 twisted his knee and in September 2002, hurt his knee while performing his work duties. Dr. Ulrey noted appellant's complaints of pain anteriorly and medially and the physical requirements of his job which included going up and down stairs all day long delivering mail. He advised appellant about living with his diagnosed conditions and undergoing arthroscopic surgery. Dr. Ulrey discussed the risks and complications associated with the surgery. He also submitted an unsigned and undated report which provided his medical, social and family background. An April 3, 2003 report from a physician whose signature is illegible found that appellant had a right medial meniscus tear.

By decision dated October 13, 2004, the Office found that appellant's letter requesting reconsideration was dated July 2, 2004 was filed more than a year after the Office's February 24, 2003 decision, rendering the request as untimely. The Office also found that he did not submit evidence establishing clear evidence of error in the Office's prior decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ 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 Office's implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴

Section 10.607(a) 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

¹ The record reveals that appellant filed a claim assigned number 09-2021200 for a right knee injury he sustained on May 10, 2002.

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 20 C.F.R. § 10.607(a).

merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁵

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

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.¹¹ 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.¹²

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely request for reconsideration. 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.¹³ The last merit decision in this case was issued by the Office on February 24, 2003 which found that appellant failed to establish that he sustained an injury while in the performance of duty. As his July 2, 2004 letter requesting reconsideration was made more than one year after the Office's February 24, 2003 merit decision, it was untimely filed.

⁵ 20 C.F.R. § 10.607(b).

⁶ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁷ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁸ *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ *Larry L. Litton*, 44 ECAB 243 (1992).

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was clear error in the Office's determination that he did not sustain an injury while in the performance of his duties as a city carrier technician. The Board notes that the underlying issue is medical in nature. The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's February 24, 2003 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor.

Appellant submitted Dr. Lewerenz's February 14, March 5 and April 11, 2003 reports which found that he had patellar tendinitis, patellar pain, crepetis and chondromalacia of the right knee and listed physical limitations. The Board finds that his reports failed to address the relationship of his finding on examination to appellant's work duties. This evidence does not establish that the Office's February 24, 2003 decision was incorrect.

Similarly, the correspondence between the Office and Dr. Lewerenz authorizing an MRI scan and between his representative and the Office regarding the case record are not relevant to the underlying issue in this case. his evidence does not address whether he sustained an injury caused by factors of his employment. Therefore, the Board finds that it does not establish that the Office's February 24, 2003 decision was in error.

Dr. Ulrey's April 9, 2003 treatment note provided a history that appellant hurt his right knee in May 2000 and September 2002, while performing his work duties and found that he sustained right knee pain, osteoarthritis and a probable medial meniscus tear. Dr. Ulrey merely provided a history of injury and did not render any opinion as to whether the diagnosed conditions were caused by factors of his employment.

The unsigned treatment notes dated February 21 and 28 and March 14 through May 28, 2003, the unsigned report dated March 14 and April 3, 2003 from a physician whose signature is illegible regarding appellant's right knee problems and unsigned and undated report which discussed appellant's medical, social and family background cannot be considered competent medical evidence because it is not clear that they are from a physician.¹⁴ Therefore, the Board finds that as the treatment notes and reports lack proper identification, they do not constitute probative medical evidence or otherwise establish that the Office's February 24, 2003 decision was clearly in error.

As the evidence appellant submitted on reconsideration is insufficient to show clear evidence of error, the Board finds that he has failed to meet his burden of proof.

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.

¹⁴ *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988) (Reports not signed by a physician lack probative value).

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board