

FACTUAL HISTORY

On August 11, 1986 appellant, then a 42-year-old mail carrier, filed a traumatic injury claim alleging that he sustained a right knee injury when he twisted it at work on July 31, 1986. The Office accepted that appellant sustained a small tear of the posterior medial meniscus of his right knee and paid him appropriate compensation. On February 16, 1987 appellant underwent a surgical debridement of the posterior horn of the right medial meniscus which was authorized by the Office.²

Appellant returned to limited-duty work for the employing establishment in March 1987 and later sustained additional periods of employment-related total disability which alternated with periods of limited-duty work. By award of compensation dated April 21, 1988, the Office granted appellant a schedule award for a 20 percent permanent impairment of his right leg. He resigned from the employing establishment in July 1989 and began to engage in various forms of private employment on a part-time basis.

On April 29, 1994 appellant filed a claim alleging that he sustained a recurrence of disability due to his accepted employment injury. He submitted a June 6, 1995 report of Dr. Michael Huo, an attending Board-certified orthopedic surgeon, and the findings of x-ray testing from October 24, 1994 which showed degenerative changes in both knees, more on the left than the right.³

By decision dated April 26, 1995, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability due to his accepted employment injury.

By letter dated July 20, 2005, appellant requested reconsideration of his claim. He submitted a June 8, 2005 letter in which he disagreed with the Office's April 26, 1995 decision which determined that he did not sustain a recurrence of disability. Appellant explained that he had problems with his right knee and suggested that his current condition was related to his July 31, 1986 injury because he never had right knee problems prior to that time.

Appellant submitted a May 5, 1998 report in which Dr. Vladimir B. Sidorov, an attending physician specializing in orthopedic surgery, stated that appellant had no complications from his left total knee replacement arthroplasty and indicated that he had moderate to severe degenerative joint disease of the right knee. Dr. Sidorov noted that appellant was being placed on a list for a right total knee replacement arthroplasty. In a report dated October 20, 1998, Dr. Mitchell A. Hardenbrook, an attending Board-certified orthopedic surgeon, described appellant's bilateral knee condition, including the fact that he had degenerative joint disease of

² Appellant underwent surgical procedures of the left knee in 1966, 1986 and 1996 which were unrelated to his work for the employing establishment. The 1996 surgery included a total knee replacement.

³ Dr. Huo stated, "The patient's right knee has had a previous injury back in 1986, and this has resulted in an acceleration of the degeneration of the right knee to a point that he is very symptomatic with advanced radiographic changes.

the right knee and was a candidate for a right total knee replacement arthroplasty.⁴ In a report dated October 12, 2004, Dr. Alec Stall, an attending physician specializing in orthopedic surgery, noted that appellant reported increased pain with activity in his right knee and provided a similar assessment of the condition of the right knee. In a report dated July 19, 2005, Dr. Eboni Stanley-Jolly, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant was being seen for scheduling of a right total knee replacement arthroplasty.⁵ Dr. Stanley-Jolly stated, “As far as the disability for the right knee, it is possible that the injury sustained during his post office job accelerated the degenerative changes that now require knee replacement. It is not clear whether or not these changes were caused by strain by the opposite knee.

By decision dated November 8, 2005, the Office denied appellant’s request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁷

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁸ Office regulations and procedure provide that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.⁹

⁴ The record also contains an October 21, 1999 report in which a physician’s assistant reported range of motion findings of appellant’s lower extremities.

⁵ Dr. Stanley-Jolly stated that appellant reported sustaining a right knee injury while working for the employing establishment in 1986 and noted that appellant was “not sure what was repaired or injured.”

⁶ 20 C.F.R. § 10.607(a).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, “The term ‘clear evidence of error’ is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.” *Id.* at Chapter 2.1602.3c.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹¹ Evidence which 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 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.¹⁴ 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.¹⁵

ANALYSIS

The Office accepted that appellant sustained a small tear of the posterior medial meniscus of his right knee on July 31, 1986. In April 1994, appellant filed a claim alleging that he sustained a recurrence of disability due to his accepted employment injury and, by decision dated April 26, 1995, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence in support thereof. In July 2005 appellant requested reconsideration of the April 26, 1995 decision. By decision dated November 8, 2005, the Office denied his request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

In its November 8, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on July 20, 2005, more than one year after the Office's April 26, 1995 decision, and therefore he must demonstrate clear evidence of error on the part of the Office in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its April 26, 1995 decision. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In support of his untimely reconsideration request, appellant submitted several reports of attending physicians which were produced between 1998 and 2005. These physicians indicated that he had undergone a left total knee replacement arthroplasty, that he had moderate to severe degenerative joint disease of the right knee, and that he was a candidate for a right total knee

¹⁰ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 7.

replacement arthroplasty. These reports are not relevant to the main issue of the present case, *i.e.*, whether the Office properly determined that appellant did not sustain a recurrence of disability in the mid 1990s due to his July 31, 1986 employment injury. The reports do not provide an opinion that appellant's right knee condition was related to employment factors, let alone an opinion that the July 31, 1986 employment injury caused disability in the mid 1990s. In a report dated July 19, 2005, Dr. Stanley-Jolly, an attending Board-certified physical medicine and rehabilitation physician, stated, "As far as the disability for the right knee, it is possible that the injury sustained during his post office job accelerated the degenerative changes that now require knee replacement. It is not clear whether or not these changes were caused by strain by the opposite knee."¹⁶ However, this statement is not relevant to the Office's denial of appellant's recurrence of disability claim because it makes no specific reference to the cause of appellant's right knee condition in the mid 1990s and it provides a speculative opinion on the cause of this condition.¹⁷

Appellant also submitted a June 8, 2005 letter in which he indicated that he disagreed with the Office's April 26, 1995 decision and claimed that the fact that he never had right knee problems prior to July 31, 1986 showed that his current right knee condition was due to the July 31, 1986 injury. However, this argument would not be relevant as the issue of this case is medical in nature and the opinion of a nonphysician would not constitute a probative medical opinion.¹⁸

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's April 26, 1995 decision and the Office properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ Dr. Stanley-Jolly provided a limited description of the July 31, 1986 injury, noting that appellant was "not sure what was repaired or injured" in 1986.

¹⁷ See *Jennifer Beville*, 33 ECAB 1970, 1973 (1982), *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (finding that an opinion which is speculative in nature is of limited probative value on the issue of causal relationship).

¹⁸ *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

ORDER

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

Issued: April 10, 2006
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