

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

SIDNEY GRIFFIN, Appellant

and

**U.S. POSTAL SERVICE, NEW BRUNSWICK
ANNEX, New Brunswick, NJ, Employer**

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**Docket No. 06-348
Issued: May 2, 2006**

Appearances:
Robert D. Campbell, Esq., 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 November 30, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 2, 2005, denying his request for reconsideration. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ The Board has no jurisdiction to consider an October 16, 2003 Office decision, denying appellant's claim for a right knee injury.² Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the September 2, 2005 decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

² See *Algimantas Bumelis*, 48 ECAB 679 (1997); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

FACTUAL HISTORY

On August 28, 2003 appellant, then a 58-year-old letter carrier, filed a traumatic injury claim alleging that he sustained a torn meniscus of his right knee on March 4, 2003 when his right leg twisted while walking his mail delivery route. The employing establishment controverted the claim, noting that he had been out of work prior to March 4, 2003 due to right knee surgery, but returned to work and continued to work prior to filing his claim on August 28, 2003.

By decision dated October 16, 2003, the Office denied appellant's claim on the grounds that the evidence did not establish fact of injury, *i.e.*, that he actually experienced the employment incident at the time, place and in the manner alleged or that the medical evidence established that the employment incident caused an injury.

On March 7, 2005 appellant requested reconsideration and submitted additional medical evidence.³ He contended that the Office erred in stating that he waited over five months before reporting his injury to the employing establishment. Appellant asserted that a March 7, 2003 note from Dr. Mark A. Zawadsky, an attending Board-certified orthopedic surgeon, established that he advised his supervisor of the claimed March 4, 2003 injury no later than March 7, 2003.⁴ He alleged that the Office erred in finding that his March 4, 2003 claim was based on a history of walking his mail route, preparing the mail for the next house, making a misstep and twisting his right leg. Appellant stated that the Office obtained this description from a claim form for a medial meniscus tear which occurred in July 2002. He argued that he was entitled to a schedule award for his right medial meniscus tear based on the medical evidence of record. Appellant argued that the Office did not consider his explanation for failing to timely file his reconsideration request within one year of the October 16, 2003 decision. He explained that the delay was due to the fact that he was not represented by counsel and was unable to provide the evidence necessary to establish his claim. Appellant argued that the one-year requirement for filing a reconsideration request should be waived due to mishandling of the claim and because he lacked legal representation.

Appellant submitted new medical evidence. In a report dated November 11, 2003, Dr. Zawadsky indicated that on December 3, 2002 he underwent a right knee partial medial meniscectomy. On March 4, 2003 appellant experienced right knee pain and swelling. Dr. Zawadsky stated that a May 15, 2003 magnetic resonance imaging (MRI) scan revealed a re-tear of his right knee medial meniscus. A repeat partial medial meniscectomy was performed on September 3, 2003.

In a January 25, 2005 report, Dr. David Weiss, an attending osteopath, indicated that on March 4, 2003 appellant sustained a twisting injury to his right knee while walking his delivery route. He diagnosed a post-traumatic internal derangement of the right knee with a re-tear of the medial meniscus, post-traumatic chondromalacia of the right knee patella and aggravation of

³ Appellant also submitted evidence previously of record.

⁴ The record shows that a March 7, 2003 note from Dr. Zawadsky was faxed to the employing establishment on September 4, 2003.

preexisting right knee pathology related to a May 2002 employment injury.⁵ Appellant was status post arthroscopic surgery with a partial medial meniscectomy. Dr. Weiss provided findings on physical examination and a schedule award rating for appellant's right leg impairment.

By decision dated September 2, 2005, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error in the October 16, 2003 merit decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁸ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.⁹ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹⁰

Section 10.607(b) 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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

⁵ The record does not reflect an accepted May 2002 employment injury.

⁶ 5 U.S.C. § 8128(a).

⁷ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁸ *Id.* at 768.

⁹ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

¹⁰ *Thankamma Mathews*, *supra* note 7 at 769.

¹¹ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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's decision.¹⁶ 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.¹⁷

ANALYSIS

Since more than one year elapsed between the October 16, 2003 Office decision and appellant's March 3, 2005 reconsideration request, the request for reconsideration of the Office's denial of his claim for a right knee injury was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.¹⁸

The Board notes that the Office stated in its September 2, 2005 decision that it had evaluated the evidence submitted by appellant with his request for reconsideration but the Office did not address specific medical reports or arguments.¹⁹ As noted, 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.

Appellant argued in his March 7, 2005 reconsideration request that the Office erred in its October 16, 2003 decision by stating that he waited over five months before reporting his injury to the employing establishment. He asserted that a March 7, 2003 note from Dr. Zawadsky established that he had advised his supervisor of the claimed March 4, 2003 injury no later than March 7, 2003. However, the record shows that the March 7, 2003 note from Dr. Zawadsky was faxed to the employing establishment on September 4, 2003. This evidence does not establish that the employing establishment had knowledge of appellant's claimed March 4, 2003 right leg injury prior to the filing of his claim on August 28, 2003. His argument does not demonstrate clear evidence of error in the October 16, 2003 decision.

¹⁴ *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *Darletha Coleman*, *supra* note 14.

¹⁷ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁸ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁹ Appellant contends on appeal that because the September 2, 2005 decision did not address specific medical reports and arguments, it does not reflect that the Office actually reviewed the evidence submitted with his March 7, 2005 reconsideration request.

Appellant argued that the Office erred in finding that his March 4, 2003 claim was based on an inaccurate history of walking his mail route, preparing the mail for the next house, making a misstep and twisting his right leg. However, the August 28, 2003 claim form for the alleged March 4, 2003 right leg injury indicated that the injury occurred as appellant was walking his mail route, preparing the mail for the next house, made a misstep and twisted his right leg. His argument does not demonstrate clear evidence of error in the October 16, 2003 decision.

The Board further finds that the medical evidence is insufficient to demonstrate clear evidence of error in the Office's October 16, 2003 merit decision.

In a report dated November 11, 2003, Dr. Zawadsky indicated that on March 4, 2003 appellant experienced right knee pain and swelling and a May 15, 2003 MRI scan revealed a re-tear of his right knee medial meniscus. However, he did not provide an opinion on causal relationship. This report does not raise a substantial question as to the correctness of the Office's October 16, 2003 merit decision denying appellant's claim for an injury on March 4, 2003. It is of insufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor.

In a January 25, 2005 report, Dr. Weiss indicated that on March 4, 2003 appellant sustained a twisting injury to his right knee while walking his delivery route. He diagnosed a post-traumatic internal derangement of the right knee with a re-tear of the medial meniscus, post-traumatic chondromalacia of the right knee patella and aggravation of preexisting right knee pathology. However, appellant did not provide sufficient explanation as to how these medical conditions were causally related to his work duties on March 4, 2003. Therefore, this report does not raise a substantial question as to the correctness of the Office's October 16, 2003 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor.

Appellant contends that he is entitled to a schedule award for his right medial meniscus tear. However, schedule awards are only payable for permanent impairment due to an accepted work-related condition.²⁰ In this case, appellant's claim for a right leg injury has not been accepted. Therefore, this argument does not establish clear evidence of error in the October 16, 2003 decision.

Appellant argues that the Office did not consider his explanation for failing to timely file his reconsideration request within one year of the October 16, 2003 decision. He explained his delay in filing his reconsideration request because he was not represented by counsel. However, this argument is not relevant on the issue of whether the Office properly determined in its October 16, 2003 decision, that he failed to establish that he sustained a work-related right knee injury on March 4, 2003. Therefore, this argument does not show clear evidence of error in the October 16, 2003 decision.

²⁰ See *Harry D. Butler*, 43 ECAB 859, 863-64 (1992) (noting that in 1949 the Act was amended to include employee compensation benefits for permanent impairment resulting from an accepted injury).

On appeal, appellant contends that the Office failed to issue a decision on his reconsideration request within 90 days as provided under Office procedures.²¹ However, this argument is not relevant on the issue of whether the Office erred in its October 16, 2003 decision in denying his claim for an injury on March 4, 2003. The argument does not show clear evidence of error in the October 16, 2003 decision.

The Board finds that appellant failed to show clear evidence of error in the October 16, 2003 merit decision. Therefore, the Office did not abuse its discretion in denying his request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking any clear evidence of error in the Office's prior decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 2, 2005 is affirmed.

Issued: May 2, 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

²¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004). See also *Geoma R. Munn*, 50 ECAB 242 (1999); *Debra E. Stoler*, 43 ECAB 561 (1992) (remanding cases for merit review where the Office delayed issuance of reconsideration decisions beyond 90 days and the delay jeopardized the claimant's right to review on the merits by the Board). The Board notes that, any delay by the Office in issuing a decision on appellant's reconsideration, request did not jeopardize his right to a review on the merits. His March 7, 2005 request for reconsideration was made more than one year past the October 16, 2003 merit decision, precluding a merit review by the Board.