

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

D.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, MO, Employer**

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**Docket No. 06-1152
Issued: November 8, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated April 5, 2006 which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent Office merit decision, dated June 16, 2004, and the filing of this appeal, 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 determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On January 11, 1985 appellant, then a 23-year-old carrier, filed a traumatic injury claim alleging that she sustained a right knee injury on December 26, 1984 when she fell while walking up concrete steps to deliver mail. The Office accepted the claim for resection of

pathological medial plica of the right knee. Appellant stopped work on February 27, 1985 and returned to a light-duty position in March 1985 and worked intermittently thereafter.

On October 22, 1993 appellant filed a claim for a schedule award. In a decision dated March 15, 1994, the Office granted appellant a schedule award for nine percent permanent impairment of the right lower extremity. Appellant filed several recurrence of disability claims which were denied by the Office in decisions dated January 20, 1993 and November 7, 2003.

On September 9, 2002 the employing establishment offered appellant a temporary modified-duty assignment which appellant accepted on September 11, 2002.

In a report dated May 5, 2003, Dr. Daniel D. Weed, a Board-certified orthopedic surgeon and Office referral physician, opined that there were no objective findings to support that appellant could not return to her previous date-of-injury job. He advised that she could return to work full-time duty without restrictions.

On May 14, 2003 the Office proposed to terminate wage-loss compensation on the grounds that the second opinion physician determined that there was no objective basis to support medical restrictions from her accepted work injury. In a decision dated July 2, 2003, the Office terminated wage-loss compensation. The Office noted that appellant's entitlement to medical treatment would continue.

On March 29, 2004 appellant filed a recurrence of disability claim alleging that she developed right knee pain on July 30, 2003 causally related to the work injury of December 26, 1984.

Appellant submitted treatment notes from Dr. Lirio Mahmoud, a family practitioner, dated June 25, 2001 to February 12, 2004. Dr. Mahmoud noted appellant's treatment for various conditions including a sore throat and bilateral knee pain. In reports dated July 26, 2003 to February 12, 2004, he noted a history of appellant's work injury and subsequent treatment for the right knee. Dr. Mahmoud diagnosed a right knee strain and patella femoral syndrome. Appellant submitted June 16, 2003 reports from Dr. Ronald W. Stitt, Jr., a Board-certified orthopedic surgeon, who noted a history of appellant's work injury of December 26, 1984 and subsequent treatment and surgery. Dr. Stitt diagnosed patellofemoral syndrome by history. In a report dated April 23, 2004, he noted appellant's continued right knee pain and diagnosed tear of the medial meniscus of the right knee as shown on an MRI scan and recommended arthroscopic surgery. Appellant submitted two narrative statements dated May 9 and 14, 2004 contending that she experienced a recurrence of right knee pain and indicated that her right knee was "locking up" when she was delivering mail and worsened during the week of July 30, 2003.

In a decision dated June 16, 2004, the Office denied appellant's claim for a recurrence of disability.

On March 14, 2006 appellant requested reconsideration. She did not submit additional evidence.

In a decision dated April 5, 2006, the Office denied reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.²

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.³

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁴

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ This entails a

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

³ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁴ *Annie L. Billingsley*, *supra* note 2.

⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁶ *Id.*

limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁷ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.⁸

ANALYSIS

The Board finds that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on June 16, 2004 denying her recurrence of disability claim. Her request for reconsideration was dated March 14, 2006 which was more than one year after June 16, 2004. Accordingly, appellant's request for reconsideration was not timely filed.

The Board further finds that appellant has not established clear evidence of error that would require the Office to reopen the claim for a merit review. The Board notes that appellant did not submit any evidence or argument with her reconsideration request that raises a substantial question as to the correctness of the Office's June 16, 2004 decision. On reconsideration, appellant submitted an Office appeal form dated March 14, 2005 requesting reconsideration. No evidence accompanied the request and she did not state the nature of her disagreement with the Office's previous decision. Because appellant did not submit any argument or evidence in support of her request for reconsideration, her reconsideration request does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision which determined that appellant failed to establish that she sustained a recurrence of injury on July 30, 2003 causally related to her accepted work injury of December 26, 1984.

Therefore the Office properly found that appellant's reconsideration request of March 14, 2006 did not establish clear evidence of error. The Office properly denied appellant's reconsideration request.

⁷ *Id.*

⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

CONCLUSION

The Office properly determined that appellant's request for reconsideration dated March 14, 2006 was untimely filed and did not demonstrate clear evidence of error.⁹

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ On appeal, appellant submitted new evidence. However, the Board cannot consider new evidence on appeal as its regulations limit its review of a case to the evidence in the case record that was before the Office at the time of its final decision. See 20 C.F.R. § 501.2(c).