United States Department of Labor
Employees' Compensation Appeals Board

N.C., Appellant	)	
	)	**Docket No. 06-297**
and	)	**Issued: September 26, 2006**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Paul Kalker, 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

JURISDICTION

On November 17, 2005 appellant, through his attorney, filed a timely appeal from an August 25, 2005 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration as untimely and found that he failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated August 20, 2003 and the filing of the appeal on November 17, 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).

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 May 16, 1997 appellant, then a 48-year-old supervisor, filed a traumatic injury claim alleging that on May 15, 1997 he hurt his right leg and knee, both thumbs and his left and right ribs when he fell over a piece of wood. He stopped work on May 16, 1997. The Office accepted appellant's claim for right knee sprain. He returned to full-time limited-duty work at the employing establishment on May 29, 1997. On March 18, 1999 the Office accepted that

appellant sustained a recurrence of disability on December 10, 1998. The Office also expanded the acceptance of his claim to include a right meniscus tear. Appellant has not returned to work.

By letter dated April 26, 1999, the Office requested that Dr. Abraham Asmamwaw, appellant's attending physiatrist, provide whether appellant could perform the duties of a limited-duty position offered to him by the employing establishment based on the restrictions he set forth in an April 19, 1999 report. On May 3, 1999 he responded that appellant could not accept the offered position because he could not sit or stand for long periods or climb stairs. Appellant rejected the job offer on May 5, 1999, stating that he suffered from excruciating pain in his right knee, his standing, sitting or walking was very limited and his leg buckled or locked at any given time.

On June 3, 1999 the employing establishment amended its limited-duty job offer to reflect restrictions set forth by Dr. Asmamwaw in a May 19, 1999 report. On June 7, 1999 appellant rejected the job offer because he was unable to climb subway stairs, he was in too much pain and he could not stand or sit for too long. In a June 16, 1999 report, Dr. Asmamwaw stated that appellant had objective and subjective residuals of his May 15, 1997 employment injuries and that these injuries were chronic, permanent and totally disabling in nature.

On June 18, 1999 the employing establishment again offered appellant the same limited-duty position. He rejected the job offer, contending that he was in continuous pain and his knee buckled and locked at any given time. Appellant could not sit, stand or walk for either short or long periods without discomfort and excruciating pain.

To determine, among other things, whether appellant had any continuing employment-related residuals and disability, the Office referred him along with a statement of accepted facts, the case record and list of questions to be addressed, to Dr. Robert J. Orlandi, a Board-certified orthopedic surgeon, for a second opinion medical examination. In an August 30, 1999 medical report, Dr. Orlandi found that appellant had no work-related disability, he did not require any additional medical treatment and he could work with no restrictions.

The Office found a conflict in the medical opinion evidence between Dr. Asmamwaw and Dr. Orlandi with regard to appellant's diagnosis and whether he had any continuing employment-related disability. To resolve the conflict, the Office, by letter dated February 3, 2000, referred appellant along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Thomas G. Larkin, a Board-certified orthopedic surgeon, for an impartial medical examination. In a February 14, 2000 report, Dr. Larkin opined that appellant experienced pain and buckling of the right knee and that he was unable to work due to his May 15, 1997 employment-related injuries. He recommended a diagnostic arthroscopy of the right knee to determine whether the medial and lateral menisci were torn and a partial meniscectomy was required.

By letter dated March 28, 2000, the Office requested that Dr. Asmamwaw provide whether he agreed with Dr. Larkin's surgical recommendation and if so it advised that this letter served as authorization to perform a partial meniscectomy.

On April 3, 2000 Dr. Mark Freilich, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's right knee, which found a focal signal abnormality of the posterior horn medial meniscus and a small popliteal cyst.

The Office received numerous reports from Dr. Harry C. Citronenbaum[1] which found that appellant had long-term complications that were chronic, permanent and totally disabling due to his May 15, 1997 employment injuries. By letter dated August 15, 2001, the Office referred appellant along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. David I. Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a September 6, 2001 report, Dr. Rubinfeld opined that there were no objective findings that the accepted employment injuries were still active. He further opined that appellant was able to perform his regular work duties as a supervisor, eight hours a day without undergoing arthroscopic right knee surgery.

The Office found a conflict in the medical opinion evidence between Dr. Citronenbaum and Dr. Rubinfeld as to whether appellant was able to perform his regular work duties. To resolve the conflict, the Office, by letter dated February 8, 2002, referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Stanley Soren, a Board-certified orthopedic surgeon. In a February 21, 2002 report, Dr. Soren found that, if appellant did not undergo right knee surgery, the ongoing instability problem would continue with buckling and locking and he would be precluded from climbing up and down ladders, repetitive bending, squatting or twisting and remaining on his feet for prolonged periods for more than a couple of hours at a time due to swelling and increased pain. He opined that appellant was capable of performing full-time light-duty desk work. Dr. Soren further opined that appellant was not totally unable to perform all kinds of work. He noted that the right knee sprain had resolved and that articular cartilage damage "in part due to the congenital tibial torsion" contributed to appellant's problems. Dr. Soren recommended arthroscopic surgery and a partial medial meniscectomy to give him a significant amount of relief although it was not likely to be completely and totally definitively curative. In an accompanying March 11, 2002 work capacity evaluation, he stated that there was no reason why appellant could not work eight hours a day. Dr. Soren set forth his physical restrictions.

On June 3, 2002 the Office approved a June 1, 2002 request from Dr. Daniel W. Wilen, a Board-certified orthopedic surgeon, to perform arthroscopic surgery on appellant's right knee.

On June 27, 2002 the employing establishment offered appellant a limited-duty position based on Dr. Soren's February 21, 2002 report. By letter dated July 2, 2002, the Office advised him that the offered position was suitable and available and that, pursuant to 5 U.S.C. § 8106(c)(2), he had 30 days to either accept the job or provide an explanation for refusing the offer. The Office further advised appellant that his compensation would be terminated based on his refusal to accept a suitable position pursuant to section 8106(c)(2).

On July 18, 2002 appellant rejected the employing establishment's job offer. He stated that he could not meet the minimum requirements of the offered position due to his disability. Appellant further stated that his knee buckled and gave out any given time without warning

[1] The Board notes that the professional qualifications of Dr. Citronenbaum are not contained in the case record.

which could cause additional injury to himself or anyone nearby. He indicated that his physician recommended surgery as a possible alternative for the pain and instability in his knee.[2] Appellant noted that he had recently applied for retirement benefits.

By letter dated August 6, 2002, the Office found appellant's reasons for rejecting the position unacceptable. The Office advised him that he had 15 days in which to accept the offered position, or it would terminate his compensation. Appellant did not accept the offered position.

On September 10, 2002 the Office issued a decision, terminating appellant's compensation effective October 6, 2002 on the grounds that he refused an offer of suitable work. It accorded special weight to Dr. Soren's February 21, 2002 impartial medical report.

In an undated letter received by the Office on October 31, 2002, appellant requested an oral hearing before an Office hearing representative and submitted medical evidence regarding his total disability for work. In an August 20, 2003 decision, the hearing representative affirmed the Office's September 10, 2002 termination decision. She accorded special weight to Dr. Soren's impartial medical opinion.

By letter dated January 5, 2005, appellant, through his attorney, requested reconsideration. Counsel argued that accompanying medical evidence established that appellant sustained more serious injuries as a result of his May 15, 1997 employment injuries such as tears of the medial and lateral menisci. He further argued that the Office engaged in "doctor shopping" to obtain medical evidence supportive of its termination of appellant's compensation by referring him to additional physicians, including Dr. Rubinfeld and Dr. Soren despite Dr. Orlandi's and Dr. Larkin's opinion that appellant's continuing disability was work related. Counsel contended that Dr. Rubinfeld's September 6, 2001 report was contradictory, equivocal and lacked medical rationale sufficient to terminate appellant's compensation as he noted ongoing symptoms related to appellant's right knee injuries. Counsel also contended that the Office committed clear evidence of error in giving special weight to Dr. Soren's February 21, 2002 impartial medical report as he found that appellant had physical limitations and required surgery although it may not have completely cured his right knee condition.

Counsel submitted a December 3, 2004 medical report of Dr. R.C. Krishna, a Board-certified neurologist. Dr. Krishna conducted a follow-up examination regarding appellant's persistent back pain secondary to his May 15, 1997 employment injury, which had become progressively worse and his right knee pain. He stated that his findings on physical, neurological and mental examination were consistent with internal derangement of the right knee and a superimposed consequential injury of the lumbar spine resulting in a lumbosacral disc. Dr. Krishna recommended right knee surgery and lumbosacral epidural steroid injections. He opined that appellant was unable to return to work due to his clinical findings.

In an October 19, 2004 report, Dr. Citronenbaum noted appellant's ongoing right knee pain and MRI scan results which revealed tears in the posterior horn of the medial and lateral menisci, right knee internal derangement and irregularity of the retropatellar cartilage. He stated

[2] The record reveals that, as of July 18, 2002, the authorized right knee surgery had not been scheduled.

that appellant's prognosis was guarded. Dr. Citronenbaum opined that his ongoing right knee conditions were caused by the May 15, 1997 employment injuries and that they were chronic, permanent and totally disabling in nature.

Counsel submitted duplicate copies of Dr. Asmamwaw's June 16, 1999 medical report and a January 21, 1999 MRI scan report of Dr. Mark A. Shapiro, a Board-certified radiologist, which found a Type I tear of the posterior horn of the medial meniscus, a Type II tear of the posterior horn of the lateral meniscus and irregularity of the retropatellar cartilage.

Treatment notes of appellant's physical therapists revealed that his knees were treated on intermittent dates from June 23, 2004 to June 22, 2005. On January 5, March 2 and June 22, 2005 Dr. Wilen's prescribed physical therapy and his treatment notes indicated that appellant's right knee was treated on March 2, April 27, May 2 and June 22, 2005. His April 27, 2005 x-ray report found no fractures or dislocations of the right knee. Dr. Wilen stated that other modalities were needed for clinical correlation.

By decision dated September 25, 2005, the Office found that appellant's January 5, 2005 reconsideration request was filed more than a year after the hearing representative's August 20, 2003 decision and, therefore, was untimely. The Office also found that he did not submit any evidence establishing clear evidence of error in the prior decisions terminating his compensation.[3]

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[4] 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 Office's 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] Pursuant to this section, 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.[7]

[3] Following the issuance of the Office's September 25, 2005 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

[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] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

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 merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13]

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.[14] 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.[15]

ANALYSIS

The Board finds that 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.[16]

The most recent merit decision in this case was issued by an Office hearing representative on August 20, 2003, which affirmed the termination of appellant's compensation effective

[8] 20 C.F.R. § 10.607(b).

[9] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[10] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[11] *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

[12] *Leona N. Travis*, *supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[14] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[15] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[16] *Larry L. Litton*, 44 ECAB 243 (1992).

October 6, 2002 on the grounds that he refused an offer of suitable work. As his January 5, 2005 letter requesting reconsideration was made more than one year after the hearing representative's August 20, 2003 merit 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 termination of his compensation on the grounds that he refused an offer of suitable work. Appellant contends that the Office engaged in impermissible "doctor shopping" by referring him to another second opinion medical examination by Dr. Rubinfeld and another impartial medical examination by Dr. Soren, arguing that the conflict in the medical opinion evidence between Dr. Asmamwaw, an attending physician, and Dr. Orlandi, an Office referral physician, was already resolved by Dr. Larkin. However, he has not submitted probative evidence to show that the Office's alleged action constitutes clear evidence that its decision to terminate his compensation was in error. Mere allegations without more by the way of supporting evidence, is insufficient to establish clear evidence of error. Thus, the Board is unable to find that the Office erred in terminating appellant's compensation.

Appellant further contends that Dr. Soren's February 21, 2002 impartial medical opinion that he could work eight hours a day was not sufficiently rationalized to serve as a basis for terminating his compensation because he set forth physical limitations and recommended surgery although it was not certain that it would cure his right knee condition. Despite establishing physical restrictions and recommending surgery, Dr. Soren concluded that appellant was capable of performing limited-duty work on a full-time basis and was thus not disabled from working. Moreover, the doctor noted that the accepted right knee sprain had resolved and attributed appellant's difficulties to congenital internal tibial torsion. As the Board has held, it is not enough merely to show that the evidence could be construed to produce a contrary conclusion.[17] The Board finds that appellant has failed to establish that the Office committed clear evidence of error in its August 20, 2003 termination decision as he has not submitted any evidence demonstrating any error on the part of the Office.

Appellant contends that he sustained more serious injuries as a result of his May 15, 1997 employment injuries. He submitted Dr. Krishna's December 3, 2004 report and Dr. Citronenbaum's October 19, 2004 report which found that he was unable to work due to his right knee conditions. Dr. Citronenbaum opined that his right knee conditions were caused by the May 15, 1997 employment injuries. Dr. Krishna's and Dr. Citronenbaum's reports are not sufficient to shift the weight of the evidence in favor of the claim as they did not specifically address whether the employing establishment's June 27, 2002 job offer was not suitable. These reports do not manifest on their face that the Office committed an error in terminating appellant's compensation benefits for her refusal to accept suitable work. Thus, the Board is unable to find that the Office committed clear evidence of error in terminating appellant's compensation.

Dr. Asmamwaw's June 16, 1999 medical report which found that appellant had chronic and permanent residuals of the May 15, 1997 employment injuries that were totally disabling and Dr. Shapiro's January 21, 1999 MRI scan which revealed tears of the posterior horn of the

[17] *See Leona N. Travis, supra* note 10.

medial and lateral menisci and irregularity of the retropatellar cartilage, were already of record. This evidence is therefore not sufficient to shift the weight of the evidence in favor of appellant's claim. Insofar as the Office has already weighed the evidence presented by appellant and found it to be insufficient to carry his burden of proof in establishing that he was unable to perform the duties of the offered position, the Board is unable to find that the Office erred in terminating appellant's compensation.

The treatment notes of appellant's physical therapists are not sufficient to shift the weight of the evidence in favor of the claim as a physical therapist is not considered to be a "physician" under the Act.[18]

Dr. Wilen's prescriptions, treatment notes and x-ray report regarding appellant's right knee are not relevant because they did not address the issue of whether appellant was capable of performing the duties of the offered limited-duty position.

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.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[18] 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).