

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

T.M., Appellant

and

**DEPARTMENT OF STATE, FOREIGN
SERVICE, Washington, DC, Employer**

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**Docket No. 07-281
Issued: June 19, 2007**

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 November 6, 2006 appellant filed a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated July 6, 2006 denying his request for reconsideration as it was not timely filed and failed to establish clear evidence of error. As the most recent Office merit decision was issued on March 11, 2005, more than one year before the filing of this appeal, the Board does not have jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On November 9, 2004 appellant, then a 47-year-old foreign affairs specialist, filed a traumatic injury claim alleging that, on October 21, 2004, while on assignment in New Delhi, India, he missed a step going down stairs, fell and strained his left knee. On the same date,

appellant sought medical attention from Dr. Pushpinder Singh Bajaj, a consultant orthopedic surgeon and traumatologist specializing in sports medicine, arthroscopy and joint replacements. Dr. Bajaj indicated that appellant complained of an injury to his left knee occurring three hours before, that he tapped his knee, drained blood and applied a crepe bandage. In a note dated December 29, 2004, appellant requested to be reimbursed for his expenses for this appointment, noting that his insurance required that he pay a \$200.00 deductible. In a medical note dated December 16, 2004, Dr. Timothy J. Crimmins, a Board-certified internist, stated that there was new damage almost all from the fall. Appellant also had a magnetic resonance imaging scan on December 14, 2004 that was read as showing broad osteochondral contusion/fracture involving the medial femoral condyle complete tear of the mid body and posterior horn of the medial meniscus extending to the median meniscocapular margin, thickening and edema of the medial collateral ligament and the acute complex consistent with an intermediate grade of injury of this structure and lateral patellar offset Grade 3 to 4 chondromalacia patella of the internal patellar facet.

By decision dated January 5, 2005, the Office denied appellant's claim for the reason that the evidence was not sufficient to establish that he sustained an injury as defined by the Federal Employees' Compensation Act.¹ The Office noted that the evidence supports that the claimed event occurred but that there was no medical evidence that provided a diagnosis which could be connected to the events. On February 2, 2005 appellant requested reconsideration. In a decision dated March 11, 2005, the Office reviewed his case on the merits and modified the prior decision by finding that he had established an incident occurring within the performance of his duties. However, appellant's case was denied as a causal relationship had not been proven.

On March 24, 2006 appellant requested reconsideration. He indicated that he realized that he was filing this a few days after the one year deadline, but indicated that he made his intention to file a request for reconsideration known orally on February 3, 2006 in a conversation with the Office. In support of his request for reconsideration, appellant submitted a receipt from Dr. Bajaj indicating that he paid 9,500 rupees on October 21, 2004. He also submitted a statement by Stacy Gilbert indicating that, as they were leaving for an off-site meeting, he fell on some stairs. Ms. Gilbert noted that, as appellant had difficulty walking, he was sent to the Embassy's medical unit to have his foot examined before departing for the United States that evening. Appellant also submitted a statement indicating that an hour or so after his injury he could not walk unassisted and went to the United States Embassy medical unit for evaluation at which time he was referred to a physician in New Delhi for further evaluation and treatment. He noted that he paid 9,500 rupees in out-of-pocket expenses for this visit, which amounted to approximately \$200.00.

By decision dated July 6, 2006, the Office denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.² 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.³

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed.⁴ 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. Office regulation 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.⁵

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

² 20 C.F.R. § 10.607(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 99, 501-02 (1990).

⁵ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedures further provide: 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 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.

⁶ *Dorletha Coleman*, 55 ECAB 143 (2003); *Leon J. Modrowski*, 55 ECAB 196 (2004).

⁷ *Id.*

⁸ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

ANALYSIS

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including a decision of the Board.¹⁰ The last merit decision in this case was issued on March 11, 2005. As appellant's March 24, 2006 request for reconsideration was submitted more than one year after the last merit decision of record, the Board finds it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.¹¹

Appellant has not presented clear evidence of error on the part of the Office in issuing its July 6, 2006 decision. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error. The Office denied appellant's claim for the reason that he had not established that the work-related incident caused his injury. With his request for reconsideration, he submitted a receipt indicating that he paid Dr. Bajaj 9,500 rupees. However, this simply is evidence of payment by appellant, not evidence of any causal relationship. Appellant also submitted statements by both himself and a witness to his fall. These statements are evidence that the fall occurred. However, that fact is not in dispute. The question of causal relationship is medical in nature and may only be resolved by rationalized medical evidence. The Board finds that the statements are not medical evidence that links the accepted work incident to an injury. Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his request for reconsideration do not *prima facie* shift the weight of the evidence in his favor, or raise a substantial question as to the correctness of the March 11, 2005 decision. Thus, they are insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case 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.

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Robert F. Stone*, 57 ECAB ___ (Docket No. 04-1451, issued December 22, 2005).

¹¹ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB __ (Docket No. 06-380, issued June 26, 2006).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 6, 2006 is affirmed.

Issued: June 19, 2007
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