

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALDINE CARSON and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Charleston, SC

*Docket No. 99-157; Submitted on the Record;
Issued March 24, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and that the application failed to present clear evidence of error.

On April 13, 1993 appellant, then a 45-year-old medical supply aide, filed a notice of traumatic injury and claim for compensation alleging that she hit her right knee on an office desk in the performance of duty. Appellant was initially treated by Dr. Glen Horses, a family practitioner, for a right knee sprain and was given a knee brace and medication. An x-ray dated April 14, 1993 revealed moderately severe osteoarthritis of the right knee, primarily involving the patella with a large joint effusion being evident. Dr. Horses referred appellant to Dr. Bright McConnell, a Board-certified orthopedist, who diagnosed a patellar contusion of the right knee and underlying arthritis with degenerative changes confirmed by x-ray. The Office accepted the claim for a right knee strain. On July 29, 1993 appellant underwent an arthroscopic debridement of the right knee, including synovectomy, chondoplasty and a partial lateral meniscectomy. Appellant received continuation of pay and compensation for intermittent periods of disability. She was later approved for full duty by Dr. McConnell effective March 21, 1994.¹

On September 27, 1994 appellant filed a Form CA-2a, claim for a recurrence of disability. Appellant alleged that she developed stress in her left knee having to favor it to protect the right knee and that she suffered from pain in both knees due to her April 13, 1993 work injury.

¹ On July 12, 1994 appellant received a schedule award for a 10 percent permanent impairment of the right knee.

By letter dated October 19, 1994, the Office notified appellant as to the type of medical and factual evidence required for her to establish either a recurrence of disability or a consequential injury related to the right knee injury of April 13, 1993.

In a decision dated December 5, 1994, the Office denied appellant's claim for a recurrence of disability on the grounds that she failed to submit sufficient evidence to establish a causal relationship between her left knee condition and the April 13, 1993 right knee injury.

On December 20, 1994 appellant requested a hearing which was held on April 27, 1995.

In support of her claim, appellant submitted a September 22, 1994 report from Dr. McConnell and treatment notes dating from October 22, 1993 to November 28, 1994.

In a report dated May 31, 1995, Dr. McConnell noted that during appellant's convalescent period, following her right knee arthroscopic surgery, she complained of increasing problems of her left knee such as popping, swelling and catching as early as September 1994. He indicated that in November 1994, appellant was diagnosed as having an acute chondral defect of her medial femoral condyle as well as a degenerative tear of the posterior lateral meniscus. Dr. McConnell stated that the causal relationship between the two conditions existed in that appellant "increasingly relied upon her left knee in recovery from her right knee surgery, she most likely aggravated underlying degenerative changes in the left knee; which at that point in time, became symptomatic and required intervention." He concluded that appellant had degenerative arthritis in both knees, which preexisted her work injury, but that it was likely that appellant's right knee condition lead to an overuse problem with the left knee and with subsequent symptoms aggravating the preexisting degenerative disease.

In a decision dated July 21, 1995, an Office hearing representative affirmed the Office's December 5, 1994 decision. The Office hearing representative specifically found that Dr. McConnell's opinion was insufficiently reasoned to support that appellant sustained a consequential injury or a recurrence of disability.

By letter dated February 14, 1996, appellant requested reconsideration. Although appellant stated that "Dr. McConnell has written a well-reasoned medical explanation for the problems caused by [the right knee injury]," she did not submit any new medical evidence to support her reconsideration request.

In a decision dated March 13, 1996, the Office denied appellant's request for a merit review.

Appellant filed another reconsideration request on June 21, 1996 and submitted a September 20, 1995 report from Dr. McConnell. He reported:

"Appellant was seen following an acute onset of discomfort in her left knee, "which occurred when she was exposed to frequent hill-climbing while in the Northeast, specifically Pittsburgh. It was felt at the time of the patient's evaluation that the overuse injury of her left knee was caused by increased reliance upon her left knee because of her recuperating convalescence of her right

knee. The patient has undergone prior arthroscopic intervention for a job-related injury to her right knee and was convalescing well. One of the residual effects of the patient's right knee will be an increased tendency to have overuse problems with both her knees, particularly the left. This increased probability did, indeed, exacerbate [appellant's] left knee that subsequently required surgical intervention. The location of such episodes of overuse has no bearing on that predisposition factor. Specifically any activity, which requires repetitive squatting, climbing, or kneeling would tend to cause an exacerbating episode. As previously noted [appellant] does have underlying degenerative changes of her knee, which were not related to her injury [but], which were aggravated by [the] same."

In a decision dated February 3, 1997, the Office denied appellant's request for reconsideration, noting that that Dr. McConnell's September 20, 1995 report was repetitive and, therefore, insufficient to warrant a merit review.

On February 28, 1997 appellant filed an appeal with the Employees' Compensation Appeals Board, but subsequently requested that her appeal be withdrawn because she wanted to pursue a reconsideration request with the Office. The Board dismissed the appeal on September 4, 1997.

Appellant next filed a request for reconsideration with the Office on March 6, 1998.

In conjunction with her reconsideration request, appellant submitted a May 10, 1993 and September 22, 1994 report from Dr. McConnell, along with intermittent treatment notes, dating from May 28, 1993 to July 18, 1997. The notes primarily document appellant's ongoing treatment for bilateral knee discomfort, beginning in the right knee and later the left knee, both of which required steroid injections and ultimately surgical intervention in both knees, including chondoplasty and debridement. The notes, however, do not Address the etiology of appellant's knee problems other than to describe her condition as a "slow degenerative process." Dr. McConnell diagnosed degenerative arthritis in his September 22, 1994 and May 10, 1993 reports but he did not discuss appellant's work injury. The May 10, 1993 report also predates appellant's alleged onset of left knee problems.²

In a decision dated May 19, 1998, the Office determined that appellant's reconsideration request was untimely filed. The Office nonetheless reviewed the medical evidence submitted by appellant on reconsideration and found that it failed to establish clear evidence of error on behalf of the Office in denying appellant's claim.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.

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.³ As

² Appellant further submitted a magnetic resonance imaging report of the lumbar spine that revealed spondylosis at L4-5 and a small disc herniation.

³ See 20 C.F.R. § 501.3(d)(2).

appellant filed his appeal with the Board on September 10, 1998, the only decision properly before the Board is the Office's May 19, 1998 decision, denying appellant reconsideration request on the grounds that it was not timely filed and failed to establish clear evidence of error.

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ The Board has ruled that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

In this case, appellant's request for reconsideration was dated March 6, 1998. Since this is more than one year after the Office's July 21, 1995 merit decision, the Office properly deemed the request to be not timely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁰ In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹² The evidence must be positive, precise and explicit and

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁷ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁸ 20 C.F.R. § 10.138(b)(2).

⁹ *See Leon D. Faidley, Jr.*, *supra* note 5.

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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 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 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.¹⁶ 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.¹⁷ 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.¹⁸

In the instant case, the Office denied appellant's claim because she submitted insufficient medical evidence to establish that she sustained either a recurrence of disability or a consequential injury causally related to the accepted work injury of April 13, 1993. The medical evidence submitted by appellant in support of her March 6, 1998 reconsideration request does not include a rationalized medical opinion to establish a causal relationship between appellant's alleged left knee condition and her original work-related injury of the right knee. Although the record indicates that appellant had a left knee condition, the reports and treatment notes submitted by appellant from Dr. McConnell do not address the etiology of appellant's left knee condition such to show that the Office erred in the original denial of his claim for compensation. In his September 22, 1994 report, he does not address the issue of causal relationship other than to diagnose degenerative arthritis.

Consequently, because appellant's reconsideration request does not raise a substantial question as to the correctness of the Office's most recent merit decision and the medical evidence submitted in support of the reconsideration request is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim, the Board finds that appellant failed to establish clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated May 19, 1998 is hereby affirmed.

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

¹⁴ See *Jesus D. Sanchez*, *supra* note 5.

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

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁸ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

Dated, Washington, D.C.
March 24, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member