United States Department of Labor
Employees' Compensation Appeals Board

HAROLD L. LAMPKIN, Appellant	)	
	)	**Docket No. 04-1537**
and	)	**Issued: November 9, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

Appearances:
Harold L. Lampkin, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 25, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated April 21, 2004 which denied his 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 last merit decision dated July 8, 1998 and the filing of this appeal on May 25, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.

ISSUE

The issue on appeal is whether the Office properly determined that appellant's request for reconsideration dated March 15, 2004 was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On December 6, 1994 appellant, then a 42-year-old mail processor, filed a claim alleging that on November 18, 1994 he twisted his left knee while he was carrying a mail tray. The

Office accepted his claim for a left knee strain with a torn medial meniscus for which arthroscopic surgery was authorized. Appellant stopped work on November 21, 1994.

Appellant came under the care of Dr. Robert H. Schmidt, a Board-certified orthopededic surgeon, who performed arthroscopic surgery of the left knee on December 20, 1994. He performed a partial medial meniscectomy, chondroplasty of the medial and lateral articular surface and articular cartilage. Appellant recovered and was returned to full-time regular duty on February 6, 1995. Dr. Schmidt noted that appellant experienced a flare-up of left knee pain and on April 20, 1995 he commenced to a light-duty position subject to various restrictions. On December 5, 1995 Dr. Schmidt performed a partial medial meniscectomy of the left knee and diagnosed recurrent medial meniscus tear Grade 3 chondromalacia; a medial femoral condyle, Grade 3 chondromalacia of the lateral femoral condyle and patellofemoral articulation. Appellant resumed his light-duty position on January 22, 1996 and on June 24, 1996 the physician recommended a sedentary position in which appellant would sit six to eight hours per day.

On June 14, 1996 appellant filed a Form CA-8, claim for continuing compensation for the period June 8 to 21, 1996. On July 26, 1996 he filed another Form CA-8 requesting compensation for the period July 6 to 19, 1996. In a decision dated August 27, 1996, the Office denied appellant's claim on the grounds that the medical evidence did not support his disability for the periods sought.[1]

On January 22, 1997 Dr. Schmidt performed a left total knee replacement and diagnosed post-traumatic varus osteoarthritis of the left knee. Appellant returned to light duty on July 1, 1997. On July 8, 1997 the employing establishment offered appellant a full-time limited-duty position as a mail processor subject to the restriction set forth by Dr. Schmidt and he accepted the position on June 24, 1997. On September 29, 1997 appellant stopped working due to his left knee condition and Dr. Schmidt opined that he sustained a ruptured left quad and recommended additional surgery. On October 15, 1997 appellant underwent a revision of the left total knee replacement and Dr. Schmidt diagnosed post-traumatic patellofemoral arthritis of the left knee. On March 9, 1998 Dr. Schmidt advised that appellant could not return to his previous job and recommended a sedentary position where he could sit for six of the eight-hour shift.

On April 24, 1998 the employing establishment offered appellant a limited-duty mail processor position subject to the restrictions set forth by Dr. Schmidt.

In a May 12, 1998 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that he had 30 days to either accept the position or provide an explanation of the reasons for refusing it; otherwise, he risked termination of his wage-loss compensation benefits. In a letter dated June 1, 1998, appellant rejected the job offer and noted that he could not work due to his total left knee replacement on January 22, 1997 and

[1] On August 3, 1996 appellant filed a Form CA-2a, notice of recurrence of disability, noting that he experienced a recurrence of left knee pain causally related to his accepted work injury of November 18, 1994. However, it appears from the record that the Office did not adjudicate this claim.

additional surgery to repair a torn patella on October 23, 1997. Appellant retired as of June 17, 1998.

On June 23, 1998 the Office advised appellant that the position of a limited-duty mail processor was suitable work and he was given 15 additional days to accept the job offer.

In a decision dated July 8, 1998, the Office terminated his wage-loss compensation effective July 18, 1998, on the grounds that he refused an offer of suitable work.

On January 29, 2004 appellant filed a claim for a schedule award. In a letter dated February 12, 2004, the Office advised appellant that as the July 8, 1998 decision terminated his entitlement to wage-loss compensation, he must follow the appeal rights attached to the decision prior to the payment of any additional compensation.

In a letter dated March 15, 2004, appellant requested reconsideration and submitted medical records from Dr. Schmidt dated June 22, 2000 to May 6, 2002. The physician noted appellant's progress postsurgery and diagnosed left knee strain -- resolved, revision of left total knee arthroplasty and lumbar-sacral disc disease. Also submitted was a report from Dr. Charles W. Kennedy, a Board-certified orthopedist, who noted a history of appellant's work-related injury and determined that appellant sustained a 50 percent permanent impairment of the left lower extremity according the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,*[2] (A.M.A., *Guides*). Appellant asserted that he was unaware that the July 8, 1998 decision would affect his entitlement to a schedule award and that he had applied for medical retirement when the July 8, 1998 decision was issued.

By decision dated April 21, 2004, the Office denied appellant's request for reconsideration on the grounds that it was not timely and that he 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."[3]

[2] A.M.A., *Guides* (5th ed. 2001).

[3] 5 U.S.C. § 8128(a).

The Office, through regulation, 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.[4]

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.[5]

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.[6]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] This entails a 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.[9] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[10]

ANALYSIS

In the April 21, 2004 decision, the Office properly determined that appellant failed to file a timely request for review. The Office rendered its most recent merit decision on July 8, 1998 when it terminated compensation based on his refusal of suitable work. Appellant's request for reconsideration was dated March 15, 2004 which was more than one year after July 8, 1998. Accordingly, the request for reconsideration was not timely filed.

The Board has reviewed evidence submitted with appellant's reconsideration request and concludes that he has not established clear evidence of error. The reports from Dr. Schmidt

[4] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[5] 20 C.F.R. § 10.607(b); *Fidel E. Perez,* 48 ECAB 663, 665 (1997).

[6] *Annie L. Billingsley*, *supra* note 4.

[7] *Jimmy L. Day*, 48 ECAB 652 (1997).

[8] *Id.*

[9] *Id.*

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

merely advised that he treated appellant after the October 15, 1997 surgery and diagnosed left knee strain, resolved; revision of left total knee arthroplasty and lumbar sacral disc disease. The Board finds that this evidence does not establish that the job offer of April 24, 1998 was not suitable or that the termination of appellant's compensation benefits due to his refusal of suitable work was improper. The reports from Dr. Kennedy estimated that appellant sustained a 50 percent permanent impairment of the left lower extremity according the A.M.A., *Guides.* However, these reports are irrelevant to the issue of his refusal of suitable work and the physicians did not review or address the 1998 job offer.[11] It cannot be said that these reports raise a substantial question as to the correctness of the Office's decision.

Appellant's contention that he was unaware that the suitable work termination might affect any schedule award entitlement is insufficient to show clear evidence of error.[12] Similarly, appellant's contention that he had applied for medical retirement has no bearing on whether the Office properly terminated his wage-loss compensation based on his refusal of suitable work.[13]

The Board, therefore, finds the evidence insufficient to raise a substantial question as to the correctness of the Office's merit decision. The Office properly denied appellant's reconsideration request.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration dated March 15, 2004 was untimely filed and did not demonstrate clear evidence of error.

[11] Once monetary compensation is terminated due to a refusal of suitable work, this constitutes a bar to receipt of a schedule award for any impairment, related to the underlying employment injury, for the period after the termination of compensation. *See Stephen R. Lubin*, 43 ECAB 564 (1992).

[12] *Cf. Catherine S. McGhee*, 21 ECAB 316 (1970) (an employee's ignorance of the law and her possible entitlement to compensation does not create an exception to the requirement for timely filing a claim); *Hazel Covington*, 25 ECAB 215 (1974) (ignorance of the law did not excuse attorneys' improper collection of legal fees prior to approval by the Office).

[13] *See Robert P. Mitchell*, 52 ECAB 116 (2000) (the Board has consistently held that electing to receive disability retirement is not a justifiable reason to refuse an offer of suitable work).

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member