



establishing that he sustained an injury. On August 30, 2003 appellant requested a hearing which was held on May 24, 2004. By decision dated July 27, 2004, an Office hearing representative affirmed the August 8, 2003 decision as appellant had not submitted rationalized medical evidence supporting that he had a disabling condition causally related to the accepted employment incident.

On February 15, 2006 appellant requested reconsideration and submitted various items including a June 3, 2003 functional capacity evaluation by an occupational therapist. In a medical report dated June 14, 2004, Dr. C.W. Koullisis, a Board-certified orthopedic surgeon, diagnosed left knee internal derangement. Appellant wrote on this report that he twisted his knee while trying to cut off a ceiling fan. He also submitted the results of a magnetic resonance imaging (MRI) scan conducted on June 16, 2004. It was interpreted as showing a tear of the posterior horn of the medial meniscus and small popliteal cyst, tears of anterior and posterior horns of lateral meniscus and mild medial patellofemoral joint space narrowing. Appellant submitted preoperative surgical instructions for surgery scheduled for July 29, 2004 together with various documents already of record.

By decision dated March 20, 2006, the Office denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

### **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.”

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 an application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought. The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted under 5 U.S.C. § 8128(a).<sup>1</sup>

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows clear

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<sup>1</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

evidence of error on the part of the Office.<sup>2</sup> 20 C.F.R. § 10.607(b) provides: [The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>3</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>4</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>5</sup> 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.<sup>6</sup> To show clear evidence of error, the evidence submitted must not only be 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.<sup>7</sup> 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.<sup>8</sup>

### ANALYSIS

The most recent merit decision by the Office is the hearing representative's decision dated July 27, 2004. Appellant had one year from the date of that decision to request reconsideration but did not do so until February 15, 2006. Accordingly, the Board finds that appellant's application for review was not timely filed within the one-year limitation set forth in 20 C.F.R. § 10.607(a).

The Office properly found that appellant's request for reconsideration did not demonstrate clear evidence of error pursuant to 20 C.F.R. § 10.607(b). Appellant's claim was denied as appellant failed to submit rationalized medical evidence establishing that the incident of May 12, 2003 resulted in a medical condition. The evidence submitted with appellant's request does not establish clear error in the denial of his claim due to lack of medical evidence establishing a causal relationship. In fact, none of the evidence provides a physician's opinion addressing whether appellant sustained an injury causally related to the May 12, 2003 incident. Although Dr. Koullisis diagnosed left knee derangement he did not address causal relationship. The June 16, 2004 MRI scan was not accompanied by a medical report relating the findings to

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<sup>2</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>3</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>4</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>5</sup> *Id.*

<sup>6</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>7</sup> *Leon D. Faidley*, *supra* note 1.

<sup>8</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

the employment incident. The functional capacity evaluation by the occupational therapist is of no probative value as he is not a physician under the Act.<sup>9</sup> The remaining evidence was repetitious of that already of record and previously considered by the Office. Therefore, appellant failed to establish clear evidence of error on the part of the Office and it properly denied reconsideration.

**CONCLUSION**

The Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 20, 2006 is affirmed.

Issued: September 15, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> 5 U.S.C. § 8101(2).