

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Warren, OH, Employer**

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**Docket No. 08-80
Issued: May 9, 2008**

Appearances:

John P. Lutseck, 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

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated September 10, 2007 which denied her 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 September 7, 2005 and the filing of this appeal on October 10, 2007 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 determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On July 5, 2005 appellant, then a 55-year-old letter carrier, filed an occupational disease claim alleging that she developed bunions on her right foot while in the performance of duty. She did not stop work.¹

By letter dated August 3, 2005, the Office advised appellant of the type of factual and medical evidence needed to establish her claim and requested that she submit such evidence, particularly requesting that she submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors.

Appellant submitted treatment notes from Dr. E. David Podolsky, a podiatrist, dated March 22 to June 2, 2005, who treated appellant for painful bunion deformities on both feet. Dr. Podolsky diagnosed hallux valgus deformity, bilateral, hallus abductus interphalangeus deformity, left worse than right, deformed fourth and fifth digit on both feet and acute bursitis of the first metatarsophalangeal joint right foot. He noted that appellant was currently employed with the employing establishment but her job did not require significant standing or walking. On April 8, 2005 Dr. Podolsky performed a bunionectomy and correction of the deformed fourth and fifth digits on the right foot. In a duty status form dated June 2, 2005, he returned appellant to restricted duty on June 7, 2005 and regular duty on June 12, 2005.

In a decision dated September 7, 2005, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that the claimed foot condition was causally related to the established work-related events.

By letter dated January 4, 2006, an attorney, John P. Lutseck, submitted a November 21, 2005 report from Dr. E.F. Cosentino, a podiatrist, who noted that appellant was a postal worker who initially had a mail route and presented with a painful stiff toe. Dr. Cosentino noted that appellant's history was significant for bunion surgery on the right foot in 2005. He diagnosed residual pain of the first metatarsophalangeal joint of the right foot which was aggravated by appellant's occupation which required walking and constant pressure on the joint. Dr. Cosentino recommended physical therapy, orthotic therapy and a possible fusion of the first metatarsophalangeal joint.

In a letter to the Office dated May 17, 2006, Mr. Lutseck requested the status of appellant's claim and inquired as to whether the recommendations of Dr. Cosentino were approved. In a letter to the Office dated December 1, 2006, he attached copies of correspondence dated January 4 and May 17, 2006 and requested a status of the claim.

In a letter dated January 3, 2007, the Office advised Mr. Lutseck that the record did not contain a signed release authorizing him to have access to appellant's case file or to represent her in the matter before the Office. The Office noted that due to an administrative error the notification of representation was not sent when Mr. Lutseck's letter of January 4, 2006 was

¹ On June 29, 1982 appellant filed an occupational disease claim for a foot condition which was accepted for an aggravation of the bone of both feet, File No. 09-0265006. She underwent surgery for this condition on August 9, 1992. This claim is not before the Board at this time.

received. The Office further noted that when a formal decision was issued review rights were attached to the decision. To have further review of the file a specific review right must be clearly stated by the claimant or any representative. The Office noted that time requirements for those review rights would consider any delays in notification which may have taken place due to administrative errors documented in the file. The Office instructed Mr. Lutseck to contact appellant regarding the issued decision with the review rights. The Office indicated that the January 4, 2006 letter from Mr. Lutseck simply forwarded a medical report but did not invoke any specific review right.

In correspondence dated February 9, 2007, Mr. Lutseck referenced an attached authorization for representation signed by appellant and requested a status of the claim. In an undated letter, received by the Office on February 12, 2007, appellant authorized Mr. Lutseck to represent her in her claim before the Office.

In a March 13, 2007 letter, the Office acknowledged receipt of the statement designating Mr. Lutseck as appellant's representative before the Office. The Office attached a copy of the CA-155, instructions relative to a representatives' fee application, as well as a copy of the entire case file. The Office further advised Mr. Lutseck that appellant's claim was denied and instructed him to refer to the appeal rights attached to that decision if he wished to appeal appellant's claim.

In a letter dated July 12, 2007, appellant, through her attorney, requested reconsideration. She referenced the report from Dr. Cosentino and noted that the Office failed to forward to her attorney a copy of the Office decision until January 3, 2007 and advised that the reconsideration request was filed within one year of that notification.

Appellant submitted a report from Dr. Cosentino dated June 25, 2007, who noted a history of injury and presented findings on examination. Dr. Cosentino diagnosed osteoarthritis of the metatarsophalangeal joint right foot with limited range of motion and synovitis. He noted that appellant's condition initially began when she was on a walking route in her job. Dr. Cosentino stated that, when appellant's duties changed to a "milk stop route," the "constant stopping and starting" increased pressure on the joint on the right side and also that stepping in and out of her vehicle aggravated the problem. He noted that these job duties caused "jamming and increased pressure" on the first metatarsophalangeal joint of the right foot causing microtrauma to the joint that gradually turned into osteoarthritis. Dr. Cosentino opined that appellant's current condition was directly related to appellant's work duties.

By decision dated September 10, 2007, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant 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."²

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 the Office will not review a decision unless the application for review is filed within one year of the date of that decision.³

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.⁴

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.⁵

Evidence that 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.⁷ 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.⁸ The Board makes an independent

² 5 U.S.C. § 8128(a).

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

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

⁵ *Annie L. Billingsley*, *supra* note 3.

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.⁹

ANALYSIS

In its September 10, 2007 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on September 7, 2005 and appellant's undated request for reconsideration was received on July 12, 2007 which was more than one year after September 7, 2005.

However, appellant's counsel contends that he was never forwarded a copy of the September 7, 2005 decision until January 3, 2007. However, there is no evidence that Mr. Lutseck was authorized to represent appellant on September 7, 2005. The first correspondence received from Mr. Lutseck was January 4, 2006 in which he submitted a November 21, 2005 report from Dr. Cosentino regarding the treatment of appellant; however, no authorization from appellant accompanied this correspondence nor did she, at that time, request reconsideration or elect any other form of review. Section 10.700(a) of the Office's implementing federal regulations regarding the representation of claimants clearly indicates that, for a representative to be recognized by the Office, a written notice, signed by the claimant, appointing a representative must be sent to the Office.¹⁰ Under the Office's regulations and Board case law,¹¹ Mr. Lutseck, in his January 4, 2006 correspondence was not an authorized representative. The record indicates that Mr. Lutseck was not authorized until February 12, 2007 and appellant did not otherwise submit any evidence indicating that Mr. Lutseck was authorized at the time the January 4, 2006 letter was submitted.¹² Appellant did not submit evidence that Mr. Lutseck was authorized to act as her representative before February 12, 2007. In any event, the January 4, 2006 correspondence did not purport to exercise any of the appeal rights that accompanied the September 7, 2005 decision. The record reflects that, after the authorization, there was no correspondence within one year of the merit decision that would qualify as a reconsideration request.¹³ Thereafter, in a letter dated July 12, 2007, Mr. Lutseck, acting as authorized representative for appellant, requested reconsideration.

The Office rendered its most recent merit decision on September 7, 2005 and appellant's request for reconsideration was dated July 12, 2007, more than one year after September 7, 2005. Appellant, therefore, did not file a timely reconsideration request after the Office's decision of September 7, 2005.

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁰ 20 C.F.R. § 10.700.

¹¹ See *id.*; see also *Nancy Marcano*, 50 ECAB 110 (1998) (where the Board found that the Office's regulations regarding the representation of claimants clearly requires that a written notice, signed by the claimant, appointing a representative be sent to the Office authorizing him to act as appellant's official representative before the Office for the purpose of filing a reconsideration request).

¹² See *Ira D. Gray*, 45 ECAB 445, 447 (1994).

¹³ See 20 C.F.R. § 10.606 (regarding how reconsideration is to be requested).

The Board has also reviewed the evidence submitted with appellant's untimely reconsideration request and concludes that a merit review is also not warranted as appellant has not established clear evidence of error on the part of the Office in its most recent merit decision.

Appellant submitted reports from Dr. Cosentino dated November 21, 2005 and June 25, 2007 who supported that appellant's work duties were the direct cause of her diagnosed conditions of osteoarthritis of the metatarsophalangeal joint right foot, synovitis and residual pain of the first metatarsophalangeal joint right foot. Dr. Cosentino opined that appellant's condition was aggravated by her occupation which required walking and constant pressure on the joint. However, this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision as these reports do not sufficiently address the underlying deficiency in the claim -- the causal relationship of appellant's diagnosed condition to her employment. Dr. Cosentino did not provide sufficient rationale supporting causal relationship of the diagnosed conditions to appellant's employment.¹⁴ For example, he concluded that job duties caused microtrauma that gradually turned into osteoarthritis but he did not explain the pathophysiological process by which particular job duties caused this to happen. The term "clear evidence of error" is intended to represent a difficult standard. Evidence such as a detailed well-rationalized medical 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 and would not require a review of the case.¹⁵ The Board finds that this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision and does not establish clear evidence of error.

CONCLUSION

The Office properly determined that appellant's request for reconsideration dated February 12, 2007 was untimely filed and did not demonstrate clear evidence of error.

¹⁴ See *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004); *James R. Mirra*, 56 ECAB 738 (2005).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board