

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

A.C., Appellant)	
)	
and)	Docket No. 10-553
)	Issued: February 22, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
Sunnyvale, CA, Employer)	
)	

Appearances:
Appellant pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 23, 2009 appellant filed a timely appeal of the January 15 and November 27, 2009 nonmerit decisions of the Office of Workers' Compensation Programs. Because more than one year elapsed from the last merit decision dated August 31, 2001 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's requests for reconsideration because they were untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On September 30, 1994 appellant, then a 30-year-old letter carrier, filed an occupational disease claim, alleging bilateral foot conditions caused by his job. The Office accepted his claim for bilateral foot tenosynovitis, bilateral tarsal tunnel syndrome and related surgery and bilateral medial nerve impingement. Appellant filed a claim for disability beginning November 12, 1995.

By decision dated December 15, 1995, the Office denied his claim on the grounds that the medical evidence established that he was able to work eight hours a day as of November 12, 1995. By decision dated January 22, 1997, an Office hearing representative affirmed the December 15, 1995 decision.

Appellant resigned from his job effective November 17, 1997. In an August 31, 2001 merit decision, the Office denied his claim for disability beginning November 12, 1995. By decision dated June 27, 2002, it denied appellant's request for reconsideration. On September 25, 2003, July 12, 2004 and March 10, 2006 the Office denied appellant's reconsideration requests as untimely and lacking clear evidence of error in the merit decision of August 31, 2001.

On October 13, 2008 appellant requested reconsideration and submitted 289 pages of medical and factual documents. The evidence submitted included a May 26, 2006 report from Dr. Kenneth G. Venos, a Board-certified orthopedic surgeon, who reviewed the medical history and provided findings on physical examination. Dr. Venos diagnosed bilateral flexor hallucis tenosynovitis, flexible pes planus with heel valgus and status post tarsal tunnel release without evidence of neurologic residue. In reports dated July 26, 2006 and October 6 and November 10, 2008, Dr. Steven N. Klein, a Board-certified podiatrist, reviewed the medical history and provided findings on physical examination. He diagnosed status post bilateral tarsal tunnel release, chronic mild bilateral Achilles tendinitis, flexible pes planovalgus, bilateral flexor hallucis longus stenosing tenosynovitis and chronic plantar fasciitis.

On January 15, 2009 the Office denied appellant's reconsideration request on the grounds that it was not filed within one year of the August 31, 2001 merit decision and failed to show clear evidence of error.

On August 25, 2009 appellant requested reconsideration. He argued that the employing establishment's October 4, 1995 job offer should be revised to include an adjustable stool and a pushcart. Appellant contended that the position was not in accordance with his medical restrictions. In an August 24, 2009 report, Dr. Klein provided findings on physical examination and diagnosed improved bilateral Achilles tendinitis, tarsal tunnel syndrome and chronic plantar fasciitis. He also submitted an October 14, 2008 report of a left ankle magnetic resonance imaging (MRI) scan.

By decision dated November 27, 2009, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to establish clear evidence of error in the merit decision of August 31, 2001.

LEGAL PRECEDENT

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 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 Office will consider an untimely application only if the application demonstrates clear evidence on the part of the Office in its most recent

merit decision. The application must establish, on its face, that such decision was erroneous.¹ 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.²

ANALYSIS

The merits of appellant's case are not before the Board. His requests for reconsideration were dated October 13, 2008 and August 25, 2009, more than one year after the Office's most recent merit decision dated August 31, 2001 and, therefore, were not timely. The issue to be determined is whether appellant established clear evidence of error in the Office's August 31, 2001 decision.

The Office's merit decision on August 31, 2001 denied appellant's claim on the grounds that the medical evidence established that he was able to work eight hours a day as of November 12, 1995. On October 13, 2008 and August 25, 2009 appellant requested reconsideration and submitted medical and factual evidence. The issue in this case is medical in nature, whether he was disabled on and after November 12, 1995 causally related to his accepted bilateral foot conditions. In the May 26, 2006 report, Dr. Venos reviewed the medical history and provided findings on physical examination. He diagnosed bilateral flexor hallucis tenosynovitis, flexible pes planus with heel valgus and status post tarsal tunnel release without evidence of neurologic residue. In reports dated July 26, 2006, October 6 to November 10, 2008 and August 24, 2009, Dr. Klein reviewed the medical history and provided findings on physical examination. He diagnosed status post bilateral tarsal tunnel release, chronic mild bilateral Achilles tendinitis, flexible pes planovalgus, bilateral flexor hallucis longus stenosing tenosynovitis, chronic plantar fasciitis and tarsal tunnel syndrome. Dr. Venos and Dr. Klein did not address the underlying issue in this case, whether appellant was able to work for eight hours a day as of November 12, 1995. Their reports do not raise a substantial question as to the correctness of the Office's August 31, 2001 merit decision or establish clear evidence of error.

Appellant argued that the employing establishment's October 4, 1995 job offer should be revised to include an adjustable stool and a pushcart. He alleged that the offered position was not in accordance with his medical restrictions. As noted, the issue in the case is medical. Appellant's arguments are not medical evidence addressing the issue of whether he was able to work eight hours a day as of November 12, 1995. His contentions are not probative on the issue in this case and does not show clear evidence of error in the August 31, 2001 merit decision.

Because appellant's untimely requests for reconsideration did not demonstrate clear evidence of error in the August 31, 2001 merit decision, the Office properly denied his reconsideration requests.

On appeal, appellant argues that the position he was offered on October 4, 1995 was not consistent with his medical restrictions. As noted, the issue in this case is whether the medical

¹ 20 C.F.R. § 10.607.

² *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004).

evidence established that he was able to work eight hours a day as of November 12, 1995. Appellant's lay opinion that the offered job was not in accordance with his work restrictions is not probative. He failed to raise a substantial question as to the correctness of the Office's August 31, 2009 merit decision or establish clear evidence of error. The Office properly denied appellant's reconsideration requests in its January 15 and November 27, 2009 decisions.

CONCLUSION

The Board finds that the Office properly denied appellant's requests for reconsideration on the grounds that they were untimely and failed to demonstrate clear evidence of error in the August 31, 2001 merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 27 and January 15, 2009 are affirmed.

Issued: February 22, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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