

xxxxxx065. She asserted that the Board's October 9, 2007 order under File No. xxxxxx828 should have combined all of her claims.¹

FACTUAL HISTORY

On September 27, 2004 appellant, then a 56-year-old mark-up clerk, filed an occupational disease claim (Form CA-2) asserting that she sustained bilateral foot tendinitis on or before March 6, 2004 due to standing for four hours a day on a cement floor. She also attributed her condition to an accepted right metatarsal fracture sustained on September 18, 2000 when a metal gate dropped on her right foot.²

In a July 1, 2004 report, Dr. Frederic C. Spector, an attending podiatrist, noted appellant's account of bilateral foot pain which she attributed to standing on a cement floor at work. He diagnosed bilateral posterior tibial tendon dysfunction, right greater than left. Dr. Spector recommended that appellant stand on a padded mat at work.

In an October 20, 2004 letter, the Office advised appellant of the additional evidence needed to establish her claim. It requested a rationalized medical report from her attending physician explaining how and why the identified work factors would cause the claimed condition.

By decision dated December 1, 2004, the Office denied appellant's claim on the grounds that causal relationship was not established. It found that appellant submitted insufficient rationalized medical evidence supporting that work factors caused the claimed bilateral foot condition.

In a July 1, 2005 letter, appellant requested reconsideration. She submitted a May 19, 2005 report from Dr. Spector noting that using a padded mat did not improve appellant's symptoms. He diagnosed a probable entrapment neuropathy of the superficial peroneal nerve in the right foot and chronic posterior tibial tendon dysfunction.³

By decision dated August 9, 2005, the Office denied modification of the December 1, 2004 decision. It found that Dr. Spector's report was based on an incomplete history and was therefore insufficient to establish causal relationship.

In a November 30, 2005 letter, appellant requested reconsideration. She asserted that multiple upper and lower extremity conditions forced her to retire. By nonmerit decision dated December 8, 2005, the Office denied reconsideration on the grounds that appellant's

¹ By order issued October 9, 2007 under File No. xxxxxx828, the Board remanded the case to the Office to combine File No. xxxxxx828, accepted for bilateral carpal tunnel syndrome and bilateral tendinitis of the hands, with File No. xxxxxx325, accepted for acromioclavicular arthritis and calcific tendinitis of the shoulders. Neither of the claims is before the Board on the present appeal.

² The Office adjudicated the September 18, 2000 right foot injury under File No. xxxxxx637.

³ An August 9, 2005 magnetic resonance imaging (MRI) scan reports showed right tibialis posterior tendinopathy with a partial tear and midfoot degenerative changes.

November 30, 2005 letter, the only evidence submitted, was insufficient to warrant a merit review.

In a December 22, 2007 letter, appellant, through her representative, requested reconsideration. She asserted that the medical evidence established that she sustained a bilateral foot condition due to the accepted metatarsal fracture and standing on a cement floor. Appellant submitted reports dated August 1, 2005 to July 11, 2007 from Dr. Spector, opining that the metatarsal fracture caused post-traumatic osteoarthritis in the right foot. Dr. Spector attributed her right posterior tibial tendon tear to prolonged standing on cement. He noted that appellant's foot pain worsened after her retirement in June 2005. Appellant also submitted a November 30, 2006 report from Dr. Stephen C. Allen, an attending Board-certified orthopedic surgeon, who diagnosed bilateral foot arthritis and bilateral pes planus and opined that appellant's symptoms were due to nerve irritation, repetitive impact and arthritis.

By decision dated January 23, 2008, the Office denied appellant's December 22, 2007 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. It found that appellant's December 22, 2007 request was untimely as it was filed more than one year after the August 9, 2005 merit decision. The Office further found that appellant's December 22, 2007 letter and the accompanying evidence did not establish that it erred in denying her claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation 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 It, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulations.⁹ Office regulations state that it will reopen a claimant's case for merit review, notwithstanding the

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁶ *Thankamma Mathews*, *supra* note 5; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁷ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 5, *Jesus D. Sanchez*, *supra* note 6.

⁹ *Thankamma Mathews*, *supra* note 5.

one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of it.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that it committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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 it.¹⁵ 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's decision.¹⁶ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹⁷

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. It issued its last merit decision in this case on August 9, 2005. Appellant's request for reconsideration was untimely filed as it was dated December 22, 2007, more than one year after the last merit decision.¹⁸ It must now be determined whether appellant's December 22, 2007 request for reconsideration demonstrated clear evidence of error in the Office's prior decisions.

Appellant's December 22, 2007 letter asserted that the medical evidence was sufficient to establish causal relationship between bilateral foot conditions and work factors. The Board finds that this letter does not raise a substantial question as to whether the Office's August 9, 2005 decision was in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, it is insufficient to establish clear evidence of error. The reports from Dr. Spector and Dr. Allen do not contain medical rationale addressing the underlying issue of causal relationship

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ *Thankamma Mathews*, *supra* note 5 at 770.

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 6 at 968.

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁷ *Gregory Griffin*, *supra* note 7.

¹⁸ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

and are thus irrelevant to the claim. Therefore, they are insufficient to raise a substantial question as to the correctness of the Office's August 9, 2005 decision.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of her December 22, 2007 request for reconsideration do not *prima facie* shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's August 9, 2005 decision and are thus insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error in the Office's August 9, 2005 decision, the last merit decision in the case. Therefore, the January 23, 2008 decision of the Office denying appellant's December 22, 2007 request for reconsideration was proper under the law and facts of this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 23, 2008 is affirmed.

Issued: April 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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