

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

W.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 11-922
Issued: November 3, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 3, 2011 appellant filed a timely appeal from a February 10, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration without further merit review. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed from August 20, 2009, the date of the most recent OWCP merit decision, to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 29, 2009 appellant, then a 53-year-old letter carrier, filed an occupational disease claim alleging that he sustained fallen arches and hammer toe in the right foot due to constant walking and standing for 29 years. He became aware of his condition and realized its relationship to his federal employment on April 29, 2009. Appellant did not incur anytime loss from work. The employing establishment controverted the claim, pointing out that no factual or medical evidence was provided.

In a May 26, 2009 letter, OWCP informed appellant that additional factual and medical evidence was needed to establish his claim. Appellant did not respond.

By decision dated June 22, 2009, OWCP denied appellant's claim, finding the evidence insufficient to establish that he experienced the employment factors as alleged.

Appellant requested reconsideration on July 26, 2009. He did not include any evidence with his application.

On August 20, 2009 OWCP modified the June 22, 2009 decision to reflect that appellant experienced the specified employment factors, but denied the claim on the grounds that he did not submit any medical evidence demonstrating a causal relationship between these accepted factors and a diagnosed condition.

Following the August 20, 2009 decision, appellant submitted medical treatment records from Drs. Ronnie D. Shade, a Board-certified orthopedic surgeon and J.D. Fajardo, a podiatrist, for the period May 14, 2009 to January 24, 2011. This included a May 14, 2009 report from Dr. Shade who advised that appellant related that he had a traumatic injury at work on April 29, 2009. Appellant also noted having an occupational hammer toe of the right foot and flat feet. Dr. Shade diagnosed flexion contracture of the right third toe, metatarsalgia with the second metatarsophalangeal plantar callus and status post 1994 right second hammer to repair. He opined that the mechanism of injury was "directly causally related to the injury that the patient sustained" and that "the injury that he sustained caused traumatic injury to the right foot/ankle." Dr. Shade reiterated that "it is my strong opinion that the occupational injury, which this patient has sustained to the right foot/ankle [was] directly related to his injury on [April 29, 2009]." In a September 15, 2010 report, he noted appellant's history including right foot surgery on March 11, 2010. Dr. Shade listed diagnoses and recommended that additional right foot conditions be "upgraded for this [April 29, 2009] date of injury" as appellant's "complaints and diagnoses were directly causally related to the compensable injury."

Appellant requested reconsideration on January 25, 2011 and submitted medical evidence from Drs. Shade and Fajardo most of which was previously of record. A February 23, 2010 report from Dr. Fajardo concluded that appellant injured his foot while carrying mail on April 20, 2009.

By decision dated February 10, 2011, OWCP denied appellant's application for reconsideration, finding that the claim was not filed within one year of the August 20, 2009 decision and there was no clear evidence of error.²

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. 20 C.F.R. § 10.607(a) provides that a request for reconsideration must be filed within one year of the date of OWCP decision for which review is sought.⁴ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise, and explicit and manifests on its face that OWCP committed an error.⁸ The evidence must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁹

² Appellant furnished additional medical evidence following issuance of the February 10, 2011 decision. The Board lacks jurisdiction to review evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

³ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁴ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *E.R.*, Docket No. 09-599 (issued June 3, 2009).

⁶ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) "(The term 'clear evidence of error' is intended to represent a difficult standard)."

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The last merit decision in this case was issued on August 20, 2009. On January 25, 2011 appellant filed an application for review of this decision. As more than one year passed since the August 20, 2009 decision, OWCP properly determined that his reconsideration request was not timely filed.

The Board further finds that appellant's untimely application failed to demonstrate clear evidence of error. In its August 20, 2009 decision, OWCP denied his claim on the grounds that he did not submit any medical evidence establishing causal relationship between the accepted employment factors and a diagnosed foot condition. Thereafter, appellant submitted new medical evidence from Drs. Shade and Fajardo. Certain of these reports provide some conclusory support for causal relationship. This evidence, however, does not establish clear evidence of error on the part of OWCP. As noted, the question of whether a claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record. None of the medical reports submitted with appellant's untimely request is sufficient to shift the weight of the evidence in favor of appellant. While Drs. Shade and Fajardo opined that appellant's right foot conditions were due to an April 2009 injury at work,¹⁰ the Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.¹¹ As the new evidence did not raise a substantial question as to the correctness of the August 20, 2009 decision, OWCP properly determined that appellant failed to establish clear evidence of error.

Appellant contends on appeal that he filed a timely request for reconsideration on July 26, 2009. This is not in dispute.¹² However, the matter presently before the Board concerns his January 25, 2011 reconsideration request. As discussed, the application was filed more than one year after the August 20, 2009 decision and a limited review of the evidence accompanying this untimely application does not show clear evidence of error on the part of OWCP.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

¹⁰ Although both physicians indicated that appellant had an injury that occurred on a particular date, appellant's claim is for an occupational disease occurring over a number of years. See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history have little probative value).

¹¹ *D.G.*, 59 ECAB 455 (2008).

¹² The Board points out that OWCP issued the August 20, 2009 merit decision with regard to the earlier reconsideration request and sent that decision, along with appeal rights, to appellant's address of record.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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