



## **FACTUAL HISTORY**

On April 5, 2002 appellant, then a 35-year-old letter carrier, filed an occupational disease claim alleging that constant walking hurt his left ankle. He did not stop work and continued his regular job duties. OWCP accepted the claim for aggravation of left foot synovitis and aggravation of left posterior tibial tendinitis. In December 2007 appellant began treatment with Dr. Kenneth M. Leavitt, a podiatrist.

On March 9, 2007 appellant filed a recurrence claim, stating that he sustained a recurrence of disability and stopped work on February 27, 2007 because he worked in daily pain. The recurrence was accepted, and appellant did not return to work. Appellant was placed on the periodic compensation rolls.

In April 2008 OWCP referred appellant to Dr. Joel A. Saperstein, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 5, 2008 report, Dr. Saperstein advised there was little in the way of objective findings. He diagnosed flexible flat feet with static pain and early degenerative arthritis of both feet. Dr. Saperstein advised that appellant could not return to his usual occupation but was capable of eight hours of sedentary, administrative, or clerical work daily, and provided physical restrictions.<sup>2</sup>

On September 9, 2008 appellant was referred to vocational rehabilitation. In October 2008, Dr. Leavitt referred appellant to Dr. Deepak S. Tandon, a Board-certified neurologist, who provided a January 12, 2009 evaluation in which he noted appellant's complaint of severe bilateral ankle and foot pain. He recommended additional testing. A February 4, 2009 electrodiagnostic study of the lower extremities was normal. In reports dated February 11 and April 8, 2009, Dr. Tandon indicated that appellant did not have nerve entrapment in the peroneal or tibial compartment or evidence of anterior or posterior tarsal tunnel syndrome, and that he was uncertain how to proceed. He recommended additional testing.

In reports dated April 16 to November 24, 2009, Dr. Leavitt described appellant's complaint of bilateral ankle pain, diagnosed bilateral collapsed feet, and described appellant's treatment. He advised that appellant was totally disabled because he was unable to stand for any period of time.

Vocational rehabilitation services were placed in interrupted status while appellant was undergoing additional medical development. The services were closed in October 2009.

In February 2010 OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Leavitt and Dr. Saperstein regarding appellant's work capabilities. OWCP referred appellant to Dr. John S. Ritter, a Board-certified orthopedic surgeon, for an impartial evaluation.

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<sup>2</sup> Dr. Saperstein also noted a history of a right Achilles tendon rupture that was not employment related.

A March 13, 2010 x-ray of the left foot demonstrated degenerative changes at the talonavicular joint and medial malleolus, similar to findings in 2007.<sup>3</sup>

In an April 8, 2010 report, Dr. Ritter noted his review of the record, including diagnostic studies, and provided physical examination findings. He diagnosed physiologic pes planus (flat foot) alignment and indicated that this was not work related. Dr. Ritter advised that appellant could not return to his usual job based on subjective complaints of bilateral ankle pain and could work full time in activities that did not require walking and standing, which were limited to two hours daily. OWCP determined that the weight of the medical evidence rested with Dr. Ritter and referred appellant to a rehabilitation specialist for vocational rehabilitation.

Dr. Leavitt continued to submit reports reiterating his findings and conclusions and advising that appellant was totally disabled due to dysfunction of both feet and severe and debilitating pain.

Appellant was again referred for vocational rehabilitation services in July 2010. In an August 20, 2010 report, Helene Annis, a vocational rehabilitation counselor, advised that she met with appellant on August 13, 2010 at which time he indicated that he did not feel that he was capable of working because he was unable to sit due to bilateral foot pain.

On November 4, 2010 the rehabilitation counselor telephoned OWCP stating that appellant did not want to continue with rehabilitation services. In a November 5, 2010 letter, OWCP proposed to suspend appellant's monetary compensation on the grounds that he impeded rehabilitation efforts. Appellant was notified of the penalty provisions of section 8113(b) of FECA<sup>4</sup> and section 10.519 of OWCP regulations.<sup>5</sup> OWCP informed him that it was assumed that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and, accordingly, compensation would be reduced to zero. Appellant was directed to make a good faith effort to participate in vocational rehabilitation, and given 30 days in which to respond by contacting both OWCP and his rehabilitation counselor.

On November 8, 2010 the employing establishment informed OWCP that appellant had been medically separated from the employing establishment, effective August 28, 2010. Appellant telephoned OWCP on November 15, 2010, voicing his disagreement with the proposed suspension, stating that he was totally disabled. In an undated statement, he stated that he could not stand or sit with his feet on the floor without constant severe pain.

By decision dated December 8, 2010, OWCP advised appellant that his failure to undergo the essential preparatory effort of vocational testing impeded a determination of his wage-earning capacity had he undergone the testing and rehabilitation effort. In the absence of evidence to the contrary, the vocational rehabilitation effort would have resulted in his return to work at the same or higher wages than for the position held when injured. Under the provisions

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<sup>3</sup> The record also contains diagnostic testing and other medical evidence regarding appellant's right lower extremity, hips, and lumbar spine, not at issue in this case.

<sup>4</sup> 5 U.S.C. § 8113(b).

<sup>5</sup> 20 C.F.R. § 10.519.

of section 8113(b) of FECA and section 10.519 of OWCP's regulations, it reduced his compensation to zero, effective December 19, 2010, because he failed to cooperate with vocational rehabilitation efforts or show good cause for not complying. Appellant was informed that the reduction would continue until he, in good faith, participated in directed vocational testing, or showed good cause for not complying, at which time the reduction of compensation would cease. His vocational rehabilitation record was closed.

On June 6, 2011 OWCP received appellant's request for reconsideration. Appellant stated that he did not participate in vocational rehabilitation services for medical reasons, stating that Dr. Leavitt advised that he was unable to participate due to his medical condition. In a January 4, 2011 report, Dr. Leavitt indicated that he began treating appellant on December 29, 2007 for posterior tibial tendinitis, severe collapsed feet, and bilateral ankle and rear foot discomfort. He advised that appellant was homebound and totally disabled from any activities that involved standing, walking, or sitting due to severe pain that resulted from lymphatic congestion. In notes dated January 13 and May 4, 2011, Dr. Leavitt described appellant's treatment.

In a merit decision dated August 24, 2011, OWCP denied modification of the December 8, 2010 decision. It found Dr. Leavitt's reports lacked sufficient rationale to overcome the weight of Dr. Ritter who advised that appellant was capable of modified work.

Appellant again requested reconsideration on May 31, 2012. He asserted that he could not work due to multiple medical issues including severe bilateral foot pain, plus left hip arthritis, and a herniated disc in his lower back. Appellant submitted diagnostic studies the bilateral hips, right ankle, and lumbar spine.

In reports dated October 26, 2011 to March 1, 2012, Dr. Leavitt reiterated that appellant had severe chronic bilateral foot pain and was unable to stand or walk for any period of time and described appellant's treatment. On February 14, 2012 he advised that appellant's gait was not normal and that the medical issues in appellant's left foot had adversely affected his right foot.

In a merit decision dated September 12, 2013, OWCP denied modification of the previous decisions. It noted that Dr. Leavitt had been on one side of the conflict resolved by Dr. Ritter and his later reports were insufficient to overcome the weight of Dr. Ritter's opinion or to create a new conflict.

On June 12, 2014 appellant telephoned OWCP with a question about taxes.

In a letter and OWCP appeal request form dated September 3, 2014, received by OWCP on September 23, 2014, appellant requested reconsideration. He also requested that his claim be expanded to include his right foot. Appellant submitted an April 10, 2014 letter in which Dr. Leavitt advised that appellant was permanently disabled due to persisting, severe, and debilitating pain in both feet. Dr. Leavitt continued that appellant was unable to bear weight, whether standing or sitting for any period of time, and was unable to walk without a limp. He advised that a return to work would worsen appellant's condition and render him severely disabled due to repetitive use of his feet.

In a November 4, 2014 decision, OWCP denied appellant's reconsideration request on the grounds that his request was untimely filed and that he failed to present clear evidence of error on the part of OWCP.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP 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.”<sup>6</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>7</sup> However, OWCP 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 OWCP 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 OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>8</sup>

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>9</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

<sup>9</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>10</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>11</sup> *Id.*

part of OWCP.<sup>12</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>14</sup> As to appellant's assertion on appeal that he submitted his reconsideration request on November 3, 2013, other than his telephone call to OWCP about taxes, there is nothing in the record between the September 12, 2013 decision and appellant's reconsideration request received on September 23, 2014 with Dr. Leavitt's April 10, 2014 report. Because appellant's request for reconsideration was not received by OWCP until September 23, 2014, more than one year after issuance of the September 12, 2013 merit decision, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its September 12, 2013 decision.

The Board also finds that appellant has not established clear evidence of error on the part of OWCP. In his September 2014 reconsideration request, appellant disagreed with OWCP's suspension of his wage-loss compensation for failure to cooperate with vocational rehabilitation efforts. He maintained that he was totally disabled and could not participate due to the accepted left foot and ankle conditions and additionally had a right foot condition and asked that it be accepted. Appellant also submitted an April 10, 2014 report from Dr. Leavitt, an attending podiatrist, who had long opined that appellant was totally disabled and had been on one side of a conflict in medical evidence resolved by Dr. Ritter regarding appellant's capability for some type of work.

The evidence submitted by appellant, however, does not raise a substantial question as to the correctness of OWCP's merit decision in which his compensation was reduced to zero for failure to participate in vocational rehabilitation efforts. 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 merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>15</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>16</sup>

The Board therefore finds that in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the argument and evidence submitted

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<sup>12</sup> *Id.*

<sup>13</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>14</sup> *Supra* note 7.

<sup>15</sup> *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

<sup>16</sup> *Supra* note 13.

by appellant with his September 2014 reconsideration request to ascertain whether it demonstrated clear evidence of error in the September 12, 2013 OWCP decision and correctly determined that it did not, and thus denied appellant's untimely request for a merit reconsideration on that basis.<sup>17</sup>

**CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed and that he failed to establish clear evidence of error. OWCP, therefore, properly denied a merit review of his claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 4, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>17</sup> 20 C.F.R. § 10.607(b) (2011); *see D.G.*, 59 ECAB 455 (2008).