

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHELLEY D. HILL and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 02-4; Submitted on the Record;
Issued June 6, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.

On July 1, 1998 appellant, then a 23-year-old mail carrier, filed an occupational disease claim alleging that she sustained a foot injury on June 19, 1998 in the performance of duty.

By decision dated September 24, 1998, the Office denied appellant's claim on the grounds that she had failed to establish that she sustained an injury on June 19, 1998, as alleged.

By letter dated October 12, 1998, appellant requested a hearing that was held on April 28, 1999.

By decision dated July 16, 1999, an Office hearing representative affirmed the Office's September 24, 1998 decision on the grounds that the medical evidence of record failed to establish that appellant sustained an injury causally related to factors of her employment.

By letter dated March 24, 2000, appellant requested reconsideration and submitted additional evidence.

By decision dated July 14, 2000, the Office denied appellant's request for reconsideration.

By letter dated August 9, 2001, appellant requested reconsideration and submitted additional evidence.

In a report dated July 14, 2001, Dr. Vincent J. Muscarella, a podiatrist, stated that appellant had been under his care for three years for complications associated with severe flatfoot deformities which were aggravated by a tight Achilles tendon and a recurrent calcaneal-

cuboid (C-C) joint in her left foot. He operated on appellant's left foot and lengthened her Achilles tendon and repaired a painful bunion and hammertoe. Dr. Muscarella stated that these conditions were directly related to her flat feet and were aggravated by her employment. He stated that appellant had been unable to return to full duty, despite her surgery, due to recurrent Achilles tendinitis, a recurrent subluxation of her C-C joint and developing traumatic arthritis in her fifth metatarsal bone. Dr. Muscarella stated, "I believe that the letter carrier's job that [appellant] continued to perform accelerated and aggravated her flatfoot and post-traumatic condition to her present state of pain and disability."

By decision dated August 22, 2001, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within one year of the Office's July 16, 1999 merit decision and failed to show clear evidence of error in the Office's decision.

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her appeal with the Board on September 13, 2001, the only decision properly before the Board is the Office's August 22, 2001 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's July 14, 2000 decision denying appellant's request for reconsideration or the Office's July 16, 1999 or September 24, 1998 merit decisions denying her claim for a work-related foot injury.²

Section 8128 of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). As one such limitation, the Office will not review a decision denying or terminating compensation benefits unless the application for review is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 5 U.S.C. § 8128(a).

⁴ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, *supra* note 2.

⁵ *Leon D. Faidley*, *supra* note 2. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request is made prior to a request for reconsideration.

⁶ 20 C.F.R. § 10.607.

one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure a review of an Office decision upon presentation of new evidence that the decision was erroneous.⁸ In accordance with this holding, the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision.⁹

Since more than one year elapsed from the July 14, 2000 decision denying appellant's request for reconsideration to appellant's August 9, 2001 application for review, the request for reconsideration is untimely. Therefore, appellant must submit clear evidence of error in the Office's last merit decision dated July 16, 1999.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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 decision.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁵

In her request for reconsideration, appellant submitted a report dated July 14, 2001 in which Dr. Muscarella, a podiatrist, stated that appellant had severe flatfoot deformities which were aggravated by a tight Achilles tendon and a recurrent C-C joint in her left foot. He stated that these conditions were directly related to her flat feet and were aggravated by her

⁷ See *Gregory Griffin*, *supra* note 4.

⁸ See *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

⁹ 20 C.F.R. § 10.607(b).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

¹¹ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 664-65 (1997); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jimmy L. Day*, 48 ECAB 654, 656; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁵ See *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, *supra* note 4.

employment. Dr. Muscarella stated, “I believe that the letter carrier’s job that [appellant] continued to perform accelerated and aggravated her flatfoot and post-traumatic condition to her present state of pain and disability.” However, as noted above, it is not sufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. Later medical evidence independently supporting causal relationship such as that submitted with appellant’s August 9, 2001 request for reconsideration, has no bearing on the probative value of the medical evidence that was before the Office at the time of its July 16, 1999 merit decision.¹⁶ Consequently, the evidence submitted in support of appellant’s untimely request for reconsideration in no way shows that the Office’s July 16, 1999 decision was erroneous. Thus the evidence submitted by appellant did not raise a substantial question as to the correctness of the Office’s July 16, 1999 decision and the Office properly denied appellant’s untimely request for reconsideration.

The decision of the Office of Workers’ Compensation Programs dated August 22, 2001 is affirmed.

Dated, Washington, DC
June 6, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁶ *Dean D. Beets, supra* note 10.