

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY PEGRAM and U.S. POSTAL SERVICE,
MISSION CITY ANNEX, Mission Hills, CA

*Docket No. 02-381; Submitted on the Record;
Issued June 18, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On November 20, 1997 appellant, then a 54-year-old postal clerk, filed a notice of recurrence of disability for a right foot condition. The Office accepted a traumatic injury claim in 1987 for "aggravation of the hallux valgus of the right foot first metatarsal" as work related. The Office informed appellant on January 28, 1998 that her recurrence claim had been converted into an occupational disease claim and requested that she submit additional factual and medical information to support her claim.

By decision dated April 7, 1998, the Office denied appellant's claim.

By letter dated October 19, 2000 appellant requested reconsideration. In support of her request, she submitted monetary statements indicating that she had been undergoing foot treatment from podiatrist Joseph I. Borden from 1987 to 2001. She also submitted work restrictions set forth by Dr. Borden, letters from the Office regarding her previous claim, and a December 4, 2000 report from Dr. Borden. He stated that in 1997 appellant suffered from multiple foot problems including right ankle pain, right foot sprain and multiple keratomas on her feet. He stated that in 1998 appellant was treated for painful keratoma and metatarsalgia. In 1998 he also diagnosed appellant with calcific tendinitis right peroneal tendon and in 1999 with plantar fasciitis and heel spurs. He stated: "In my opinion the cause of her foot pain is related to the job requirements of her position as a mail carrier. The more she stands and walks the more her foot pain will worsen."

By decision dated August 9, 2001, the Office denied appellant's request for reconsideration.

The only Office decision before the Board on this appeal is the August 9, 2001 decision denying appellant's request for reconsideration. More than one year has elapsed between the date of the Office's most recent merit decision on April 7, 1998, which denied appellant's occupational disease claim for a foot condition, and the filing of appellant's appeal on November 7, 2001. The Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.² 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).³

The Office properly found in its August 9, 2001 decision, that the one-year time limit for filing a request for reconsideration of the Office's April 7, 1998 decision expired on April 7, 1999, and that the request for reconsideration dated October 19, 2000 was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that 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.⁴ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

² 20 C.F.R. § 10.607(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁶ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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 the Office.¹⁰

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.¹¹ 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.¹²

In support of her request for reconsideration, appellant submitted a personal statement, monetary statements for foot treatments from 1997 to 2001, work restrictions set forth by Dr. Borden, letters from the Office regarding her previous claim, and a December 4, 2000 report from Dr. Borden. The nonmedical information submitted by appellant is irrelevant since the underlying issue in this case is medical. Appellant's claim was denied on April 7, 1998 because appellant did not submit any rationalized medical evidence establishing causal relationship between her foot condition and factors of her federal employment. Dr. Borden, in his December 4, 2000 report, discussed the history of appellant's foot condition and opined that the cause of her foot pain was related to her job as a mail carrier. While he found that appellant's foot condition was related to her federal employment, his conclusion is not supported by findings or medical rationale to raise a substantial question as to the correctness of the denial of appellant's claim. Since the evidence appellant submitted with her request does not establish that the Office committed an error in its April 7, 1998 decision, it is insufficient to establish clear evidence of error.¹³

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

⁸ *Jesus D. Sanchez, supra* note 3.

⁹ *Leona N. Travis, supra* note 7.

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr., supra* note 3.

¹² *Gregory Griffin, supra* note 4.

¹³ The Board cannot consider a new report from Dr. Borden since the report was not before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

The August 9, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 18, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member