

accepted the claim for aggravation of bilateral ankle/foot arthritis. The Office paid compensation for total disability and placed him on the periodic rolls.

On December 23, 1998 the employing establishment offered appellant a job as a modified distribution clerk. Appellant signed the form indicating his acceptance and reported to work on December 28, 1999. However, he showed up for work wearing bedroom slippers and using crutches. Appellant was informed that he was not wearing proper footwear, left work and never returned. Appellant submitted a handwritten note on another copy of the job offer form in which he indicated that he was refusing the job because it had not been reviewed by his treating physician.

By letter dated January 28, 1999, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office advised appellant that it would be terminating appellant's compensation based on his refusal to accept a suitable position which reflected his ability to work his current job as a modified mail processing clerk for four hours per day. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).¹

By letter dated March 5, 1999, the Office advised appellant that he had 15 days in which to accept the position, or it would terminate his compensation. By decision dated March 29, 1999, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

On February 10, 2004 appellant requested reconsideration of the Office's March 29, 1999 termination decision. Appellant submitted reports dated June 20, 2001, December 4, 2002, February 28 and June 9, 2003 and January 8, 2004 from Dr. Kiran K. Nanji, a podiatrist. On June 20, 2001 Dr. Nanji indicated that appellant was experiencing disabling chronic pain and that he had a history of tarsal tunnel syndrome which lead to peripheral neuropathy. He opined that appellant's present medical condition did not allow him to work as a distribution clerk or other job with the employing establishment since his pain was aggravated by physical activity. Appellant experienced constant pain from standing, sitting or sleeping caused by his chronic pain syndrome and peripheral neuropathy. On January 8, 2004 Dr. Nanji reiterated his previous findings and conclusions and opined that appellant's medical condition had not allowed him to work since 1997 as a distribution clerk. He stated that appellant's condition was permanently disabling.

Appellant also submitted a December 11, 2001 report from Dr. Sherrell R. Wilkerson, a physician, who stated that he was familiar with the chronicity of discomfort appellant experienced on his left foot and legs, although he had not seen him in two years. He noted appellant's attempts to procure comfortable footwear.

¹ 5 U.S.C. § 8106(c)(2).

By decision dated April 1, 2004, the Office denied appellant's request for reconsideration finding that he had not timely requested reconsideration and failed to submit evidence sufficient to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁶

In those cases where a request for reconsideration is not timely filed, the Board had held, however, 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.⁷ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

⁶ *See* cases cited *supra* note 3.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.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's decision.¹⁴ The Board makes an independent determination of whether an appellant 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

ANALYSIS

The Office properly determined that appellant failed to file a timely request for reconsideration. The Office issued its last merit decision in this case on March 29, 1999. Appellant requested reconsideration on February 10, 2004. Appellant's reconsideration request was untimely as it was made outside the one-year time limit.

The Board finds that appellant's February 10, 2004 request for reconsideration failed to establish clear evidence of error. The reports from Drs. Nanji and Wilkerson are of limited probative value as they do not provide a reasoned medical opinion on the relevant issues. The Office found that the position of modified distribution clerk was medically suitable in a letter dated January 28, 1999. Dr. Nanji stated that appellant was unable to work since 1997 as a distribution clerk without providing a relevant factual background or explanation for his stated conclusions. He did not describe the specific duties and physical requirements of the offered

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley Jr.*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

position, discuss appellant's condition as of the time the job was offered or clearly explain why appellant could not perform the job at that time. Dr. Wilkerson's opinion is similarly deficient and failed to address appellant's condition as of the time of the 1989 job offer. Moreover, his opinion was not based on a contemporaneous examination of appellant.

The Office reviewed the medical evidence and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated February 10, 2004. The Office properly denied further review of his claim.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2004 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: October 20, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member