

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

VERNETHIA J. COLEY-SMITH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 04-1398
Issued: September 16, 2004**

Appearances:
Vernethia J. Coley-smith, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 3, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated April 20, 2004 which denied her reconsideration request on the grounds that it was untimely and did not show clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was its September 19, 2002 decision which terminated appellant's compensation and medical benefits. Because more than one year

has elapsed between this decision and the filing of this appeal on May 3, 2004, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for further review of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal in this case. In the first appeal,² the Board issued a decision on February 6, 2004 which affirmed a September 2, 2003 decision of the Office on the grounds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).³ The Office determined that the evidence appellant submitted in connection with her timely reconsideration request was not sufficient to require reopening of her claim for review on the merits. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On March 15, 2004 appellant requested reconsideration of her claim and submitted a March 1, 2004 report of Dr. Kevin E. Till, an attending podiatrist. In his report, Dr. Till indicated that appellant was seen at the clinic at which time she reported pain at the back of her right heel and claimed that she reinjured her Achilles tendon while pulling a cart at work. He noted that appellant exhibited pain upon various palpations and movements of the right foot. Dr. Till diagnosed Achilles tendinitis of the right foot and indicated that appellant had been disabled since July 14, 2000 and was currently unable to work in any job. By decision dated April 20, 2004, the Office refused to reopen appellant's claim for further review of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹ The record contains a February 6, 2004 decision of the Board which was issued within one year of the May 3, 2004 filing of the present appeal. In the absence of further review by the Office on the issue addressed by this decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d). Moreover, the subject matter of the Board's February 6, 2004 decision concerns the nonmerit issue of denial of a reconsideration request, rather than the merit issue of the present case.

² Docket No. 04-192 (issued February 6, 2004).

³ On June 7, 1999 appellant, then a 38-year-old mail processor, filed a traumatic injury claim alleging that on June 6, 1999 she injured her right foot when a steel mail container she was pulling cut the back of her foot. The Office accepted her claim for a right foot laceration. The Office later accepted that appellant sustained an employment-related strain of the right foot and heel on July 14, 2000. She stopped work and began receiving compensation for lost wages. By decision dated September 19, 2002, the Office terminated appellant's compensation and medical benefits effective September 19, 2002 on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Jerry Matlen, a Board-certified orthopedic surgeon and an Office referral physician, established that she had no residuals from her accepted right foot laceration and right foot and heel strain.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁷ Office procedures provide 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁸

ANALYSIS

Appellant's March 15, 2004 letter requesting reconsideration was submitted more than one year after the Office's September 19, 2002 merit decision terminating her compensation and medical benefits and, therefore, was untimely. As appellant's request was filed more than one year after the Office's September 19, 2002 decision, appellant must demonstrate clear evidence of error on the part of the Office in issuing its September 19, 2002 decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest 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

⁴ See 5 U.S.C. § 8128(a); *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as 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 and would not require a review of the case...."

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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 decision.¹⁴

Appellant has not submitted any evidence which would show clear evidence of error in the Office's prior decision. Appellant submitted a March 1, 2004 report of Dr. Till, an attending podiatrist. However, this report is not relevant to the merit issue of the present case, *i.e.*, whether appellant had residuals of her June 6, 1999 and July 14, 2000 employment injuries after September 19, 2002. In his report, Dr. Till indicated that appellant reported pain symptoms in her right foot and diagnosed Achilles tendinitis of the right foot. However, he did not provide any indication that this condition was due to her June 6, 1999 or July 14, 2000 employment injury.¹⁵ Dr. Till indicated that appellant had been disabled since July 14, 2000 and was currently unable to work in any job, but he did not specify the cause of this disability.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for further review of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

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

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ He noted that appellant claimed that she reinjured her Achilles tendon while pulling a cart at work, but he did not provide any further detail of this matter and it has not been accepted that appellant sustained an employment injury in this manner.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member