



fasciitis was employment related, and a June 4, 2007 Office decision denying appellant's request for reconsideration.<sup>2</sup> The facts of the case as set forth in the prior decision are incorporated herein by reference.<sup>3</sup>

On July 27, 2007 the Office received a February 1, 2007 report by Dr. Peter G. Gerbino, an examining Board-certified orthopedic surgeon, diagnosing plantar fasciitis. Dr. Gerbino provided a history that appellant had worked 20 years as a postman and that his foot pain began in 2005. A physical examination revealed bilateral foot dorsiflexion of 20 degrees, no tenderness in the calcanei or Achilles tendon and moderate to severe tenderness along the left plantar fascia and at the left plantar fascia insertion. Dr. Gerbino noted that this condition was caused by walking and other activities involving the lower extremities. He opined that appellant's employment duties caused his condition.

On June 3, 2008 appellant, through his representative, requested reconsideration and submitted additional evidence.

By decision dated August 29, 2008, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within one year of the most recent merit decision dated December 21, 2006 and the evidence did not establish clear evidence of error in the 2006 decision.

#### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act<sup>4</sup> provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>2</sup> Docket No. 07-2219 (issued February 18, 2008).

<sup>3</sup> On September 20, 2006 appellant, then a 44-year-old letter carrier, filed an occupational disease claim alleging that his left heel pain was employment related. He stated that he first became aware of his condition in July 2005 and that he first realized that his injury was caused or aggravated by his employment duties, which included standing and walking for long periods of time, in July 2006.

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> 20 C.F.R. § 10.605.

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit, and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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.<sup>9</sup>

### **ANALYSIS**

The Board previously reviewed the merits of this claim in a February 19, 2008 decision. A merit decision of the Board extends the one-year period to request reconsideration of a final decision before the Office.<sup>10</sup> Appellant's request for reconsideration was dated June 3, 2008. As this request was filed within one year after the Board's merit decision, it is timely.

As appellant filed a timely request for reconsideration, the Office improperly evaluated his request for reconsideration pursuant to the clear evidence of error standard. The case will therefore be remanded to the Office for a decision regarding whether the evidence submitted with the June 3, 2008 request for reconsideration was sufficient to warrant a review of the merits of appellant's claim under 20 C.F.R. § 10.606(b).

### **CONCLUSION**

The Board finds that appellant filed a timely request for reconsideration. Accordingly, this case must therefore be remanded to the Office for an appropriate decision consistent with this opinion.

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<sup>8</sup> See *Alberta Dukes*, 56 ECAB 247 (2005); see also *Leon J. Modrowski*, 55 ECAB 196 (2004).

<sup>9</sup> See *Alberta Dukes*, *supra* note 8.

<sup>10</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Veletta C. Coleman*, 48 ECAB 367 (1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 29, 2008 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: July 7, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board