United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 09-357**
	)	**Issued: September 15, 2009**
DEPARTMENT OF THE AIRFORCE, 61 MSS/DPCE, El Segundo, CA, Employer	)	

Appearances:
James Hefflin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 19, 2008 appellant filed a timely appeal from an August 25, 2008 nonmerit decision of the Office of Workers' Compensation Programs, denying reconsideration of an April 17, 2006 merit decision. As over a year has passed since the date of the last merit decision, dated April 17, 2006 and the filing of this appeal, dated November 19, 2008, the Board lacks jurisdiction over the merits of appellant's claim.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On November 3, 2004 appellant, a police officer, filed an occupational disease claim (Form CA-2) for reconstructive foot surgery with a fusion of the 1st and 2nd metatarsal-cuneiform

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

joint of the right foot and bone spurs of the tarsal area of both feet. He attributed his injuries to standing for prolonged hours and having to walk large areas to maintain the physical security of the installation. Appellant reported that, while recovering from foot surgery, his physician, during a follow-up visit, determined that his condition was directly associated with his employment.

By decision dated February 23, 2005, the Office denied appellant's claim because the evidence of record was insufficient to establish that he sustained an injury as defined by the Federal Employees' Compensation Act.

Appellant disagreed and, through his representative, requested reconsideration.

By decision dated April 17, 2006, the Office modified its February 23, 2005 decision to reflect that appellant had established the alleged factors of employment but denied his claim because the evidence of record was insufficient to establish that these factors caused his claimed bilateral foot condition, rather than his prior civilian and military employment.

Appellant disagreed and, through his representative, requested reconsideration on August 8, 2008.

Appellant submitted a December 15, 1999 operative medical report signed by Dr. Douglas H. Richie, Jr., podiatrist, who performed a bilateral ostectomy cuneiform.

In an April 15, 2006 medical note, Dr. Steve Reynolds reported that he had been appellant's primary care physician for the past 10 years. He noted that in 1999, he referred appellant to a specialist, Dr. Douglas Richie, who agreed that appellant's bilateral foot pain was a result of "excessive wear and tear" likely caused and or exacerbated by his employment. Dr. Richie opined that appellant's foot problems were a direct result of his years as a federal police officer.

In a May 19, 2006 medical report, Dr. Richie reported findings upon examination of tenderness across appellant's right midfoot as well as fibrosis and enlargement of the entire right foot. He noted that appellant described forefoot pain for the past 20 years, which was unrelated to his industrial injury. Dr. Richie found palpable scar tenderness at the right and left mid-feet and regrowth of bone prominence at the right midfoot. He diagnosed appellant with right midfoot post-traumatic degenerative arthritis. Dr. Richie opined that appellant developed radiographic evidence of accelerated degenerative joint disease during the period October 23, 1999 through March 11, 2004 evidence of which, though not clear on October 23, 1999, became obvious over the next three years while appellant was employed by the Federal Government.

By decision dated August 25, 2008, the Office denied reconsideration because appellant's request was untimely and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the

Office decision, for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[2]

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."[3] Office regulations and procedure 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.[4]

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report, which if submitted prior to the Office's denial, 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 on the director's own motion.[5]

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.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[8] The Board makes an independent determination of whether a claimant has

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[2] 20 C.F.R. § 10.607.

[3] *See* 20 C.F.R. § 10.607(b); *D.D.*, 58 ECAB ___ (Docket No. 06-1148, issued November 30, 2006); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[4] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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." *Id.* at Chapter 2.1602.3c.

[5] Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1602.3(b) (April 1991).

[6] *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[7] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[8] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.[9]

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[10] A right to reconsideration within one year also accompanies any subsequent merit decision.[11] As appellant's August 8, 2008 request for reconsideration was submitted more than one year after the last merit decision of record, dated April 17, 2006, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.[12]

The Board also finds that appellant's request for reconsideration failed to demonstrate clear evidence of error. Appellant, through his representative, contended that the Board should consider the merits of his claim. Appellant's representative, in a lengthy memorandum, argued that the Office had not properly developed appellant's claim as required by the Office's procedural manual. The representative, citing several examples of the Board case law, argued that the evidence of record was sufficient to establish causal relationship and that there was no evidence to the contrary in the record. Finally, the representative argued that the Office's April 17, 2006 decision, found that the evidence of record established fact of injury, which the

[9] *See Alberta Dukes*, 56 ECAB 247 (2005).

[10] 20 C.F.R. § 10.607(a).

[11] *Robert F. Stone*, 57 ECAB 292 (2005).

[12] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

representative interpreted to mean that appellant's injury occurred in the performance of duty and, therefore, he was entitled to payment of as well as reimbursement for, expenses incurred for medical treatment necessitated by the accepted injury.[13]

The burden is on appellant to submit evidence required to establish his claim within the statutorily defined time limits.[14] While the representative asserts an appeal that the Office bore a duty to develop his claim that included an obligation to seek a clarifying opinion from his attending physician or a second opinion evaluation, this assertion is not clear evidence that the Office's denial was erroneous. The Office, as required by its procedural manual, is encouraged to seek clarifying opinions and second opinion evaluations when, for example, a discrepancy in the evidence exists between complaints of disability and objective findings.[15] The clarifying opinion and second opinion evaluation tools for resolving conflicts and discrepancies in the evidence and are not tools whereby the Office shares appellant's initial burden of establishing his claim.[16]

As noted above, because over a year has passed since the date of the last merit decision, dated April 17, 2006 and the filing of this appeal, dated November 19, 2008, the Board lacks jurisdiction over the merits of appellant's claim.[17] Therefore, the representative's arguments

[13] While the Office's April 17, 2006 decision found that the evidence of record established fact of injury, the Office denied appellant's claim because the evidence of record was insufficient to establish the causal relationship between her injury and his federal employment.

An employee seeking benefits under the Act, 5 U.S.C. §§ 8101-8193, has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury. *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989). To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee. *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish,* 46 ECAB 276, 279 (1994).

In its April 17, 2006 merit decision, the Office found that the factual and medical evidence was sufficient to establish that appellant performed duties of a police officer, element one of fact of injury and a diagnosis in connection with factors of employment which included prolonged standing and walking, element 2 of fact of injury. However, the Office denied appellant's claim because the evidence of record was insufficient to establish that his bilateral foot conditions and subsequent surgeries were causally related to his federal employment, element 3. Thus, appellant has not met his burden because he did not establish the requisite causal relationship, element 3 and, therefore, is not entitled to compensation benefits.

[14] 20 C.F.R. § 10.115(a).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Requesting clarification from the attending physician*, Chapter 2.810.8(a) (October 2005).

[16] *Id. See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Second Opinion Examinations*, Chapter 2.810.9 (October 2005).

[17] *See* 20 C.F.R. at §§ 501.2(c) and 501.3(d)(2).

concerning whether or not the evidence of record established a causal relationship between appellant's alleged condition and his federal employment are not convincing because appellant's failure to file his reconsideration request within the one year limit[18] precludes the Board's review of the merits of appellant's claim.

The only relevant issues on appeal are the timeliness of appellant's reconsideration request and whether he established clear evidence of error on the part of the Office, neither of which he or the representative addressed.[19]

In support of his untimely reconsideration request, appellant submitted medical reports from Drs. Richie and Reynolds. None of these documents demonstrated clear evidence of error on the part of the Office when it decided the case on the evidence in the record at the time. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[20] Dr. Reynolds' note did not proffer a diagnosis or contemporaneous findings upon examination, nor did he raise a substantial question concerning the correctness of the Office's decision. Although Dr. Reynolds' opined that appellant's injury was a direct result of his federal employment, he did not ever describe the implicated work factors in any detail or provide any explanation of why he felt that work factors contributed to appellants injury.[21]

Dr. Richie's December 15, 1999 report is of limited relevance as it concerned a surgical procedure and proffers nothing of relevance concerning causal relationship. Thus, it raises no substantial question concerning the correctness of the Office's decision and, therefore, is insufficient to establish clear evidence of error.

In his May 19, 2006 report, Dr. Richie diagnosed right midfoot post-traumatic degenerative arthritis and opined that this condition was caused by prolonged standing and walking that appellant performed in the course of his federal employment. However, this evidence also is insufficient to raise a substantial question as to the correctness of the Office's decision as these reports do not sufficiently address the underlying deficiency in the claim -- the causal relationship of appellant's diagnosed condition to his employment. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[22] His report is of limited relevance to the main issue of the present case because Dr. Richie did not describe the implicated work factors in any detail or provide any explanation of why he felt that work factors contributed to appellant's injury and,

[18] *Id.* at § 10.607(a).

[19] *Id.* at § 10.607(b).

[20] *See Alberta Dukes*, 56 ECAB247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004). *See also Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

[21] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[22] *See Ausberto Guzman*, 25 ECAB 362 (1974).

therefore, does not raise a substantial question concerning the correctness of the Office's decision.[23]

As noted above, the term clear evidence of error is intended to represent a difficult standard. 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.[24] Neither Dr. Richie or Dr. Reynolds raised a substantial question as to the correctness of the Office's August 25, 2008 merit decision or demonstrate clear evidence of error and, therefore, these reports are insufficient to establish clear evidence of error.

The evidence submitted in support of appellant's untimely reconsideration request is insufficient to establish clear evidence of error. The evidence appellant submitted on reconsideration fails to meet this standard. Therefore, the Board finds that this evidence is insufficient to raise a substantial question as to the correctness of the Offices decision and does not establish clear evidence of error.

For these reasons, the Office properly denied appellant's request for reconsideration.

CONCLUSION

The Office properly determined that appellant's request for reconsideration dated August 8, 2008 was untimely filed and did not demonstrate clear evidence of error.

[23] *See supra* note 21.

[24] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (October 2005); *James R. Mirra*, 56 ECAB 738 (2005).

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board