

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

L.R., Appellant)	
)	
and)	Docket No. 10-1301
)	Issued: February 7, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
Rockaway, NJ, Employer)	
)	

Appearances:
James S. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2010 appellant filed a timely appeal from a March 12, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last Office merit decision is dated November 4, 2008 decision denying appellant's traumatic injury claim. The Board lacks jurisdiction to review the merits of the claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On February 15, 2008 appellant, then a 56-year-old city mail carrier, filed a traumatic injury claim alleging that she sustained a lacerated tendon of the right calf on February 14, 2008 while reaching to place mail in a curbside box.

In a February 21, 2008 report, Dr. Louis Bouillon, an attending Board-certified orthopedic surgeon, stated that she sustained a right lower extremity injury a week earlier while delivering mail. He noted that appellant put a lot of pressure on her right calf as she leaned from her truck to reach a mailbox and felt a sudden sharp pain in the middle aspect of posterior right calf. Dr. Bouillon provided findings on examination and diagnosed a plantaris tendon rupture of the right calf.

By decision dated April 7, 2008, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that she sustained an injury in connection with the accepted incident.

On August 26, 2008 appellant requested reconsideration. In an August 4, 2008 report, Dr. Bouillon repeated the history of injury described in his prior report and diagnosed status post ruptured plantaris tendon with soft tissue complications, namely tibialis posterior tendinitis, Achilles tendinitis and paresthesias. A February 14, 2008 hospital emergency room report, signed by a Dr. Amjad AAzeer, diagnosed a gastrocnemius strain and planteris tendon rupture.

In a November 4, 2008 decision, the Office denied the claim, finding that the medical evidence did not provide a rationalized medical opinion from a physician explaining the relationship between appellant's diagnosed condition and the February 14, 2008 employment incident.

On December 9, 2009 appellant, through her representative, requested reconsideration. Counsel noted that he was enclosing a report from Dr. Bouillon which included a diagnosis of postruptured plantaris tendon with soft tissue complications including tibialis posterior tendinitis, Achilles tendinitis and paresthesias. He also contended that the February 14, 2008 emergency room record also documented that appellant was injured on the job.

In a December 8, 2009 report, Dr. Bouillon reiterated the history of injury and reviewed his February 21, 2008 examination findings. He provided a diagnosis of plantaris tendon rupture, complicated subsequently by numerous soft tissue complications, including tibialis posterior tendinitis, Achilles tendinitis and paresthesias. Dr. Bouillon stated:

“There is no question that the injury [appellant] sustained was sustained on February 14, 2008 at work. There is no question that the numerous, symptomatic residual soft tissue complications are a direct result of the original injury she also sustained at that time.”

By decision dated March 12, 2010, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 8128(a). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.³ 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.⁴

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁵ 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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

⁷ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ *See M.L.*, 60 ECAB ____ (Docket No. 09-956, issued April 15, 2010). *See Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹²

ANALYSIS

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹³ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁴ As appellant's December 9, 2009 request for reconsideration was submitted more than one year after the date of the last merit decision of record on November 4, 2008, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim.¹⁵

Counsel's reference to Dr. Bouillon's report and his contention that the February 14, 2008 emergency room record that appellant was injured on the job, does not allege or establish clear error on the part of the Office, but merely repeats arguments considered previously. Therefore, his contentions are insufficient to raise a substantial question concerning the correctness of the Office's decision.

The medical evidence submitted by appellant is insufficient to establish that the Office committed an error. In a December 8, 2009 report, Dr. Bouillon reiterated the history of injury and reviewed his February 21, 2008 examination findings, which revealed a diagnosis of plantaris tendon rupture, complicated subsequently by numerous soft tissue complications, including tibialis posterior tendinitis, Achilles tendinitis and paresthesias. He stated again that appellant sustained a work-related injury on February 14, 2008 and that her residual soft tissue complications were a direct result of the original injury. Although Dr. Bouillon's reports generally support appellant's claim, they repeat the information contained in his prior reports that were previously considered and fail to raise a substantial question as to the correctness of the Office's decision. The term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.¹⁶

The Board finds that the evidence submitted in support of appellant's untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests

¹² *Pete F. Dorso*, 52 ECAB 424 (2001).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Robert F. Stone*, 57 ECAB 292 (2005).

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

¹⁶ *Joseph R. Santos*, 57 ECAB 554 (2006).

on its face that the Office committed an error. Therefore, appellant has failed to meet her burden of proof.

On appeal, counsel contends that there was clear error in the decision of November 4, 2008 because Dr. Bouillon's report of August 4, 2008 was sufficient. He noted that the emergency room record provided a diagnosis and indicated that appellant was injured on the job. As noted, the Board finds that appellant has failed to establish clear evidence of error on the part of the Office.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board