

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

D.S., Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
NATIONAL PARK SERVICE, Washington, DC,)
Employer)

Docket No. 12-919
Issued: August 23, 2012

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2010 appellant filed a timely appeal from February 21, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration without further merit review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed from March 5, 2010, the date of the most recent OWCP merit decision, to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 17, 2009 appellant, then a 45-year-old park police officer, filed a traumatic injury claim alleging that a horse stepped on his left foot during training on December 28, 2008. In a January 27, 2010 letter, OWCP informed him that evidence was needed to establish his claim and gave him 30 days to submit a report from a qualified physician explaining how the work event caused or contributed to the injury. Appellant did not respond.

By decision dated March 5, 2010, OWCP denied appellant's claim, finding that he failed to submit medical evidence demonstrating that a diagnosed condition resulted from the accepted December 28, 2008 employment incident.

Following issuance of this decision, OWCP received a December 30, 2008 report from Dr. Andrew B. Wolff, a Board-certified orthopedic surgeon, which related that appellant sustained left great toe pain after a horse stepped on his foot a few days earlier. X-rays exhibited minimally-displaced left hallux fracture. OWCP also received emergency department records dated December 28, 2008.

On December 9, 2011 appellant filed a request for reconsideration, asserting that the employing establishment failed to forward his medical records in a timely manner due to limited personnel in human resources.² He submitted a December 29, 2008 case incident report and a Form CA-16 for treatment authorization. The CA-16 was not signed by a physician.

By decision dated February 21, 2012, OWCP denied appellant's request for reconsideration, finding that it was not filed within one year of the March 5, 2010 decision and did not otherwise establish clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. 20 C.F.R. § 10.607(a) provides that a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.⁴ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, it must nevertheless

² An April 12, 2011 letter from the employing establishment corroborated appellant's statement.

³ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁴ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁸ The evidence must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁹

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The last merit decision in this case was issued on March 5, 2010. Appellant filed an application to reopen this decision for further merit review on December 9, 2011. Because more than one year passed between March 5, 2010 and December 9, 2011, OWCP properly determined that the reconsideration request was not timely filed.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. In its March 5, 2010 decision, OWCP denied his traumatic injury claim on the grounds that he did not submit any medical evidence establishing that the accepted December 28, 2008 employment incident was causally related to a left toe condition. Thereafter, appellant submitted new medical evidence, namely a December 30, 2008 report from Dr. Wolff.¹⁰ As noted, the question of whether a claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record. Although Dr. Wolff addressed causal relationship, the underlying issue of the March 5, 2010 decision, his report did not manifest on its face that OWCP erred in denying

⁶ *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) ("The term 'clear evidence of error' is intended to represent a difficult standard.").

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

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

⁹ *See J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁰ The Board notes that appellant submitted a December 29, 2008 case incident report and a Form CA-16 for treatment authorization. Neither, however, contained a physician's opinion addressing the issue of causal relationship. *See F.R.*, Docket No. 09-575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error); 5 U.S.C. § 8101(2).

appellant's claim in view of the earlier, deficient case record.¹¹ As the new evidence did not raise a substantial question as to the correctness of the March 5, 2010 decision, OWCP properly determined that the untimely request failed to establish clear evidence of error.

Appellant contends on appeal that he relied on the assistance of an understaffed employing establishment to process his claim. The Board has held that the regulatory language unequivocally sets a one-year time limit for filing reconsideration requests and does not indicate that a late filing may be excused by extenuating circumstances such as dependence on others to navigate the workers' compensation process.¹²

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 23, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹¹ See also *D.G.*, 59 ECAB 455, 460 (2008) (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; the evidence must *prima facie* shift the weight of the evidence in favor of the claimant).

¹² *B.F.*, Docket No. 11-1181 (issued December 8, 2011). See also 20 C.F.R. § 10.607.