

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

M.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oklahoma City, OK, Employer**

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**Docket No. 11-1317
Issued: January 20, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) decision dated November 9, 2010 which denied her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's January 31, 2008 decision. Because more than one year elapsed between the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

ISSUE

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

FACTUAL HISTORY

On September 27, 2007 appellant, then a 37-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she developed subtalar joint arthrodesis of the right foot. She first became aware of her illness and of its relationship to her employment on June 10, 2005. Appellant notified her supervisor on October 10, 2007. The employing establishment controverted the claim and noted that she was not working at that time due to a separate OWCP claim, File No. xxxxxx810.³

In an undated narrative statement, appellant reported that her duties as a mail carrier involved walking, retrieving and sorting mail, standing and sitting for eight hours a day, five days a week. She stated that she stretched ligaments on top of her right foot in 1979. Appellant stated that in 1997 her physician informed her that she had a healed fracture which was degenerative. She stated that on June 10, 2005 her physician told her she needed surgery on her right foot because it was considered broken due to deterioration from arthritis which developed in the otherwise healed fracture. Appellant stated that she had been working for the postal service for 20 years and had been on light duty for 12 years from February 1994 to August 2005.

Appellant submitted an April 7 and July 30, 2003 medical report from Dr. Laurence H. Altshuler, Board-certified in internal medicine, who diagnosed appellant with degenerative joint disease of the right ankle.

In a September 20, 2007 medical report, Dr. Raymond L. Smith, a treating physician, reported that he had been treating appellant since 2003 for right ankle pain. He noted that she had complained of ankle pain for many years prior to being treated and that her symptoms significantly worsened in August 2005. Dr. Smith diagnosed a degenerated subtalar joint with malposition due to an old fracture of the posterior facet of the subtalar joint. On September 6, 2005 appellant underwent a subtalar joint arthrodesis but continued to have walking limitations because of the fusion of the subtalar joint.

By letter dated October 19, 2008, the employing establishment controverted the claim. It noted that appellant was off work due to claim No. xxxxxx810. The employing establishment also reported that on March 13, 2007, appellant received a notice of removal from the agency due to her refusal to accept a modified job offer which OWCP had deemed valid.⁴

³ OWCP accepted appellant's February 1, 1993 occupational disease claim for right wrist and right shoulder strains, File No. xxxxxx810. Under a separate claim, OWCP accepted appellant's November 1, 2000 claim for bilateral carpal tunnel syndrome, File No. xxxxxx350. The two cases were combined under master claim, File No. xxxxxx810. OWCP also accepted a December 14, 2005 traumatic injury claim for sprain of neck under claim, File No. xxxxxx027.

⁴ A removal arbitration hearing was held on October 2, 2007.

By letter dated November 15, 2007, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and asked that she respond to the provided questions within 30 days.

By letter dated December 14, 2007, Dr. Smith referred to his previously submitted September 20, 2007 report and stated that appellant's condition was probably exacerbated by her job condition as a mail carrier.

By decision dated January 31, 2008, OWCP denied appellant's claim because the evidence failed to establish that the claimed medical condition was related to the accepted work-related events.

On January 30, 2009 appellant requested reconsideration of OWCP's decision. She stated that a medical report from Dr. Smith was forthcoming. In a January 30, 2009 return to work note, it was noted that appellant was seen by Dr. Smith on January 14, 2009.

By decision dated February 19, 2009, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence.

On August 19, 2009 appellant requested reconsideration of OWCP's decision.⁵ She submitted an undated narrative statement which repeated her medical and work history.

In an August 19, 2009 note, Dr. Smith reported that appellant's employment duties had caused aggravation and acceleration of joint pain associated with the fusion site and adjacent areas.

By letter dated October 29, 2010, appellant resubmitted her previous medical reports of record.

By decision dated November 9, 2010, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷

⁵ Appellant also sent an August 19, 2009 reconsideration request to the Board. By letter dated August 28, 2009, the Board requested clarification on whether she was seeking reconsideration from OWCP or an appeal to the Board. By letter dated September 17, 2009, appellant responded that she sought reconsideration by OWCP. Based upon appellant's stated intention, the Board did not docket an appeal of the February 19, 2008 decision.

⁶ 20 C.F.R. § 10.607(a).

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

OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.⁸

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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.⁹

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹² The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

In its November 9, 2010 decision, OWCP properly determined that appellant failed to file a timely application for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ As appellant's August 19, 2009 request for reconsideration was submitted more than one year after the date of the last merit decision of record on January 30, 2008, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁶

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In support of her request for reconsideration, appellant resubmitted previous medical reports of record. She also submitted an August 19, 2009 note from Dr. Smith and a narrative

⁸ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹¹ *Id.*

¹² *Id.*

¹³ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ *Supra* note 6.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹⁶ *See Debra McDavid*, 57 ECAB 149 (2005).

statement detailing her injury and work assignment. Dr. Smith reported that appellant's employment duties had caused aggravation and acceleration of joint pain associated with the fusion site and adjacent areas. However, this evidence is insufficient to establish that OWCP erred in its denial of appellant's claim.¹⁷ Dr. Smith did not provide detailed medical rationale explaining how appellant's work duties caused her alleged injury. Further, this evidence was submitted after OWCP's January 30, 2008 merit decision. The Board notes that 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 merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.¹⁸ Dr. Smith's note does not raise a substantial question as to the correctness of OWCP's January 30, 2008 merit decision or demonstrate clear evidence of error.

On appeal, appellant stated that she submitted her requests for reconsideration in a timely manner and that the delay in sending Dr. Smith's report was out of her control. While she addressed her disagreement with OWCP's denial of her claim, her general allegations do not establish clear evidence of error because her arguments do not raise a substantial question as to the correctness of OWCP's decision. The Board notes that the underlying issue is medical in nature and the medical evidence submitted was not sufficient to shift the weight of the evidence in her favor and establish that OWCP erred in denying her claim.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's decision.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁷ See *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (March 2011).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 20, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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