

On appeal, appellant contends that she was injured in 1986 and that her physician determined that she was permanently disabled with physical restrictions. She contended that when her duty assignment was changed her injury was aggravated and that her reconsideration request was timely filed.

FACTUAL HISTORY

On May 29, 1986 appellant, then a 26-year-old mail clerk, filed a traumatic injury claim alleging that on that day an airline employee came through the doors and ran over her heel with a hamper, injuring her left heel. OWCP accepted her claim for left foot sprain and contusion. On January 10, 1991 it issued a schedule award for a 14 percent impairment of the left foot (ankle).

On November 3, 2005 appellant filed a claim for recurrence of disability on November 7, 2005. She stated that she had returned to work with restrictions but her job required standing for long periods of time and that aggravated her left foot injury.

By decision dated March 1, 2006, OWCP denied appellant's claim for a recurrence, finding that the factual and medical evidence did not establish that her claimed disability resulted from the accepted employment injury. It denied modification of this finding in decisions dated July 11, December 12, 2007 and February 12, 2009.

On December 14, 2009 appellant again requested reconsideration of an OWCP decision issued on "December 21, 2008." She submitted a November 29, 2009 report by Dr. Patrick A. Noel, a Board-certified orthopedic surgeon, who indicated that she continued to experience left ankle and foot pain from her May 29, 1986 injury. Dr. Noel diagnosed a contusion, sprain and pronation of the left foot arch. Under prognosis, he noted that appellant continued to have pain in that area and that the injury was permanent and would never heal.

By letter dated December 23, 2009, OWCP informed appellant that there was no decision dated December 21, 2008 so no action would be taken on her reconsideration request. On April 8, 2010 appellant requested reconsideration of a "December 23, 2009" decision. On July 12, 2010 OWCP informed her that there was no decision issued on December 23, 2009, that this was simply a letter and not a formal decision with appeal rights.

By letter dated December 21, 2010, appellant requested clarification of the decision rendered on February 12, 2009. She stated that her intention of requesting an additional schedule award, argued that her injury was permanent and that she required further medical treatment.

By decision dated January 19, 2011, OWCP denied appellant's request for reconsideration finding that it was not timely filed and failed 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 her application for review within one year of the date of that decision.² The

² 20 C.F.R. § 10.607(a).

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.³

OWCP, 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, OWCP must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁴ OWCP regulations and procedure provide that it 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 OWCP.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP 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 OWCP.¹⁰ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP decision.¹¹

ANALYSIS

The Board finds that more than one year elapsed from the date of the last merit decision of February 12, 2009 to appellant's request for reconsideration filed on December 21, 2010.

³ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's procedures further provide, the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP 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.

⁶ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

⁸ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ See *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

Therefore, the request was not timely filed. Appellant's letters submitted on December 14, 2009 and April 8, 2010 provided erroneous OWCP decision dates.¹² Her request on December 21, 2010 specifically identified the February 12, 2009 decision. OWCP properly found that appellant's request, made over one year after the February 12, 2009 decision, was not timely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim.

Appellant's claim for recurrence was denied because there was no medical evidence that showed that she sustained a recurrence of her accepted injury. Dr. Noel's report on November 29, 2009 was not sufficient to establish clear evidence of error as it did not establish that appellant sustained a recurrence of disability causally related to her accepted injury. The Board further notes that his November 29, 2009 report was repetitive of statements he made in prior reports that were found insufficient to establish a recurrence, and accordingly, this document does not establish clear evidence of error. Appellant's specific arguments on appeal address the merits of her case. However, as previously noted, the merits of the case are not before the Board at this time as the sole issue is whether appellant established clear evidence of error in OWCP's February 12, 2009 merit decision.

To establish clear evidence of error, appellant must submit evidence or argument that is positive, precise and explicit and must manifest on its face that OWCP committed an error.¹³ The term clear evidence of error is intended to represent a difficult standard.¹⁴ Appellant's request would have to establish on its face that OWCP's denial of her claim was erroneous. Therefore, the Board finds that she has not established clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹² Pursuant to OWCP's Procedure Manual, a request for reconsideration must identify, *inter alia*, the date of the decision from which an appeal is being filed. If the request is lacking, OWCP shall write a letter to claimant advising that the case is not in posture for reconsideration. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602 (May 1991).

¹³ *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁴ *D.L.*, Docket No. 08-1057 (issued June 23, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 19, 2011 is affirmed.

Issued: March 8, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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