

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

D.S., Appellant)	
)	
and)	Docket No. 12-355
)	Issued: October 19, 2012
U.S. DEPARTMENT OF NAVY,)	
Cherry Point, NC, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 6, 2011 appellant filed a timely appeal from a November 16, 2011 Office of Workers' Compensation Programs' (OWCP) nonmerit decision, which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent OWCP merit decision, dated February 25, 2010 and the filing of this appeal on December 6, 2011, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act¹ (FECA) 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On November 11, 2008 appellant, then a 54-year-old bearing reconitioner, filed a Form CA-2, notice of occupational disease, alleging that he developed tarsal tunnel as a result of prolonged sitting and standing at his job. He became aware of his condition and realized it was causally related to his employment on June 20, 2007. Appellant did not stop work. He submitted a statement describing his work duties.

Appellant provided an October 5, 2008 report from Dr. Thomas E. Curd, a podiatrist, who noted treating appellant since 2007 for bilateral foot pain. He reported wearing steel toe shoes at work and having pain, numbness and tingling with swelling after prolonged standing at work for up to 10 hours daily. Dr. Curd noted that appellant was a diabetic. Appellant had a normal musculoskeletal examination, normal strength, limited ankle range of motion, decreased sensation in all toes, pes planus deformity and positive Tinel's sign over the left foot. X-rays revealed a large spur plantarly under the left heel while a magnetic resonance imaging scan of the left foot revealed a soft tissue mass on the left heel consistent with a lipoma. Dr. Curd diagnosed plantar fasciitis of both feet, diabetic neuropathy and soft tissue mass on the left heel. He noted his treatment of appellant and stated that he reported pushing, pulling and lifting items weighing 70 to 80 pounds 9 to 12 times a day which aggravated his condition. Dr. Curd noted that appellant had a nerve conduction study, which showed bilateral symmetrical distal and proximal sensory and motor polyneuropathy that was compatible with diabetic neuropathy. He opined that appellant had worsening peripheral neuropathy that was exacerbated by his work activities and also by his diabetic neuropathy.

In a December 19, 2008 statement, the employing establishment challenged appellant's claim asserting that his job requires standing no more than three hours a day and not longer than 10 minutes at a time. It was noted that appellant had been on light duty since June 2, 2008 for another injury and sedentary duty since July 28, 2008.

By decision dated January 30, 2009, OWCP denied appellant's claim on the grounds that the medical evidence failed to establish that the claimed medical condition was related to the established work-related events.

On February 26, 2009 appellant requested an oral hearing which was held on July 8, 2009. In a decision dated October 1, 2009, an OWCP hearing representative affirmed the January 30, 2009 decision.

On January 12, 2010 appellant requested reconsideration. He submitted a December 24, 2009 report from Dr. Curd, who noted that, based on his description of his job duties which included walking, standing, stopping, lifting and carrying objects, his duties exacerbated his medical condition. Dr. Curd noted that appellant had been on light duty and his symptoms improved. He opined that appellant's work duties placed increased pressure on his feet with increased pronatory changes around the ankle and tarsal tunnel area which worsened his condition.

In a decision dated February 25, 2010, OWCP denied modification of the October 1, 2009 decision.

On October 25, 2011 appellant requested reconsideration. In a November 4, 2011 letter and inquiry, his congressional representative requested a waiver of the late filing as the evidence submitted was not available within the filing period. Appellant submitted an April 21, 2011 report from Dr. Curd, who noted that he presented with worsening symptoms of his lower extremities. Dr. Curd noted findings upon examination of edema around both ankles, pain with palpation to the plantar fascia bilaterally, no atrophy, limited range of motion of the midtarsal, proximal interphalangeal and metatarsophalangeal joints, normal muscle strength and decreased sensation in both lower extremities. He diagnosed neuropathy of the bilateral lower extremities, sensory and motor polyneuropathy, onychomycosis and plantar fasciitis bilaterally. Dr. Curd opined that appellant's job activities including walking, standing, stooping and lifting had an adverse effect on the tarsal tunnel condition along with neuropathy which were exacerbated by his work duties. In another April 21, 2011 report, he noted that appellant's condition had deteriorated. Dr. Curd opined that appellant's previous job activities including walking, standing, stooping, lifting and carrying exacerbated his symptoms and his diagnosed tarsal tunnel syndrome and neuropathy.

By decision dated November 16, 2011, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

‘(1) end, decrease or increase the compensation awarded; or

‘(2) award compensation previously refused or discontinued.’”³

OWCP, 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(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the date of that decision.⁴ However, 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 that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁵

³ 5 U.S.C. 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁶ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹² As appellant's October 25, 2011 request for reconsideration was submitted more than one year after the most recent merit decision of February 25, 2010 it was untimely. Appellant's representative requested waiver of the one-year filing requirement asserting that the evidence submitted was not available within the filing period. However, OWCP regulations contain no provision for waiving the filing period while a claimant attempts to obtain medical evidence.¹³ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁴

Appellant submitted two April 21, 2011 reports from Dr. Curd who noted examination findings and diagnoses. Dr. Curd opined that appellant's job activities including walking, standing, stooping and lifting had an adverse effect on the tarsal tunnel condition along with neuropathy which were exacerbated by his work duties. However, these reports are insufficient to

⁶ *Annie L. Billingsley*, *supra* note 4.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

¹¹ 20 C.F.R. § 10.607(a).

¹² *Robert F. Stone*, 57 ECAB 292 (2005).

¹³ OWCP regulations provide that the one-year time limit to file a reconsideration request does not include any time following the decision that the claimant can establish through medical evidence an inability to communicate in any way and that his testimony would be necessary to modify OWCP decision. *See* 20 C.F.R. § 10.607(c). The Board notes that appellant has not provided any probative medical evidence establishing that he was unable to communicate, or any evidence that his testimony would be necessary for a proper determination of his case.

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

establish clear evidence of error. 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. The term clear evidence of error is intended to represent a difficult standard. The submission of detailed well-rationalized medical reports, which, if submitted before the denial was issued, could have created a conflict in medical opinion requiring further development, is not enough to establish clear evidence of error.¹⁵ This evidence is not so positive, precise and explicit that it manifests on its face that OWCP committed an error. Consequently, the Board finds that Dr. Curd's reports submitted on reconsideration are insufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, appellant has not established clear evidence of error by OWCP in its November 16, 2011 decision.

CONCLUSION

The Board finds that appellant's request for reconsideration dated October 25, 2011 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *D.G.*, 59 ECAB 455 (2008); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).