

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, counsel contends that the medical evidence of record is sufficient to establish that appellant sustained a right foot fracture due to the accepted April 14, 2009 employment incident.

FACTUAL HISTORY

On April 14, 2009 appellant, then a 34-year-old crew leader, filed a traumatic injury claim alleging that she sustained a swollen right foot on that date and scraped her left knee when she fell and twisted her right ankle while carrying a box of census work to her car.

The hospital records include a medical report dated April 14, 2009 signed by Betsy Rondinelli, a registered nurse, who advised that appellant had a right foot fifth metatarsal fracture and left knee laceration. Discharge instructions dated April 14, 2009 addressed appellant's treatment plan and follow-up medical care related to her right foot and left knee injuries.

In medical records from April 16 to June 5, 2009, Dr. Rick J. Delmonte, an attending Board-certified podiatrist, advised that appellant had a right foot fifth metatarsal fracture and left knee laceration. In a May 20, 2009 report, he recommended that she stay off her feet until further notice due to the severity of her condition. On June 5, 2009 Dr. Delmonte released her to return to work on June 29, 2009.

In a July 6, 2009 decision, OWCP found that the evidence was sufficient to establish that the April 14, 2009 incident occurred as alleged. It denied appellant's claim finding insufficient medical evidence to establish that she sustained injury causally related to the accepted employment incident.

By letter dated May 13, 2011, appellant, through her attorney, requested reconsideration.

Appellant submitted copies of Nurse Rondinelli's April 14, 2009 report, the April 14, 2009 discharge instructions and Dr. Delmonte's April 16, 2009 treatment note and May 20, 2009 report.

An April 14, 2009 report from Dr. Neil B. Horner, a Board-certified radiologist, advised that an x-ray of the right ankle demonstrated a fracture at the base of the fifth metatarsal and associated marked soft tissue swelling. On April 14, 2009 he reported that an x-ray of the left knee showed no fracture or subluxation.

In a January 30, 2012 decision, OWCP denied appellant's request for reconsideration, without a merit review as it was not timely filed and failed to establish clear evidence of error in the July 6, 2009 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁵ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of OWCP's implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.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 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.¹²

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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁴

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. The Board's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁵ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶

The most recent merit decision in this case was OWCP's July 6, 2009 decision, which accepted that the April 14, 2009 incident occurred as alleged but found that the medical evidence was insufficient to establish a causal relationship between appellant's right foot and left knee conditions to the accepted employment incident. Appellant's May 13, 2011 letter requesting reconsideration of the merits of her claim by OWCP was made more than one year after the July 6, 2009 merit decision.¹⁷ The Board finds that it was not timely filed.

The Board further finds that appellant has not established clear evidence of error on the part of OWCP. The duplicate April 14, 2009 discharge instructions and Dr. Delmonte's April 16, 2009 treatment note and May 20, 2009 medical report were previously of record and considered in the July 6, 2009 decision. Resubmission of this material does not establish clear evidence of error regarding the determination that appellant did not sustain an injury related to the April 14, 2009 employment incident. The discharge instructions and Dr. Delmonte found that she had right foot fifth metatarsal fracture and left knee laceration. Dr. Delmonte recommended that she stay off her feet until further notice due to the severity of her condition. This evidence, however, failed to provide a medical opinion explaining how appellant's fall on April 14, 2009 caused the diagnosed conditions or resultant disability. The Board finds, therefore, that the discharge instructions, treatment note and medical report resubmitted by her do not discharge her burden of showing clear evidence of error.

Dr. Horner's diagnostic test results failed to establish clear evidence of error. He failed to provide any medical opinion explaining how appellant's fall on April 14, 2009 caused a fracture at the base of the right foot fifth metatarsal and associated marked soft tissue swelling of the right ankle. Further, Dr. Horner did not diagnose a left knee condition causally related to the accepted employment incident.

The April 14, 2009 report signed by Nurse Rondinelli is of no probative value as a nurse is not a physician as defined by FECA.¹⁸ Thus, the Board finds that her report does not shift the

¹⁵ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹⁶ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ Appellant had one year to request reconsideration by OWCP of its July 6, 2009 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

¹⁸ *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

weight in favor of appellant to demonstrate clear evidence of error on the part of OWCP in the issuance of its July 6, 2009 decision.

The Board finds that the evidence submitted by appellant in support of her untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet her burden of proof to show clear evidence of error on the part of OWCP.

On appeal, appellant's attorney contended that the medical evidence was sufficient to establish an employment-related right foot fracture. As discussed, the medical evidence was not sufficient to shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of OWCP's decision denying her traumatic injury claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2012
Washington, DC

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

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

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