

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

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C.V., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**CUSTOMS & BORDER PROTECTION,** )  
**Tucson, AZ, Employer** )

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**Docket No. 14-1293**  
**Issued: February 23, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On May 15, 2014 appellant filed a timely appeal from a February 28, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>2</sup>

**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.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The last merit decision issued in this case was the Board's July 29, 2013 review of the claim. The decision issued by OWCP following the Board's decision was a nonmerit decision. Therefore the Board's jurisdiction is limited to review of only the February 28, 2014 nonmerit decision. *See* 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated April 19, 2012, the Board affirmed a June 16, 2011 OWCP merit decision finding that the medical evidence of record failed to establish that appellant's left ankle and foot injuries were causally related to factors of her federal employment.<sup>3</sup> In a subsequent appeal, by decision dated July 29, 2013, the Board conducted a merit review and affirmed a February 1, 2013 OWCP decision, finding that appellant had failed to establish left ankle and bilateral foot injuries causally related to factors of her federal employment.<sup>4</sup> The findings and facts as set forth in the prior decisions are hereby incorporated by reference. The relevant facts are set forth herein.

On March 18, 2011 appellant, then a 43-year-old customs and border protection (CBP) officer, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral tendinitis in her feet as a result of standing due to her federal employment duties. In support of her claim, she submitted narrative statements and various medical reports.

By decision dated July 29, 2013, the Board conducted a merit review and affirmed OWCP's February 1, 2013 decision, finding that appellant failed to establish that she sustained left ankle and bilateral foot injuries causally related to factors of her federal employment.<sup>5</sup>

By letter dated December 2, 2013, appellant requested reconsideration. In support of her claim, she submitted a November 13, 2013 medical report from Dr. Ladislav Kuchar, a podiatrist.

In his November 13, 2013 report, Dr. Kuchar reported that he first treated appellant on October 9, 2013 for ankle derangement and peroneus brevis tendinitis of both feet. He noted that appellant's employment duties required her to work for long hours (8 to 16 hours daily for up to 10 consecutive days) while standing and/or walking on uneven and hard surfaces, such as concrete while she worked as a CBP officer from January 1997 through September 2002. Dr. Kuchar stated that appellant's job assignment and requirements were not necessarily the cause of her symptoms and diagnoses. However, long periods of walking and standing, especially on rigid surfaces which irritated the anatomical structures in question and the resulting diagnoses, were not inconsistent with the injury. Thus, Dr. Kuchar opined that appellant's preexisting conditions were aggravated by her employment duties.<sup>6</sup>

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<sup>3</sup> Docket No. 11-1842 (issued April 19, 2012).

<sup>4</sup> Docket No. 13-912 (issued July 29, 2013). The Board noted that, although the February 1, 2013 decision purported to be a nonmerit decision denying reconsideration, OWCP's analysis of the evidence indicated that it reviewed the merits of appellant's claim and thus, the Board exercised jurisdiction over the merits of the case.

<sup>5</sup> *Id.*

<sup>6</sup> Dr. Kuchar also stated that appellant was later diagnosed with rheumatoid arthritis. He noted that arthritis primarily affected the joints. As appellant's complaints were not related to the joints, her arthritis could be ruled out as a preexisting condition which did not cause her symptoms. Dr. Kuchar stated that appellant's chief complaint focused on the tendons and thus, the true cause of her symptoms resulted from the diagnosed tendinitis condition.

By decision dated February 28, 2014, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error. It noted that her December 2, 2013 reconsideration request was not made within one year of the last OWCP merit decision on June 16, 2011. OWCP further noted that the Board's July 29, 2013 decision was final and not subject to review.

### **LEGAL PRECEDENT**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>7</sup> The Board has held, however, that OWCP's procedure manual<sup>8</sup> should be interpreted to mean that a right to reconsideration within one year accompanies any subsequent merit decision on the issues, including any merit decision by the Board.<sup>9</sup>

### **ANALYSIS**

The Board has reviewed the record on appeal and finds that the case must be remanded to OWCP for application of the appropriate standard of review because appellant's request for reconsideration was timely submitted.

An application for reconsideration must be received by OWCP within one year of the date of a merit review of the claim, including any merit review by the Board.<sup>10</sup> The last merit decision of record was the Board's July 29, 2013 decision.<sup>11</sup> As appellant's reconsideration request dated and received on December 2, 2013 was made within one year of the Board's merit decision dated July 29, 2013, the Board concludes that the request was timely.<sup>12</sup>

OWCP's February 28, 2014 decision erroneously noted the date of the last merit decision as June 16, 2011. It correctly noted that the Board's July 29, 2013 merit decision was not subject to appeal, but failed to acknowledge that appellant had one year from the date of the last merit decision (July 29, 2013) to file a timely request for reconsideration with OWCP.<sup>13</sup> In its February 28, 2014 decision denying appellant's reconsideration request, OWCP applied the clear evidence of error legal standard. This standard is the appropriate standard only for cases in which a reconsideration request is untimely filed.<sup>14</sup> Since OWCP erroneously reviewed the evidence submitted by appellant in support of her reconsideration request under the clear

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<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

<sup>9</sup> See *Mary E. Schipske*, 43 ECAB 318 (1991); see also *John W. O'Connor*, 42 ECAB 797 (1991).

<sup>10</sup> *Id.*

<sup>11</sup> *Supra* note 4.

<sup>12</sup> *J.N.*, Docket No. 12-1543 (issued February 12, 2013).

<sup>13</sup> *Supra* note 9.

<sup>14</sup> See *Donna M. Campbell*, 55 ECAB 241 (2004).

evidence of error standard, the Board will remand the case to OWCP for application of the standard for reviewing a timely request for reconsideration as set forth at 20 C.F.R. § 10.606(b)(2).

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 28, 2014 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: February 23, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board