

FACTUAL HISTORY

Appellant, a 66-year-old distribution operations supervisor, sustained a work-related injury on January 21, 2012. He fell from the shipping/receiving dock onto concrete approximately five feet below.³ Appellant landed feet first then fell onto his right side, sustaining injuries to his chest, left leg, and right foot. OWCP accepted the claim for contusion of the right ribs, open wound of the left leg, and fracture of the right 5th metatarsal. Appellant initially received continuation of pay, followed by appropriate wage-loss compensation. He returned to work on July 9, 2012. Appellant subsequently filed a claim (Form CA-7) for a schedule award.

On July 19, 2012 OWCP advised appellant that his physician must submit an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008). It afforded him at least 30 days to submit the required medical evidence in support of his claim for a schedule award.

On March 7, 2013 OWCP denied appellant's claim for a schedule award. It noted that he had not submitted the required evidence in response to its July 19, 2012 development letter. The medical evidence of record did not support a permanent impairment of a schedule member or body function.

Appellant telephoned OWCP on March 12, 2013 to discuss his recently denied claim for a schedule award. OWCP returned the call on March 28, 2013. The telephone call notes (Form CA-110) indicate that appellant advised OWCP that he scheduled a medical appointment for April 26, 2013, and would forward the report as soon as the doctor released it.

On May 30, 2014 OWCP received appellant's request for reconsideration. Appellant claimed not to have received a letter of denial the first time. He also indicated that he had difficulty finding a Chicago-area physician familiar with the A.M.A., *Guides* (6th ed. 2008). OWCP reportedly offered its assistance during a May 2013 telephone conversation, but did not follow through. Appellant further stated that he was involved in a motor vehicle accident in July 2013, and was hospitalized for a month. Afterwards, he underwent therapy for three months. Appellant reportedly called OWCP again and was advised he had been assigned a new caseworker. At the time, he left a message informing OWCP that he had found a doctor to fill out the necessary paperwork. Appellant indicated that he was moving to Nevada for the next three to four months for therapy and to recuperate. In closing, he stated that his physician sent the rating evaluation directly to OWCP.

In a report dated May 22, 2014, Dr. Robert J. Strugala, a Board-certified orthopedic surgeon, found six percent impairment of the right lower extremity under Table 16-2, Foot & Ankle Regional Grid -- Lower Extremity Impairments, A.M.A., *Guides* 504 (6th ed. 2008). The rating was based on the diagnosis of fracture/dislocation "Other metatarsal -- with angulation and metatarsalgia."

³ As appellant placed one foot in the back of a van, the vehicle began to pull away from the dock causing him to fall.

OWCP subsequently forwarded Dr. Strugala's impairment rating to its district medical adviser (DMA) for review.

By decision dated July 15, 2014, OWCP denied appellant's request for reconsideration because the May 30, 2014 request was untimely and appellant failed to demonstrate clear evidence of error. Additionally, it acknowledged receipt of Dr. Strugala's May 22, 2014 impairment rating, and advised appellant that further appropriate action would be taken following the DMA's review.⁴

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.⁸

ANALYSIS

By decision dated March 7, 2013, OWCP denied appellant's claim for a schedule award because he failed to submit medical evidence demonstrating permanent impairment. It had previously advised appellant of the need to submit an impairment rating under the A.M.A., *Guides* (6th ed. 2008). More than seven months lapsed between OWCP's July 2012 development letter and the March 7, 2013 decision denying appellant's claim. Appellant's request for

⁴ In a July 23, 2014 report, the DMA concurred with Dr. Strugala's six percent right lower extremity impairment rating. However, this evidence is not properly before the Board because it was received after OWCP issued its July 15, 2014 decision. *See supra* note 2.

⁵ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁸ 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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's decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

reconsideration was received on May 30, 2014, which was approximately 15 months after OWCP issued its latest merit decision. However, appellant claimed not to have received a letter of denial the first time. OWCP records (Form CA-110) indicate that appellant was aware of his denied schedule award when he telephoned on March 12, 2013. Also, there is no evidence that the March 7, 2013 decision was returned to OWCP as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.⁹ This presumption is commonly referred to as the “mailbox rule.”¹⁰ It arises when the record reflects that the notice was properly addressed and duly mailed.¹¹ The current record is devoid of evidence to rebut the presumption that appellant received OWCP’s March 7, 2013 decision in due course. As such, appellant’s May 30, 2014 request for reconsideration was untimely by more than two months.¹² Because appellant’s request for reconsideration was untimely, he must demonstrate clear evidence of error on the part of OWCP in denying his claim for a schedule award.¹³

As noted, OWCP denied the claim because appellant had not submitted evidence of impairment in accordance with the A.M.A., *Guides* (6th ed. 2008). The May 30, 2014 request for reconsideration did not dispute this fact, but merely explained appellant’s difficulty finding a local physician familiar with rating impairment under the A.M.A., *Guides* (6th ed. 2008). Appellant claimed that in May 2013 OWCP offered its assistance in locating a physician, but failed to follow through. This contention is not only unsubstantiated, it also does not establish error on the part of OWCP in issuing the March 7, 2013 decision. The March 28, 2013 telephone call (Form CA-110) notes appear to reflect the only verbal and/or written communication between appellant and OWCP prior to receipt of his May 30, 2014 request for reconsideration. Moreover, whether OWCP reneged on promises allegedly made after the March 7, 2013 decision does not relieve appellant of his primary responsibility to establish entitlement to FECA benefits. It previously advised appellant of the evidence necessary to establish his claim and afforded him ample opportunity to supplement the record prior to issuing its March 7, 2013 decision.

Whatever the reason, appellant did not submit medical evidence of right lower extremity impairment until almost two years after he filed his claim for a schedule award (Form CA-7). Although Dr. Strugala’s May 22, 2014 impairment rating may ultimately support an award of benefits, this recent medical report does not establish clear evidence of error on the part of

⁹ *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

¹⁰ *Id.*

¹¹ *Id.*

¹² See *supra* note 7. Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b.

¹³ 20 C.F.R. § 10.607(b).

OWCP in denying appellant's claim based on the record before it on March 7, 2013. The Board finds that OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).¹⁴

CONCLUSION

Appellant's May 30, 2014 request for reconsideration was untimely, and he failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2015
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹⁴ Although OWCP's adjudication of the request for reconsideration was legally correct, issuing the July 15, 2014 decision prior to receiving the DMA's input appears piecemeal. Moreover, it failed to take "[f]urther action" as promised once it received the DMA's report on July 24, 2014. The Board notes that more than three months lapsed between the time OWCP received the DMA's report and the filing of the instant appeal.