

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

T.K., Appellant)
and) Docket No. 15-1570
U.S. POSTAL SERVICE, POST OFFICE,) Issued: November 16, 2015
Taylor, MI, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 15, 2015 appellant filed a timely appeal from an April 30, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of February 27, 2014 to the filing of the current appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to present clear evidence of error.

FACTUAL HISTORY

OWCP accepted that on or before May 10, 2012 appellant, then a 56-year-old letter carrier, sustained degenerative changes of the right talus and fibula, right peroneus brevis

¹ 5 U.S.C. § 8101 *et seq.*

tenosynovitis, and right plantar fasciitis causally related to a January 25, 1993 right lateral malleolus fracture accepted under a previous claim.²

In a September 25, 2012 report, Dr. Alan J. Schram, an attending podiatrist, opined that appellant should work no more than 30 hours a week due to the accepted conditions. On November 1, 2012 he explained that appellant required a permanently reduced work schedule because full-time work aggravated the diagnosed conditions.

On December 19, 2012 appellant claimed leave buyback for 32 intermittent days from April 30 to October 30, 2012.³ In a February 19, 2013 letter, OWCP advised appellant of the additional medical evidence needed to establish total disability for work for the claimed periods.

In response, appellant submitted a March 5, 2013 letter from Dr. Schram, opining that appellant required “periodic time off” as his work duties exacerbated the accepted conditions. In an undated note, Dr. Schram prescribed orthotics.⁴

By decision dated June 18, 2013, OWCP denied appellant’s claim as he did not provide medical evidence establishing disability for work for the claimed periods.

In a letter dated July 31, 2013, appellant requested reconsideration. He submitted two July 1, 2013 letters from Dr. Schram, confirming that he instructed appellant to stay home from work on the claimed dates due to “degenerative changes.” Dr. Schram explained that “[s]edentary light[-]duty work [was] not recommended as long periods of inactivity further exacerbate the condition.”

By decision dated October 17, 2013, OWCP denied modification as Dr. Schram did not explain why appellant was totally disabled for work for the claimed periods.

Appellant disagreed and, in a February 10, 2014 letter, again requested reconsideration. He submitted additional medical evidence.

In a January 28, 2014 letter, Dr. Schram noted treating appellant for degenerative changes to the right talus and fibula, right peroneus brevis tenosynovitis, and right plantar fasciitis. He opined that appellant’s duties as a letter carrier from April 30 to October 30, 2012, including walking up to 10 hours a day while carrying up to 35 pounds of mail “resulted in a temporary worsening of these accepted conditions to the point where [appellant] was physically unable to perform these duties as a consequent intermittent disability from work” on each of the claimed dates. Dr. Schram explained that the intermittent nature of appellant’s disability during the claimed periods was “indicative of the intensely physical nature of his letter carrier duties and

² The previous claim is not presently before the Board.

³ Appellant claimed leave buyback for a total of 256 hours for the following dates in 2012: April 30 to May 3; May 10, 15, 21, 28; May 31 to June 1; June 11, 12, 20, and 29; July 17 and 25; August 1, 2, 11, 13, 20, and 21; September 11, 12, 20, and 21; and October 4, 8, 15, 24, 25 and 30.

⁴ In a June 14, 2013 letter, appellant requested a status report on his claim.

the resultant impact on his legs and feet.” He recommended a permanent reduction in appellant’s work hours.

By decision dated February 27, 2014, OWCP denied modification, finding that Dr. Schram’s additional report was insufficient to establish an objective worsening of appellant’s condition on the dates claimed. It found that Dr. Schram merely recommended that appellant take periodic days off to avoid flare-ups of his chronic conditions.

In a letter dated and postmarked February 24, 2015 and received by OWCP on March 2, 2015, appellant requested reconsideration. He asserted that Dr. Schram clearly opined that periodic days off were necessary to manage the accepted chronic right foot conditions. Appellant enclosed an April 3, 2014 Family and Medical Leave Act certification in which Dr. Schram stated that appellant required the claimed days off to recover from pain symptoms, an April 3, 2014 chart note from Dr. Schram with recommendations for symptoms management including “reduced work hours,” and literature about plantar fasciitis.

Appellant also provided a May 3, 2012 note from Dr. Howard M. Wright, an attending osteopathic physician Board-certified in family practice, holding appellant off work from April 30 to May 4, 2012. Dr. Wright referred appellant to a specialist.

By decision dated April 30, 2015, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to present clear evidence of error. It found that appellant’s request for reconsideration was received on March 2, 2015, more than one year following the February 27, 2014 merit decision. OWCP further found that appellant’s request did not establish clear evidence of error in the February 27, 2014 decision denying his traumatic injury claim.

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁶ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁷ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁹

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁷ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁸ 20 C.F.R. §§ 10.607, 10.608(b). The Board has concurred in OWCP’s limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁹ 5 U.S.C. § 10.607(b); *supra* note 6, *Jesus D. Sanchez*, *supra* note 7.

In those cases where requests for reconsideration are untimely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.¹⁰ OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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 by OWCP.¹⁶ The Board must make 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.¹⁷

ANALYSIS

In its April 30, 2015 decision, OWCP properly determined that appellant failed to file a timely application for review of the February 27, 2014 merit decision. Appellant requested reconsideration by a letter dated and postmarked on February 24, 2015, but not received by OWCP until March 2, 2015, more than one year from the issuance of the February 27, 2014 merit decision. OWCP denied the request by April 30, 2015 decision as it was untimely filed and failed to present clear evidence of error. As the March 2, 2015 reconsideration request was untimely filed, the Board must therefore determine whether appellant's request demonstrated clear evidence of error in OWCP's February 27, 2014 merit decision.

In support of his request for reconsideration, appellant submitted a February 24, 2015 letter contending that the reports of Dr. Schram, an attending podiatrist, were sufficient to meet his burden of proof. The critical issue in the claim at the time of the February 27, 2014 merit

¹⁰ *Supra* note 6.

¹¹ 20 C.F.R. § 10.607(b).

¹² *Supra* note 6.

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *Jesus D. Sanchez*, *supra* note 7.

¹⁵ *Supra* note 13.

¹⁶ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁷ *Gregory Griffin*, *supra* note 8.

decision was a lack of probative medical evidence establishing disability for work on the claimed dates due to the accepted conditions. As appellant is a layperson, his opinion does not constitute medical evidence.¹⁸ Appellant's letter is therefore irrelevant to the claim and does not demonstrate clear evidence of error.¹⁹

Appellant also provided medical reports and literature from Dr. Schram and from Dr. Wright, an attending Board-certified family practitioner. As Dr. Schram's reports and literature on plantar fasciitis did not specifically address the claimed disability for work, they are irrelevant to the claim. While Dr. Wright's opinion suggests a contrary conclusion to that reached by OWCP, this is insufficient to establish clear evidence of error.²⁰

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its February 27, 2014 merit decision denying appellant's claim. He did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error. For these reasons, OWCP's April 30, 2015 decision was proper under the law and facts of the case.

On appeal, appellant contends that tracking information proves that OWCP received his reconsideration request before March 2, 2015. However, there is no evidence of record indicating an earlier date of receipt. Appellant also contends that OWCP ignored his letters, explanations, and the opinions of his physicians. Appellant asserts that 120 days was a reasonable recovery time, and that he did not work because he could not work. These arguments pertain to the merits of the claim that are not before the Board on the present appeal.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of the claim as it was untimely filed and failed to present clear evidence of error.

¹⁸ *Supra* note 13.

¹⁹ *Id.*

²⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 30, 2015 is affirmed.

Issued: November 16, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board