

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

D.C., Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, OFFICE OF INSPECTOR)
GENERAL, Washington, DC, Employer)

Docket No. 15-0293
Issued: September 11, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 1, 2014 appellant filed a timely appeal from a June 5, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the most recent merit decision dated April 3, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 21, 2013 appellant, then a 43-year-old criminal investigator, filed a traumatic injury claim alleging that on September 1, 2011 she sustained a left foot injury in the performance of duty. She alleged that while at the office moving boxes in high heel shoes she sustained a stress fracture and a bruise which later became Morton's neuroma requiring surgical excision.

Appellant submitted a September 9, 2011 treatment note from an unidentified healthcare provider. It indicated that she was experiencing left foot tenderness after moving office material while in high heels. The report further noted that there was bruising over the third metatarsophalangeal. Appellant submitted a September 19, 2011 treatment note containing an illegible signature. It advised that she was experiencing left foot pain over the plantar aspect, but no signs of acute fracture, dislocation, or degenerative joint disease.

By letter dated March 4, 2013, OWCP advised appellant of the type of evidence needed to establish her claim. It allowed her 30 days from the date of the letter to submit responsive evidence.

In a January 16, 2013 report, Dr. Michael Stempel, a podiatrist, advised that appellant complained of left foot pain, swelling, vague numbness in the fourth digit, and a radiating sensation into the digits. He noted that she had a recent complex history of an unexplained neuritic event that resulted in a blood pressure drop and slurred speech. On examination Dr. Stempel noted that appellant had localized fullness in the third interspace, tenderness to palpation, and compression of the forefoot.

In a January 29, 2013 diagnostic report, Dr. Kathleen Brindle, a diagnostic radiologist, advised that a magnetic resonance imaging (MRI) scan of the left foot revealed Morton's neuroma in the third intermetatarsal space. Imaging also revealed two separate cystic areas of the first and fifth metatarsals with rim enhancement in the plantar subcutaneous soft tissue, which possibly represented a bursa formation.

In a February 21, 2013 report, Dr. Brindle advised that appellant was scheduled to undergo surgery on her left foot for removal of a neuroma and aspiration of cyst/bursa planta to the first metatarsophalangeal joint. She diagnosed Morton's neuroma and cyst burst and reiterated the result of appellant's left foot MRI scan.

In a March 20, 2013 statement, appellant advised that while moving materials from one office to another she was required to lift and reposition hundreds of boxes while wearing high heel shoes. She advised that her foot was very sore the next day, but she did not inspect it for bruising or injury because she was busy with her caseload. Appellant noted that when she initially sought medical care she was diagnosed with a stress fracture and bruise. She further noted that her foot pain had subsided for several months, but resurfaced in 2012 when she began to experience burning sharp left foot pain. Appellant stated that initially she did not make the connection that her condition was related to the earlier work incident.

By decision dated April 3, 2013, OWCP denied appellant's claim because the medical evidence of record was insufficient to establish that the diagnosed medical condition was related to the established work-related events.

In an April 9, 2013 report, Dr. Howard Osterman, a podiatrist, advised that appellant was 18 months post left foot work injury. He noted that she had a stress reaction fracture of the third and fourth metatarsals in September 2011. Dr. Osterman explained that the area was intermittently tender and subsequently made scar tissue that entrapped the interdigital nerve creating a neuroma. Physical examination revealed pain and palpation to the area overlying the third and fourth metatarsal in the left foot with redness, swelling, and warmth.

On April 8, 2014 appellant requested reconsideration. In support of reconsideration, she asserted that Dr. Osterman's April 9, 2013 report established causal relationship. Appellant also argued that her claim was initially improperly denied because the record was not held open for 30 days to allow her to submit additional evidence. She claimed that although the development letter was dated March 4, 2013 it was not postmarked until March 5, 2013 and that she did not receive it until March 8, 2013.

By decision dated June 5, 2014, OWCP denied appellant's request for reconsideration claim as untimely, as the request was received more than one year after the April 13, 2013 OWCP decision denying her claim.

On appeal appellant argued that her request for reconsideration was postmarked prior to the deadline for requesting reconsideration. She also argued that the evidence submitted clearly established causal relationship and that OWCP prematurely issued a denial without giving her a full 30 days to submit additional evidence.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It 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.² When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.³ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations, if the claimant's application for review shows clear evidence of error on the part of OWCP.⁴ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁵

² 20 C.F.R. § 10.607(a) (2011).

³ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁴ 20 C.F.R. § 10.607(b) (2011).

⁵ *See Alberta Dukes*, 56 ECAB 247 (2005).

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

ANALYSIS

The Board finds that OWCP properly determined that appellant had failed to file a timely request for reconsideration. The most recent OWCP merit decision in this case was issued on April 3, 2013. Appellant's request for reconsideration was not received by OWCP until April 8, 2014, more than one year after the April 3, 2013 merit decision. Therefore, it was not timely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for compensation.

On appeal appellant argues that her reconsideration request was postmarked within one year of the date of that decision. However, OWCP regulations are clear that an application for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought. Thus, the fact that the reconsideration letter was mailed within one year of the decision does not constitute a timely filing. The regulatory language unequivocally sets a one-year time limitation for reconsideration requests to be received by OWCP.⁷

The Board finds that appellant has not established clear evidence of error on the part of OWCP in the denial of her traumatic injury claim. After appellant's April 3, 2013 decision, appellant submitted evidence previously considered by OWCP and an April 9, 2013 report from Dr. Osterman. Dr. Osterman advised that appellant was 18 months post left foot work injury. He noted that she had a stress reaction fracture of the third and fourth metatarsals in September 2011 and that the area was intermittently tender which subsequently made scar tissue that entrapped the interdigital nerve creating a neuroma. Although this report provides a history of the injury and provides some support for causal relationship, it does not raise a substantial question as to the correctness of OWCP's denial of appellant's claim. The term clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-

⁶ *Robert G. Burns*, 57 ECAB 657 (2006).

⁷ 20 C.F.R. § 10.607(a). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011) (a reconsideration request must be received by OWCP within one year of the date of the its decision for which review is sought for merit decisions issued on or after August 29, 2011); *R.L.*, Docket No. 14-1342 (issued February 24, 2015) (appellant asserted that, as her reconsideration request was received only one day late, OWCP should have used the postmark date; the Board found the request untimely as OWCP regulations provide that the timeliness of a reconsideration request is determined by the date the request is received by OWCP).

rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.⁸

Appellant also argues on reconsideration that OWCP's initial denial was improper because she was not initially given 30 days to submit additional evidence. By letter dated March 4, 2013, OWCP advised appellant that if evidence was not received within 30 days from the date of the letter, a decision would be made based on the evidence in the file. OWCP issued a decision on April 3, 2013, exactly 30 days following the date of its development letter. Appellant argues that the development letter was not postmarked until March 5, 2013 and that she did not receive it until March 8, 2013. However, the letter advised that additional evidence had to be received within 30 days from the date of the letter. Therefore, appellant was afforded 30 days to submit additional evidence. These assertions do not raise a substantial question as to the correctness of OWCP's decision.

On appeal, appellant also reiterates argument made on reconsideration. As explained, these are insufficient to establish clear evidence of error.

CONCLUSION

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

⁸ *D.G.*, 59 ECAB 455 (2008); *see* Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.5(a) (October 2011).

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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