

FACTUAL HISTORY

On January 11, 2013 appellant, then a 54-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on November 12, 2012 he sustained a fractured right great toe when a patient in a motorized wheelchair ran over his foot.

In a November 19, 2013 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including medical evidence establishing the presence of the claimed injury, and a report from his attending physician explaining how the alleged November 12, 2012 incident caused the injury. It afforded him 30 days to submit such evidence. Appellant submitted no additional evidence prior to December 24, 2013.

By decision dated December 24, 2013, OWCP denied appellant's claim as he did not establish causal relationship. It accepted that the November 12, 2012 incident occurred as alleged. However, as appellant had not submitted any medical evidence in support of his claim, he had failed to establish that the accepted incident caused the claimed injury.

In a letter received by OWCP on December 30, 2014, appellant requested reconsideration. He submitted a November 16, 2012 report from Dr. Eve N. Hanna, an attending physician Board-certified in occupational and emergency medicine, relating his account of right big toe pain after a "compression injury by wheelchair (ran over tip of foot) two weeks ago and again on November 12, 2012." Dr. Hanna obtained x-rays demonstrating an intra-articular fracture of the right great toe with possible comminution at the interphalangeal joint. She provided September 6 and November 15, 2013 follow-up reports, diagnosing a nonunion fracture of the distal phalanx of the right great toe, calcaneal spurring in the right heel, and a synovial effusion in the right knee.

By decision dated January 9, 2015, OWCP denied appellant's request for reconsideration, as it was not timely filed and failed to present clear evidence of error. It found that his request for reconsideration was received on December 30, 2014, more than one year following the December 24, 2013 merit decision. OWCP further found that appellant's request did not establish clear evidence of error in the December 24, 2013 decision denying his traumatic injury claim.

LEGAL PRECEDENT

Section 8128(a) of FECA² does not entitle a claimant to a review of an OWCP decision as a matter of right.³ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁴ 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

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

received within one year of the date of that decision.⁵ 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).⁶

In those cases where requests for reconsideration are not timely filed, 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.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 which 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 by OWCP.¹² 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.¹³

ANALYSIS

In its January 9, 2015 decision, OWCP properly determined that appellant had failed to file a timely application for review of the December 24, 2013 merit decision. Appellant requested reconsideration on December 30, 2014, more than one year from the issuance of the December 24, 2013 merit decision. OWCP denied the request by January 9, 2015 decision as it was not timely filed and failed to present clear evidence of error. The remaining issue is whether appellant's request demonstrated clear evidence of error in OWCP's December 24, 2013 merit decision.

⁵ 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).

⁶ 5 U.S.C. § 8128(a); *supra* note 3; *Jesus D. Sanchez*, *supra* note 4.

⁷ 20 C.F.R. § 10.607(b).

⁸ *Supra* note 3.

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

¹⁰ *Jesus D. Sanchez*, *supra* note 4.

¹¹ *Id.*

¹² *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Gregory Griffin*, *supra* note 5.

In support of his request for reconsideration, appellant submitted an appeal rights form dated December 23, 2014. This form does not contain additional evidence or argument to demonstrate error in OWCP's January 9, 2015 decision.

Appellant also provided medical reports from Dr. Hanna, an attending physician, Board-certified in occupational and emergency medicine. Dr. Hanna recorded appellant's account of multiple compression injuries to the right great toe after a wheelchair ran over his foot on two occasions. She diagnosed a nonunion fracture of the distal phalanx of the right great toe. While Dr. Hanna's opinion suggests a conclusion contrary to that reached by OWCP, the reports are insufficient to establish clear evidence of error.¹⁴

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its December 24, 2013 merit decision denying his claim. Appellant did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error. The Board has found that even a detailed, well-rationalized medical report which, if submitted timely, would have created a conflict in medical evidence is still not sufficient to create clear evidence of error.¹⁵ For these reasons, OWCP's January 9, 2015 decision was proper under the law and facts of the case.

On appeal, appellant contends that OWCP refused to consider his diabetes as an element in adjudicating his claim. This argument is not clear evidence of error. Appellant also argues that the Board committed improprieties in adjudicating his appeal under File No. xxxxx911.¹⁶ However, as File No. xxxxxx911 is not before the Board on the present appeal, appellant's assertions in this regard are irrelevant.

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 not timely filed and failed to present clear evidence of error.

¹⁴ *Supra* note 9.

¹⁵ *Scotty A. Linney, Jr.*, Docket No. 90-1234 (issued March 27, 1991).

¹⁶ Under File No. xxxxxx911, OWCP accepted a closed fracture of the left great toe sustained on June 17, 2013, when a patient in a motorized wheelchair ran over appellant's foot. By decision and order issued June 15, 2015, the Board affirmed OWCP's December 18, 2014 merit decision finding that he had no continuing disability on or after June 6, 2014. File No. xxxxxx911 is not before the Board on the present appeal.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 9, 2015 is affirmed.

Issued: September 8, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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