

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

_____)	
W.M., Appellant)	
)	
and)	Docket No. 18-0565
)	Issued: August 14, 2018
DEPARTMENT OF THE NAVY, NAVY)	
INSTALLATIONS COMMAND, Meridian, MS,)	
Employer)	
_____)	

Appearances:
*Capp P. Taylor, Esq., for the appellant*¹
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 January 23, 2018 appellant, through counsel, filed a timely appeal from a January 2, 2018 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated April 29, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 28, 2015 appellant, then a 45-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that, on November 19, 2014, he sustained a work-related injury to his right heel in the form of tendinitis of his Achilles tendon. He asserted that the injury occurred when he was running a mile and a half as part of mandatory physical training conducted on the premises of the employing establishment.⁴ Appellant did not stop work.

In a June 11, 2015 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

In a December 12, 2014 report, Dr. Julian Grafton, Jr., an attending Board-certified family practitioner, noted that appellant presented complaining of right foot pain localized to his posterior heel. He advised that appellant reported that the discomfort developed gradually several weeks prior and that the onset of pain was related to jogging. Dr. Grafton diagnosed right Achilles tendinitis. In a December 29, 2014 report, he indicated that appellant reported that his right Achilles tendinitis was aggravated by standing for long periods and walking. Dr. Grafton noted that appellant could not attribute the onset of his right heel pain to any specific activity or event.

In an April 21, 2015 report, Dr. Steven D. Nowicki, an attending Board-certified orthopedic surgeon, noted that appellant reported having right heel pain that had been ongoing for five months and that had not gotten any better. He diagnosed insertional calcific Achilles tendinitis. In a June 2, 2015 report, Dr. Nowicki advised that appellant reported his right heel condition was approximately 50 percent better and he indicated that appellant should be on limited duty.

By decision dated July 15, 2015, OWCP denied appellant's claim for a November 19, 2014 employment injury. It found that she established that the incident occurred as alleged and that a medical condition had been diagnosed. However, OWCP also found that appellant failed to establish a causal relationship between the accepted November 19, 2014 employment incident and the diagnosed condition.

³ Docket No. 17-1724 (issued December 8, 2017).

⁴ On the reverse side of the claim form, appellant's immediate supervisor indicated that the employing establishment was controverting appellant's traumatic injury claim as he had not filed his Form CA-1 within 30 days of the claimed injury.

On July 28, 2015 appellant requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. He submitted additional evidence prior to the hearing being held, including an undated addendum that Dr. Nowicki made to his April 21, 2015 report. Dr. Nowicki diagnosed insertional calcific Achilles tendinitis and noted that appellant reported his pain began "as a result of his line of duty at work" in that he injured his right foot while running at work on November 19, 2014.

During the hearing held on March 15, 2016, appellant testified that he did not have any foot or heel injury/symptoms prior to November 19, 2014. He noted that his right foot/heel condition continued to bother him and that he was performing modified duty at work. Appellant's immediate supervisor also testified at the hearing, noting that he was running beside appellant on November 19, 2014 when he heard a popping sound and appellant reported that his foot was hurting.

Appellant submitted additional evidence after the March 15, 2016 hearing. In an August 11, 2015 progress note, Dr. Nowicki noted that appellant was eight days status post right Achilles tendon debridement and Haglund's deformity excision.⁵ He indicated that appellant's wounds showed mild swelling, erythema, and slight serous drainage. Dr. Nowicki advised in an August 18, 2015 progress note that appellant had a very satisfactory postoperative course and that he had ordered a walking boot for him. On September 22, 2015 he noted appellant's wound was well healed and that he was walking without aid.

In a March 22, 2016 report, Dr. Nowicki indicated that appellant underwent debridement in August 2015 for a degenerative right Achilles tendon and excision of a Haglund's deformity on his calcaneus. He noted that this condition was brought on by a combination of factors that increased stress on the Achilles tendon, including physical exercise and physical fitness testing and running.

By decision dated April 29, 2016, OWCP's hearing representative affirmed OWCP's July 15, 2015 decision. She found that appellant had established the occurrence of an employment incident on November 19, 2014 in the form of running a mile and a half, but that he failed to submit rationalized medical evidence establishing causal relationship between a diagnosed medical condition and the accepted November 19, 2014 employment incident.

On April 28, 2017 counsel, on behalf of appellant, requested reconsideration of the April 29, 2016 decision. He noted that the claimed November 19, 2014 employment injury was witnessed, as indicated in the record, and asserted that there is no evidence that the injury did not happen. Counsel claimed that appellant presented sufficient evidence such that a reasonable person would conclude that a causal connection existed between the accepted event and the diagnosed condition.

By decision dated May 10, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the April 28, 2017 request for

⁵ The record does not contain a copy of the surgery report for this procedure.

reconsideration did not contain a relevant legal argument that had not previously been considered and counsel did not show that OWCP erroneously applied or interpreted a point of law.

Appellant, through counsel, appealed OWCP's May 10, 2017 nonmerit decision to the Board. By decision dated December 8, 2017,⁶ the Board affirmed OWCP's May 10, 2017 decision.

On December 13, 2017 appellant, through counsel, requested reconsideration of OWCP's April 29, 2016 decision. Counsel noted that the claimed November 19, 2014 employment injury was witnessed and asserted that there is no evidence that the injury did not happen. He argued that appellant presented sufficient evidence such that a reasonable person would conclude that a causal connection existed between the accepted event and the diagnosed condition. Counsel asserted that an attached November 20, 2017 report of Dr. Nowicki contained a well-rationalized opinion on causal relationship and established appellant's claim for a November 19, 2014 employment injury.

In his November 19, 2014 report, Dr. Nowicki described his treatment of appellant's right foot/heel condition since April 21, 2015, noting that appellant reported that his problems began acutely after running a physical fitness test on November 19, 2014. Appellant also reported that, after November 19, 2014, his symptoms were worsened by the prolonged standing and walking required by his job. Dr. Nowicki noted that he had diagnosed retrocalcaneal bursitis and insertional Achilles tendinitis. He posited that appellant's right foot/heel condition was made worse because he had a Haglund's deformity (a bump on the heel bone which increased pressure on the Achilles tendon) and because he was required to run as part of his job, thereby increasing the wear and tear caused by the Haglund's deformity. Dr. Nowicki discussed appellant's August 3, 2015 right foot/heel surgery and his subsequent recovery from that surgery. He indicated that appellant was totally disabled from work for approximately one week following his surgery and that he required light-duty work through approximately January 1, 2016.

By decision dated January 2, 2018, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that appellant's request for reconsideration was untimely filed because it was not received until December 13, 2017, more than one year after issuance of its April 29, 2016 merit decision. OWCP further found that the evidence and argument appellant submitted in connection with his untimely reconsideration request, including Dr. Nowicki's November 20, 2017 report, failed to demonstrate clear evidence of error by OWCP in its April 29, 2016 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The

⁶ *Supra* note 3.

Secretary, in accordance with the facts found on review, may end, decrease, or increase the compensation awarded; or award compensation previously refused or discontinued.⁷

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁸ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁹

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰ The Board notes that clear evidence of error is intended to represent a difficult standard.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁴ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹² *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

of the date of OWCP's decision for which review is sought.¹⁶ As appellant's request for reconsideration was not received by OWCP until December 13, 2017, more than one year after issuance of its April 29, 2016 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its April 29, 2016 decision.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its April 29, 2016 decision.¹⁷ Appellant failed to submit the type of positive, precise, and explicit evidence or argument which manifests on its face that OWCP committed an error in its April 29, 2016 decision.¹⁸ His contentions, made through counsel, referenced arguments previously of record and already considered. Counsel noted that the claimed November 19, 2014 employment injury was witnessed and asserted that there is no evidence that the injury did not happen. He argued that appellant presented sufficient evidence such that a reasonable person would conclude that a causal connection existed between the accepted event and the diagnosed condition. However, the main issue of the present case, *i.e.*, whether the medical evidence establishes an employment injury due to appellant's running activities on November 19, 2014, is medical in nature and must be resolved by the submission of probative medical evidence.

In this regard, the Board notes that the medical evidence appellant submitted in support of his untimely reconsideration request did not raise a substantial question concerning the correctness of OWCP's April 29, 2016 decision.¹⁹ Appellant submitted a November 20, 2017 report of Dr. Nowicki which he felt contained a well-rationalized opinion on causal relationship and established his claim for a November 19, 2014 employment injury. However, he failed to explain how this evidence raised a substantial question as to the correctness of OWCP's April 29, 2016 decision. In his November 20, 2017 report, Dr. Nowicki merely provided a conclusory opinion that appellant's running at work negatively affected his right foot/heel condition. For example, he indicated that appellant's right foot/heel condition was made worse because he had a Haglund's deformity (a bump on the heel bone which increased pressure on the Achilles tendon) and because he was required to run as part of his job, thereby increasing the wear and tear caused by the Haglund's deformity. Such an opinion, which lacks medical rationale in support of its opinion on causal relationship, is not the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its April 29, 2016 decision.²⁰

On appeal counsel argues that the submission of Dr. Nowicki's November 20, 2017 report required reopening appellant's claim for a review of the merits. However, the Board has explained

¹⁶ See *supra* note 7.

¹⁷ By decision dated April 29, 2016, an OWCP hearing representative found that appellant had established the occurrence of an employment incident on November 19, 2014 in the form of running a mile and a half, but that he failed to submit rationalized medical evidence establishing causal relationship between a diagnosed medical condition and the November 19, 2014 employment incident.

¹⁸ See *supra* note 8.

¹⁹ See *supra* notes 9 and 11.

²⁰ The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale. *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

why the submission of this report would not demonstrate clear evidence of error in OWCP's April 29, 2016 decision such that appellant would be entitled to merit review of his claim.

For these reasons, the Board finds that appellant's request for reconsideration does not show on its face that OWCP committed error when it found in its April 29, 2016 decision that appellant failed to establish a November 19, 2014 employment injury.²¹ As noted above, clear evidence of error is intended to represent a difficult standard.²² Appellant has not met this standard in the present case and OWCP properly determined that he did not demonstrate clear evidence of error in its April 29, 2016 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2018
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

²¹ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

²² See *supra* note 10.